

**Reputational Feedback Systems and Consumer Rights:  
Improving the European Online Redress System**

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5 **Reputational Feedback Systems and Consumer Rights:**  
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7 **Improving the European Online Redress System**  
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11 **Abstract:** The European Union Single market needs to tackle an outstanding issue to  
12 boost competitiveness and growth: a trust-based redress framework that ensures the  
13 effectiveness of consumers' rights. The current disparities in terms of quality among  
14 dispute resolution mechanisms, added to the fact that in practice many do not  
15 guarantee effective solutions due to a number of reasons –namely, lack of traders  
16 participation or cost of legal enforcement- represent a serious obstacle to the  
17 effectiveness of consumers rights and also the reasons why many consumers refrain  
18 from making purchases beyond their countries' borders. The recognition and  
19 integration of certain dispute avoidance tools drawn on reputation added to the  
20 regulation of some common enforcement mechanisms are key issues in the field of  
21 consumer protection. The goal of this paper is to offer some insights and ideas within  
22 the context of the European Union legislative proposals aimed at improving the  
23 current redress system.  
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41 **JEL Classification:** K12, K13, K15, K41, K41, K42.

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43 **Keywords:** reputational feedback systems, consumer's protection, dispute resolution,  
44 ADR, ODR, enforceability, e-commerce, European redress system small claims.  
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50 *1. Introduction*  
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3 In the field of ecommerce and consumers conflict resolution one outstanding challenge  
4 is to secure the effectiveness of consumers' rights and the satisfaction of their needs in  
5 an increasingly globalised market. Internationally, this pressing issue has been tackled  
6 by the market itself, through the idea of trust in terms of reputation, concept that has a  
7 direct impact upon consumers' purchasing intentions. The online market has recently  
8 experienced rapid growth in Europe thanks to the emergence of highly innovative and  
9 highly sophisticated tools in the electronic environment, whose ultimate goal is to build  
10 trust among users. They incorporate very heterogeneous digital mechanisms of  
11 qualification, recommendation or punctuation of goods or services, in addition to  
12 chargebacks and blockings of accounts in case of non-compliance of a trader. Electronic  
13 feedback, reputation and private execution systems are complementary ancillary tools  
14 that provide significant added value to webs and digital intermediary platforms as they  
15 play an essential role in creating the necessary trust and credibility. In turn, they  
16 empower consumers and enable them to decisively influence trader's behaviour. They  
17 have become essential dispute avoidance tools.

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20 The idea or belief that an individual person or legal entity will meet expectations  
21 in an economic transaction will depend, firstly, upon previously obtained personal  
22 knowledge and experience, references from other users in similar circumstances and in  
23 their absence, upon the possibility of having funds returned by the credit card company.  
24 Information on the professional rating of a supplier, good or service is a crucial aspect  
25 in today's market: it confers transparency, something that, in turn, creates trust in the  
26 trader benefitting from it. This is why mechanisms based on referrals, ratings from  
27 members of a community or chargebacks have also been so warmly welcomed by the  
28 market and are regarded as a collective measure of trustworthiness.

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3 Even so, disputes can arise and there is an inevitable clash of interests in a  
4 context in which trust has been affected. In such a scenario, conflict resolution schemes  
5 (ADR/ODR)<sup>1</sup> may play a crucial role since resorting to the courts to resolve consumer  
6 issues is not always the most adequate forum for low-value issues.<sup>2</sup> In addition to this, if  
7 the dispute resolution scheme chosen is non-adjudicative –namely, mediation,  
8 conciliation- some kind of mechanisms that guarantee the effectiveness of the outcomes  
9 are needed in case of non-compliance.  
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18 This paper will analyse some existing tools and mechanisms and will provide  
19 insights in order to overcome current concerns, aiming at improving the functioning and  
20 effectiveness of consumer protection.  
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## 29 *2. Reputation feedback systems as dispute avoidance tools*

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33 A number of alternative ways to gain trust for traders and effective redress for  
34 consumers has emerged in the online market by means of innovative electronic tools,  
35 which allocate trust and improve voluntary compliance, avoiding the need for judicial  
36 enforcement mechanisms. Soft security mechanisms –namely reputation/feedback tools-  
37 use collaborative methods for assessing the behaviour of participants and making  
38 possible to identify who cares about satisfaction of users, to sanction those who breach  
39 the norms, and to recognise and reward those who adhere to the norms. The rationale  
40 behind this is that in the online and often cross-border environment these tools stimulate  
41 quality, provide incentives for good behaviour and integrity of sellers and purchasers  
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54 <sup>1</sup> Which are anglo-saxon acronyms to identify the modalities of out-of-court dispute resolution (ADR) and online  
55 dispute resolution (ODR).

56 <sup>2</sup> See P. Cortes “Conclusion” at *The New Regulatory Framework for Consumer Dispute Resolution* (Edited by Pablo  
57 Cortés, Oxford University Press, 2016) p. 454.

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3 and avoid disputes because the consumer's expectations are better managed by their  
4 enhanced information on the sellers.<sup>3</sup> Transactions can seldom rely on judicial  
5 enforcement systems which are not suitable for resolving low-value disputes<sup>4</sup> because  
6 courts are not sufficiently user-friendly and cost-effective.<sup>5</sup> Instead, the digital market is  
7 increasingly developing tools that empower consumers with information about the  
8 reliability of traders.  
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18 A. Trust and online reputation. Trust is a term with a variety of meanings and, as  
19 academic commentators note, two main interpretations are to view trust as the perceived  
20 reliability of something or somebody, called "reliability trust", and to view trust as a  
21 decision to enter into a situation of dependence, called "decision trust".<sup>6</sup> Gambetta adds  
22 that this is a particular belief predicated not on evidence but on the lack of conflicting  
23 evidence – a feature that makes it vulnerable to deliberate destruction. In contrast,  
24 distrust is very difficult to invalidate through experience. Once distrust has set in it soon  
25 becomes impossible to know if it was ever in fact justified.<sup>7</sup>  
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35 The concept of reputation, closely linked to that of trust, is the overall quality or  
36 character as seen or judged by people in general.<sup>8</sup> The first reputation systems to arise in  
37 the field of online B2C commerce were the trustmarks, alongside rating systems. The  
38 former are quality labels in the form of logos that companies display to demonstrate  
39 their compliance with certain quality standards in the carrying on of their business. The  
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48 <sup>3</sup> See A. Jøsang "Trust and Reputation Systems. Foundations of Security Analysis and Design IV, FOSAD  
49 2006/2007" (Aldini & Gorrieri Eds. Springer, 2007) p. 3 available at <http://home.ifi.uio.no/josang/papers/Jos2007-FOSAD.pdf>

50 <sup>4</sup> See R. Koulu "Where Law, Technology, Theory and Practice Overlap – Enforcement Mechanisms and System  
51 Design" (2015) *Online Dispute Resolution. An International Approach to Solving Consumer Complaints*. Ed by Colin  
52 Adamson. Net Neutrals, 57-69

53 <sup>5</sup> J. Williams and C. Gill "A dispute System Design Perspective" *The New Regulatory Framework for Consumer  
54 Dispute Resolution* (Oxford University Press, 2016) p. 377.

55 <sup>6</sup> See A. Jøsang, *op. cit.* p. 3.

56 <sup>7</sup> See D. Gambetta "Can We Trust Trust?" *Making and Breaking Cooperative Relations* (Department of Sociology,  
57 University of Oxford, 2000), 213-237.

58 <sup>8</sup> A. Jøsang *op. cit.* at 12–13.

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3 later provide the opinions of other users or consumers regarding their experience of the  
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5 product or service sold over the Internet. The initial form in which they appeared –  
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7 websites created by users themselves and open to anyone wishing to express their  
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9 opinion – coexists alongside sophisticated rating tools included today on e-commerce  
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11 intermediary platforms or on the traders’ websites, to allow users to express their degree  
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13 of satisfaction, experiences, and to rate the product or service received. Designed to win  
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15 a potential of user’s trust with regard to a product or service, these tools provide a  
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17 powerful incentive for traders, keenly aware of the adverse impact that a negative  
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19 review might label the trader as a ‘risky’ vendor. The creation of online reputations has  
20  
21 thus become an almost unavoidable activity accompanying the marketing and sale of  
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23 products and services. Businesses have seen that finding out users’ wishes, being  
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25 sensitive to their behaviour patterns and needs, and meeting them, leads to success.<sup>9</sup>  
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27 Ratings, recommendations, referrals and collaborative filtering systems help to set  
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29 marketing strategies and to improve sales margins.  
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33 Online traders are more concerned than their offline counterparts in securing the  
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35 satisfaction of customers’ expectations and they often have to accept the adoption of  
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37 generous redress measures to prevent negative reviews. The objective is to improve  
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39 consumer trust and satisfaction levels and, consequently, their competitive position,  
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41 which has a knock on effect in the number of future sales.  
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44 These reputation mechanisms operate as conventional incentives for better  
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46 compliance that may work either separately or embedded into dispute resolution  
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48 processes, thus avoiding users from the need of resorting to judicial enforcement. Their  
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50 aim is to ensure self-compliance with contractual and settlement agreements, which  
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53 <sup>9</sup> T. L. Tuten, M. R. Solomon, *Social Media Marketing* (2014) at 20. See also K. Lobaugh, J. Simpson, and L. Ohri,  
54 “Navigating the new digital divide: Capitalizing on digital influence in retail,” (Deloitte Consulting LLP, 2015) p. 17,  
55 available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-cb-navigating-the-new-digital-divide-051315.pdf>. Also, (2016) *Local Consumer Review Survey*, Bright Local, available at  
56 <https://www.brightlocal.com/learn/local-consumer-review-survey/>  
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3 means that the parties will have no need to resort to the courts. Accordingly, the United  
4 Nations -through Working Group III of its Commission on International Trade Law- has  
5 carried out some work in collating and listing these tools into the so-called ‘private  
6 enforcement mechanisms’.<sup>10</sup>  
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13 B. Trustmarks. Also called trust seals, they are quality labels –namely stamps or logos-  
14 used by companies in their establishments and on their websites to demonstrate  
15 compliance with certain quality standards in the carrying on their business. The e-  
16 commerce is characterised by a high degree of informational asymmetry and a low level  
17 of personal interaction between consumers and traders. The seal issued by an  
18 independent, neutral third party certifies that the trader complies with certain conduct  
19 standards. Internet users that recognise the trust mark will identify the holder as a secure  
20 trader. Accordingly, a seal’s value will depend on how recognisable it is to users.  
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31 One potential problem arises from the fact that there are several trust marks  
32 operating in the market and each have different scope and focus parameters. While  
33 some are concerned with guaranteeing compliance with specific privacy policies, others  
34 focus on guaranteeing compliance with standards covering internal company processes,  
35 or securing that the technology employed is safe. And users are frequently unaware of  
36 these parameters and the actual reputation of each seal.  
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44 Traders’ commitment to participating in ODR procedures may be granted with a  
45 trust mark. Such trust mark is kept –or lost- based on the degree of compliance of the  
46 trader with the agreements, resolutions or recommendations issued from the ODR  
47 procedures arising from a dispute. To give just some illustrative examples, Norton  
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55 <sup>10</sup> See UNCITRAL “Electronic dispute settlement in cross-border e-commerce operations: an overview of private  
56 enforcement mechanisms”. Note by the Secretariat of 13 December 2013, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V13/863/47/PDF/V1386347.pdf?OpenElement>  
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3 Secured,<sup>11</sup> BBB Accredited,<sup>12</sup> or TRUSTe<sup>13</sup> are internationally-recognised trust marks  
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5 for dispute management and resolution of disputes and show that the companies  
6  
7 displaying them comply with certain codes of conduct and adhere to participate. In  
8  
9 Europe, the Ecommerce Europe Trustmark<sup>14</sup> incorporates a mediation process for  
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11 disputes with EU companies and also a code of conduct by virtue of which companies  
12  
13 have a duty to provide clear information on a number of subject matters.<sup>15</sup> In Spain,  
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15 Confianza Online,<sup>16</sup> a not-for-profit association founded by Adigital, Autocontrol and  
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17 Red.es, offers companies a trust mark linked to a code of conduct<sup>17</sup> and a binding  
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19 resolution process that is free for consumers.  
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23 Consumers consider less risky and more trustworthy those websites that display  
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25 a recognisable quality seal<sup>18</sup>. It should nevertheless be noted that there are still no  
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27 empirical studies that help us to identify the market impact of these seals. Another  
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29 problem arises from the possibility of conflict of interest arising from the fact that a  
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31 trader selects and pays for the seal provider as well as for the ODR service provider.  
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33 Similarly, an expert's neutrality could be indirectly affected to the extent that the service  
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35 providers and said experts are at the service of one of the parties. These formal obstacles  
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37 could be overcome if the grantor of the trust mark is independent from the ODR  
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39 provider.  
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43 <sup>11</sup> Available at [https://support.symantec.com/en\\_US/mysymantec.html](https://support.symantec.com/en_US/mysymantec.html)

<sup>12</sup> See BBB website available at <https://www.bbb.org/consumer-complaints/file-a-complaint/get-started>

<sup>13</sup> Dispute Resolution Manager: <https://www.truste.com/business-products/dpm-platform/dispute-resolution-services/>

<sup>14</sup> Available at <https://www.ecommercetrustmark.eu/>

<sup>15</sup> Traders shall be transparent and provide clear information on identity, address, email, telephone number, description of the products and services offered, including photographs, final price, shipping costs if any, information on the existence of a legal warranty, and order confirmations. They also have to provide the ability to download contracts and secure means of payment.

<sup>16</sup> More information available at:

[https://www.confianzaonline.es/consumidores/publicaciones/?publication\\_type=&description=&yr=Todos&mn=&buscar-btn=Buscar&page-num-results=\\*&pagina=1](https://www.confianzaonline.es/consumidores/publicaciones/?publication_type=&description=&yr=Todos&mn=&buscar-btn=Buscar&page-num-results=*&pagina=1)

<sup>17</sup> Ethical Code of Conduct that was recognized by the Spanish Data Protection Agency in a resolution dated 7 November 2002 (CT / 0004/2002) and granted the public trustmark by the National Consumer Institute on 15 July 2005, after analyzing the content and verifying that the dispute resolution mechanism fulfilled the requirements established in Recommendation 98/257/EC, available at [http://www.autocontrol.es/pdfs/cod\\_confianzaonline.pdf](http://www.autocontrol.es/pdfs/cod_confianzaonline.pdf)

<sup>18</sup> The effectiveness of these seals will be highly dependent on the reputation of the scheme and on its becoming known by a critical mass of participants. See J. P. Cortes and F. Esteban in

“Building a Global Redress System for Low-Value Cross-Border Disputes”, (2013) *International and Comparative Law Quarterly*, Volume 62, Issue 02, April, at 422.



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5 C. Rating systems. These are tools allowing users to express opinions on their degree of  
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7 satisfaction with a specific product or service. They are a widely-employed practice in  
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9 online trade and are commonly used in the form of scores or grades. Based on scores for  
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11 service providers, services and goods stemming from user opinions and assessments,  
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13 they provide specific information on concrete indicators. It uses algorithms to  
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15 dynamically calculate such reputation indicators on the basis of the opinions and ratings  
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17 received.<sup>19</sup>

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20 Consumer review mechanisms may take the form of standalone sites that have as  
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22 a function the collection of user's feedback or be embedded within websites that have as  
23  
24 a primary function the sales of goods or services.

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26 Both in the emerging collaborative economy (P2P) and in online consumption  
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28 (B2C), these reputation systems are crucial. Typically based on centralized or  
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30 distributed architectures they collect all the ratings for the performance of a given  
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32 merchant from users who have had direct experience with that merchant.

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35 The greatest difficulty for users is to judge the quality, robustness and the  
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37 reliability or vulnerability of reputation systems. Some studies have suggested certain  
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39 criteria for evaluating them<sup>20</sup>. To wit, systems should be capable of the following: (i)  
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41 reflecting confidence in a specific rating and able to distinguish between a new entity of  
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43 unknown quality and a known one; (ii) indicating recent trends in the entity's  
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45 performance; (iii) resisting cyber-attacks and attempts by entities to manipulate  
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47 reputation indicators; (iv) preventing the simple addition of any indicator from, in itself,  
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49 significantly influencing the score as a whole.

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54 <sup>19</sup> Collaborative filtering systems (CF) have similarities with reputation systems, however the assumptions behind CF  
55 systems is that different people have different tastes, and rate things differently according to subjective taste. See A.  
56 Jøsang op. cit. p. 13.

57 <sup>20</sup> A. Jøsang, R. Ismail, C. Boyd, "A Survey of Trust and Reputation Systems for Online Service Provision", *Decision*  
58 *Support Systems*, 43(2) 2007, p. 36.

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3 The importance of reputation has now reached the point that people are now  
4 beginning to consider the so-called ‘reputation banks’ capable of aggregating all the  
5 information gathered in the different databases on the worldwide web to create online  
6 reputations that can be managed as capital. In this regard, it is known that a trader’s  
7 good reputation on certain e-commerce platforms such as eBay helps them increase not  
8 only the number of sales but also the price of their products. To encourage users to give  
9 ratings, some platforms have even introduced a ‘reward’ system in the form of points  
10 that can be exchanged for advantages. Additionally, the same platforms provide benefits  
11 for users/traders with high ratings, for example allowing them to be more selective with  
12 their potential customers.  
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24 A range of studies on e-commerce and user behaviour indicate that purchasers  
25 prefer websites that distribute products known to them, that are familiar or whose  
26 manufacturers they know. Online reputation has a positive association with trust and the  
27 idea that transactions with reputable participants are likely to result in more favourable  
28 outcomes than transactions with disreputable participants.<sup>21</sup> It is also known that a  
29 negative reputation has a much greater impact upon consumers and users than a positive  
30 one and also that the appearance of improper behaviour by a trader is associated with  
31 the idea of a potential risk in the future.<sup>22</sup>  
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42 With a rating system market agents can build their own ‘brand’. Some e-  
43 commerce platforms offer advice on how to build this reputation (for example, by using  
44 the technique of providing a free gift for a certain period of time, accompanying the user  
45 throughout the purchasing process, with messages conveying their desire to resolve any  
46 incidents that may arise, accepting that they might lose sometimes even when it is not  
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55 <sup>21</sup> See A. Jøsang op. cit. at 20.

56 <sup>22</sup> P. Resnick, R. Zeckhauser, J. Swanson et al. “The Value of Reputation on eBay: A Controlled Experiment” (2006)  
57 *Exp Econ* 9, p.79.

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3 their fault, applying discounts, accepting returns or taking care to negotiate highly  
4 competitive shipping rates).

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7 Such mechanisms are vulnerable to some kinds of attacks, such as the so-called  
8 'sybil' attack, consisting in the fraudulent practice of creating false identities (with  
9 pseudonyms, for example) to harm a user/trader by damaging its reputation.  
10  
11 Consequently, and in parallel, systems have emerged and been developed to prevent  
12 this, as have strategies to enhance the reputation of users/traders. False comments are  
13 easily traceable these days and search engines like Google have resources to locate  
14 them.  
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22 One question raised by rating systems concerns the hosting of these scores and  
23 their management, as well as the way in which the public is made aware of them.  
24 Another issue that must be considered is the subjective nature of some scores and the  
25 low response rates, which may lead to negative ratings that do not reflect the reality of a  
26 situation. Another problem that needs to be tackled by this system is that of the threat  
27 caused by the potential activity of fraudulent players, who may conceal their identity  
28 and give false scores.  
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37 In some sectors -such as the hotel industry- consumers use reviews not only to  
38 filter hotels but rather to decide amongst a smaller choice set already from a prior  
39 search. A survey of 2,500 users where 35 per cent of respondents use online reviews  
40 early on to identify hotels to consider, while 28 per cent use them to narrow down pre-  
41 determined choices.<sup>23</sup> Furthermore, the number of comments with content created by  
42 users has grown to such an extent that it has brought about a real revolution in the  
43 provision of hotel services and in users' booking decision-making process.  
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55 <sup>23</sup> See P. Carroll, *Digging deeper into hotel reviews: exactly how and why travelers use them (online)*, 2014,  
56 available at [http://ehotelier.com/news/2014/07/02/digging-deeper-into-hotel-reviews-exactly-how-and-why-travelers-  
57 use-them/](http://ehotelier.com/news/2014/07/02/digging-deeper-into-hotel-reviews-exactly-how-and-why-travelers-use-them/)

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3 Holidaymakers are placing increasing trust in the comments and ratings made online by  
4 other customers, to the point that it has become a core part of the search process.<sup>24</sup>  
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7 Studies are currently being carried out on how to integrate this web-sourced  
8 information into traditional hotel rating processes.<sup>25</sup> This makes it clear how a rating  
9 system is capable of providing a service to consumers in their choices before acquiring a  
10 product or service, but also to companies, which often manage to achieve higher scores  
11 in comments than the actual administrative rating itself, which is better, as a 1 per cent  
12 higher rating by customers means 1 per cent higher RevPAR (revenue per available  
13 room). This means that, in users' decisions, greater importance is attached to trust and  
14 meeting of needs than even price.  
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24 Some findings confirm the fact that, as the number of ratings received by  
25 suppliers of goods or services increases, their worth or positivity is also enhanced,  
26 because it dilutes the weight of negative ratings. This is why these operators are  
27 concerned with securing broad-based user participation.  
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33 Rating systems have become so important that they have given rise to parallel  
34 lines of business. By way of example, on a worldwide scale, the Global Review Index  
35 (GRI) is a standard index for measuring the online reputation of both companies and  
36 also products on the web at their service, to improve and manage said reputation. Also  
37 the Better Business Bureaus (BBB), a non-profit organization not affiliated with any  
38 governmental agency is focused on advancing marketplace trust, consisting of 112  
39 independently incorporated local BBB organizations in the United States and Canada,  
40 coordinated under the Council of Better Business Bureaus (CBBB).<sup>26</sup> This entity serves  
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52 <sup>24</sup> World Tourism Organization (UNWTO) *Online Guest Reviews and Hotel Classification Systems. An Integrated*  
53 *Approach*, 2014, available at [https://www.starratings.com.au/docs/default-source/media-releases/unwto-rating-](https://www.starratings.com.au/docs/default-source/media-releases/unwto-rating-report.pdf?status=Temp&sfvrsn=0.9296408442314714)  
54 [report.pdf?status=Temp&sfvrsn=0.9296408442314714](https://www.starratings.com.au/docs/default-source/media-releases/unwto-rating-report.pdf?status=Temp&sfvrsn=0.9296408442314714)

55 <sup>25</sup> See UNWTO, p. 27. See also: QualityMark Norway *Classifications, quality assurance and guest communication in*  
56 *the hotel industry in Norway and Europe: A report on the different schemes and methods used by the hotel industry in*  
57 *Norway and in Europe in their quality assessment and on guest communication*, 2013;

58 <sup>26</sup> <https://www.bbb.org/council/about/vision-mission-and-values/>

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3 as an intermediary between consumers and businesses, collects and provides free  
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5 business reviews, and also handles consumer disputes against businesses. Accredited  
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7 Businesses are allowed to use its trademarked logo. To avoid bias, the BBB's policy is  
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9 to refrain from recommending or endorsing any specific business, product or service.  
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11 Nevertheless, the organization has been the subject of controversy, particularly related  
12  
13 to its alleged practice of giving higher ratings to businesses that pay a membership fee.  
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16 Furthermore, companies have appeared to 'repair' online reputations on e-  
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18 commerce sites. And it is in the activity of reputation recovery in which ratings once  
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20 again have importance. Traders needing to 'repair' their online reputation resort to  
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22 satisfied users to carry out new transactions and provide positive messages.  
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24 Participation in blogs and forums also helps achieve recognition.  
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27 Nowadays, carrying out promotional work and trading on the Internet  
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29 necessarily entails the maintenance of a good reputation. Online comments and ratings  
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31 are the Internet's 'word of mouth' (WOM) and affect consumers' purchasing  
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33 decisions.<sup>27</sup> Recent studies also suggest that the impact of consumers' comments on  
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35 online sales also depends on other factors beyond the product and its characteristics.  
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37 The impact is greater when the means of acquiring information are relatively scant.  
38  
39 Another aspect that is beginning to take form is cutting the cost of searching for  
40  
41 opinions. Given that the marketing directors of online companies are becoming  
42  
43 increasingly aware of the importance of word of mouth, they try to facilitate users'  
44  
45 access to said information, for example by using more visible symbols on their websites  
46  
47 to indicate the rating achieved by a product or by making it easier to read comments  
48  
49 associated with a specific rating level. To make this process easier for consumers,  
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54 <sup>27</sup> Customer Complaining Behavior (CCB) has received much attention among scholars since 1981. See, M. Marquis  
55 and P. Filiatraut, "Understanding Complaining Responses through Consumer's Self-consciousness Disposition"  
56 (2002) *Psychology & Marketing*, Vol. 19, Issue 3, march 2002, 267-292. Also, Hong and Lee "Online Technology as  
57 a Complaint Communication Channel" at Y. Gao, *Web Systems Design and Online Consumer Behavior*, (2005), p.  
58 97.

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3 specific websites have been developed<sup>28</sup>, which collate consumer perceptions recorded  
4 on different websites, reviews and ratings, to arrange all this data in a single system  
5 that, using metrics, gives the trader an overall score from 1 to 100. The quality of these  
6 rating systems needs to be subjected to comparative evaluative testing to guarantee the  
7 transparency and quality of their processes and ensure that they constitute valid,  
8 objective tools for consumers and users.  
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16 Some platforms associated with dispute resolution services offer reputation  
17 repair services: if a trader manages to resolve a problem with a user, it obtains as  
18 compensation the deletion of the negative ratings associated with the dispute, but still  
19 retains the messages or comments published. Yet, transparency is the bone of  
20 contention: some platforms are not transparent on how they manage the reviews and  
21 whether or not the removal is subject to a payment.  
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29 The European Union is considering regulating this sector. The Results of the  
30 Public Consultation on the Regulatory Environment for Platforms, Online  
31 Intermediaries, Data and Cloud Computing and The Collaborative Economy ran from  
32 24 September 2015 until 6 January 2016 reveals that most business and citizens  
33 consider that platforms should be more transparent and also that no clear view emerges  
34 on whether online reputation systems and trust mechanisms guiding consumer choice  
35 are reliable. This inconclusiveness persists for consumers and businesses. Many  
36 stakeholders refer to the following potential improvements to rating systems: (i) ensure  
37 that reviews are based on actual customer experience and avoid fake reviews; (ii)  
38 establish a charter of good practice for reviews and reputational systems; (iii) ensure the  
39 accuracy and reliability of statistical information resulting from reviews when it may  
40 influence buyer behaviour; (iv) for branded products find ways to ensure that reviews  
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57 <sup>28</sup> For example, [www.ConsumerPerceptionRating.org](http://www.ConsumerPerceptionRating.org), [www.myCPRscore.org](http://www.myCPRscore.org), the 'Customer Effort Score' (CES).

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3 do not relate to counterfeits; (v) and ensure that comparison tools are impartial and  
4  
5 transparent about their methodology.. Respondents realise the risk of manipulation of  
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7 consumer opinion via fake reviews or misrepresented statistics. The majority of citizen  
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9 and online platforms respondents considered that the above mentioned problems  
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11 consumers or suppliers perceive could be best addressed by a combination of regulatory  
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13 solutions, self-regulatory and market dynamics. Nevertheless, there is consensus that  
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15 rating systems and trust mechanisms are beneficial because they allow consumers to  
16  
17 read other consumers' opinions.<sup>29</sup>  
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20 In the arena of digital intermediary platforms, the European Union has become  
21  
22 aware of the importance of effective private enforcement mechanisms and, given the  
23  
24 cross-border nature of many transactions and the fact that the final destination is often a  
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26 consumer, such implementation requires not only harmonization but also articulation of  
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28 means for cooperation between competent authorities. This implies, on the one hand,  
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30 macro-data analysis tools allowing to obtain detailed information on the ecosystems of  
31  
32 online platforms and, on the other hand, instruments of private and public compulsion  
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34 of obligations. With this new approach the first challenge for the European Union is to  
35  
36 assess whether the existing regulatory framework is still appropriate, as standards  
37  
38 designed for a traditional service delivery model may not be effective in a virtual  
39  
40 environment. At this stage, self-regulation and co-regulation based on principles, codes  
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42 of conduct and other tools may also be useful to ensure the application of legal  
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44 provisions and the adoption of the most appropriate control mechanisms. Such measures  
45  
46 can ensure a fair balance between predictability, flexibility and efficiency.  
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50 The European Union considers today that reputational tools in the market play  
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52 an essential role in creating the necessary trust and credibility. Reputational systems are  
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55 <sup>29</sup> See v. gr. Synopsis Report on the *Public Consultation on the Regulatory Environment for Platforms, Online*  
56 *Intermediaries and the Collaborative Economy* <https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-at-page-8>.  
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3 a powerful tool to discourage harmful behaviour of market participants and to reduce  
4 the risks arising from the information asymmetries of the parties. As the European  
5 Commission acknowledges, this can contribute to improving the quality of services and  
6 potentially reducing the need for certain regulatory provisions as long as the quality of  
7 reviews and ratings can be relied upon and are free from any bias or manipulation.<sup>30</sup>  
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9 Enhancing confidence in these tools - the vast majority created by collaborative  
10 platforms or specialized third parties – helps and empowers consumers.  
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18 The Communication from the Commission to the European Parliament and the  
19 Council on Online Platforms and the Digital Single Market expresses the need for these  
20 tools to be transparent so that users can understand how the information is filtered,  
21 configured or customized. The correct information provided about the nature of the  
22 products they see or consume online contributes to the efficient functioning of markets.  
23 That is why existing EU consumer and marketing regulations require online platforms  
24 to be transparent and not to mislead users. A number of academics claim the need to  
25 harmonize the legal framework of reputational feedback tools currently provided by  
26 online intermediary platforms<sup>31</sup>. Where a platform embeds a reputational feedback  
27 system, it shall provide information on the modalities for collecting, processing and  
28 publishing ratings and reviews. Furthermore, the reputational feedback system should  
29 comply with a number of standards, namely: (i) The online platform shall take  
30 reasonable and proportionate steps to verify that the reviews are based on a confirmed  
31 transaction. (ii) If a review has been requested in exchange for a benefit, it must be  
32 indicated. (iii) The reviews must be published without undue delay and, if a review is  
33 rejected, the reviewer must be informed without undue delay of the rejection and the  
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53 <sup>30</sup> Conversely, false reviews and comments cause a loss of confidence that can undermine the business model of the  
54 platform itself and generate generalized mistrust.

55 <sup>31</sup> Vid. Comment and analysis of such Draft at C. Busch, G. Darnemann, H. Schulte Nolke, A. Wiewiorowska-  
56 Donagalska, F. Zoll, "Discussion Draft of a Directive on Online Intermediary Platforms" (2016) *EuCML*, num.  
57 4/2016, at 165.



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3 reasons for such rejection. (iv) The order in which the reviews are presented by default  
4 should not be misleading. Platform users should be able to see reviews in chronological  
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7 order. (v) If the reputation feedback system excludes previous revisions, this should be  
8  
9 indicated to the users of the platform. The exclusion period should be reasonable and  
10  
11 not less than 12 months; And, finally (vi) If reviews are consolidated into a global  
12  
13 rating, the total number of reviews on which the rating is based should be indicated.  
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16 Another issue that should be refined at this point is how to ensure that platforms  
17  
18 integrate free and reliable complaint mechanisms for both traders and users, if there is  
19  
20 any concern about the authenticity of a review.  
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23 Furthermore, in order to preserve those review as a reputational capital of the  
24  
25 supplier, platforms should facilitate means to transfer those reviews other platforms in  
26  
27 a structured, commonly used and readable format.  
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30 There is little doubt that reviews are a primary pillar for the prevention of  
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32 disputes fully integrated in the commerce because, on the one hand, users consult and  
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34 nurture them systematically and spontaneously before, during and after a transaction is  
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36 completed and, on the other, companies have embraced these tools and will continue to  
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38 empower them to the extent that it gives them a competitive advantage in the market.  
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40 Therefore, it is paramount to advocate for a regulation that responds to the needs of  
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42 both, traders and consumers.  
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46 D. Blacklists. Blacklisting is a naming and shaming approach consisting in publishing a  
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48 list of people or groups regarded as unacceptable or untrustworthy and often marked  
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50 down for punishment or exclusion.<sup>32</sup> This is another enforcement mechanism by means  
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57 <sup>32</sup> See Oxford dictionary definition available at <https://en.oxforddictionaries.com/definition/blacklist>

of which a non-compliant trader becomes part of the listing of, and statistics for, traders who are risky to users.

Recently, they have been successfully adopted by certain public electronic platforms associated with consumer dispute resolution. Worthy of particular note is British Columbia's initiative Consumer Protection BC,<sup>33</sup> which consists in providing consumers with web-based access to a computerised search system of opened, ongoing, and closed cases against companies that have received complaints, indicating the number of complaints accepted and publishes the full decisions taken.

Within the sphere of the European Union, noteworthy a number of initiatives, namely: (i) The Sweden's Allmänna reklamationsnämnden (National Consumer Complaints Office, ARN), which publishes a weekly listing of companies that do not comply with the obligations arising from the outcomes of the ADR procedures it has managed and which conclude in a non-binding recommendation or judgement based on law.<sup>34</sup> (ii) Italy's consumer financial sector, the Arbitro Bancario Finanziario (the Banking and Finance Arbiter, ABF) -reporting to Banca de Italia<sup>35</sup>, the country's national banking authority- owns a system for publishing the legally-based but non-binding decisions it issues, consisting in the publication on the ABF website of a news update disclosing the company in question's non-compliance.<sup>36</sup> (iii) The Czech Republic holds the Office of the Financial Arbitrator (FA),<sup>37</sup> which organises arbitration with binding decisions that are published to inform consumers. (iv) The Austria Internet

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<sup>33</sup> Available at <https://www.consumerprotectionbc.ca/>

<sup>34</sup> See "Rad & Ron" magazine owned by the Swedish consumer organization available at <http://www.radron.se/>. See also P. Cortes and F. Esteban de la Rosa, "La normativa europea de resolución de conflictos de consumo y su transposición en España: una oportunidad para mejorar los derechos de los consumidores aprovechando las experiencias positivas en el derecho comparado" (2016) *ADICAE* (in press).

<sup>35</sup> Article 128 bis of Legislative Decree 385/1993 and Legislative Decree 130/2015 transposing EU Directive 2013/11.

<sup>36</sup> ABF website: <https://www.arbitrobancariofinanziario.it/intermediariInadempienti>

<sup>37</sup> V.FA website: <http://www.finarbitr.cz/cs/reseni-sporu/sbirka-rozhodnuti.html>

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3 Ombudsman provides a watch list with information of fraudulent sites, scams, and non-  
4  
5 compliant traders.<sup>38</sup>

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7 At a global level, also trustmark organisations and other non governmental  
8  
9 entities turn to the usage of blacklists for the general public to assess the trustworthiness  
10  
11 of a trader.<sup>39</sup>

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13 Yet, the lack of transparency in the policies applicable to some blacklists, the  
14  
15 misleading decisions and even pressure on companies to adhere to and pay a fee may  
16  
17 question their usefulness.

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22 E. Account suspension or blocking. Another mechanism that has become popular on the  
23  
24 Internet -in the case of traders providing goods or services through ecommerce  
25  
26 intermediary platforms- is the suspension or blocking of their accounts to prevent them  
27  
28 from operating in the future in said virtual markets, either provisionally or even  
29  
30 definitively. In this regard, digital intermediary platforms frequently reserve in their  
31  
32 terms and conditions of the company's policies, certain rights associated with remaining  
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34 on their platform. Generally, these terms include some waiver releasing the  
35  
36 intermediary platform from any content-related liability, stating that they have no  
37  
38 obligation to monitor the information or communications carried out by traders.<sup>40</sup> They  
39  
40 also stipulate that under no circumstances do they guarantee or make any undertaking  
41  
42 that all the content published or uploaded by providers on their services and/or goods  
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44 will be definitively published, as publication will not occur in the case that the provider  
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51 <sup>38</sup> See Austria Internet Ombudsman website available at <https://www.watchlist-internet.at/>

52 <sup>39</sup> See *Trust marks Report 2013: Can I trust the trust mark?* (ECC-Net, October 2013) p. 9, available at  
53 [http://ec.europa.eu/dgs/health\\_food-safety/information\\_sources/docs/trust\\_mark\\_report\\_2013\\_en.pdf](http://ec.europa.eu/dgs/health_food-safety/information_sources/docs/trust_mark_report_2013_en.pdf)

54 <sup>40</sup> With regard to limits to install a system for filtering, see Case C-360/10 *CVBA (SABAM) v Netlog NV*,  
55 ECLI:EU:C:2012:85, paragraph 53, on which grounds, the European Union Court of Justice rules that EU Directives  
56 2000/31/EC, 2001/29/EC and 2004/48/EC must be interpreted as precluding injunctions against a hosting service  
57 provider which requires it to install a system for filtering information which is stored on its servers by its service  
58 users, which applies indiscriminately to all of those users as a preventative measure and exclusively at its expense for  
59 an unlimited period, which is capable of identifying electronic files with a view to preventing breach of rights.

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3 in question has acted in bad faith or to prejudice a consumer. So, the terms contemplate  
4 that, should any illegal, fraudulent or prejudicial act be detected, the intermediary  
5 platform may be entitled to take the following actions: (i) Delete, suspend, edit or  
6 modify the content at its sole discretion, including, amongst others, user publications, at  
7 any time, without prior notice and for whatever cause or to delete, suspend or block any  
8 service user publication. (ii) To access and disclose any information that they deem  
9 reasonably necessary to comply with any law, regulation, legal process or request from  
10 a legal authority. (iii) to prevent and manage fraud-related, technical or security issues.  
11 (iv) and to respond to consumers requests for assistance. The most severe measure for a  
12 trader is, undoubtedly, blocking the access, either provisionally or definitively.  
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26 F. Contact information, personalised attention and feedback. Another strategy used to  
27 improved trust levels is to provide users with telephone or email contact details on the  
28 website. It is known that one of the most frequent complaints of users/consumers is the  
29 lack of information of this type, or the fact that it is difficult to find, thereby preventing  
30 them, in practice, from contacting the trader. A second complaint is with regard to the  
31 lack of response when contact has been established. Not providing a proper or timely  
32 (within 24 hours) response to contact can entail, in many online markets, a negative  
33 rating that will impact upon a site's reputation.  
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44 Feedback between user and trader is another technique for enhancing one's  
45 reputation. This can be achieved by means of, amongst other methods, brief surveys  
46 inviting users to evaluate the service, the trader's response capacity, the product,  
47 delivery, etc. In this way, positive comments can be gathered, as can (perhaps more  
48 importantly) concerns, which will allow for the correction and prevention of errors in  
49 the future.  
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5 Nevertheless, at times, disputes cannot be avoided. In such cases, said platforms provide  
6  
7 advice on how to tackle them to ensure the least impact possible on the trader: by  
8  
9 satisfying the consumer. Instead of entering into an open dispute leading to negative  
10  
11 public feedback, the best remedy is to offer private feedback with the customer with the  
12  
13 goal of resolving their problem professionally, negotiating and speaking with customers  
14  
15 by telephone when there is a dispute. It has been shown that, although emails can be  
16  
17 useful, a less impersonal tool, such as providing a telephone number and having a  
18  
19 conversation, can be very effective.  
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24 G. Chargebacks and escrow accounts. Alongside reputation systems, other mechanisms  
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26 have emerged to guarantee the effectiveness of Internet users' rights in online  
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28 transactions, linked in this case to forms of payment. We are referring here to the  
29  
30 reimbursement systems or chargebacks and escrow accounts offered by some payment  
31  
32 intermediaries.  
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35 A chargeback is the technical term used by international card schemes to name  
36  
37 the refunding process for a transaction carried out by card following the violation of a  
38  
39 rule. This process takes place between 2 members of the card scheme, the issuer of the  
40  
41 card and the acquirer. The final customers of these 2 schemes members, the cardholder  
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43 for the issuer and the merchant for the acquirer, do not have any direct relationship in  
44  
45 the chargeback process. Chargebacks allow users to recover amounts from traders when  
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47 their expectations of a transaction are not met. They can be put into practice when the  
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49 financial transaction has been carried out with certain payment methods (Visa,  
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3 MasterCard, PayPal, etc.) or by depositing the price into a third-party account. The  
4 intermediary in these payment systems can exercise very effective de facto control.<sup>41</sup>  
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7 In a 'chargeback', a complainant may requests the reimbursement of an amount  
8 paid to a trader via an intermediary when certain conditions are met. By way of  
9 example, these include: services not provided or goods not received, a recurring  
10 transaction cancelled, goods not as described or defective, fraudulent multiple  
11 transactions, falsification, authorisation rejected, no authorisation, card expired, late  
12 submission, unrecognised transaction, account number not matching, incorrect  
13 transaction amount or account number, duplicated processing or payment by other  
14 means. The process triggered in case of non-conformity on the part of the trader is first  
15 one of pre-arbitration followed, as the case may be, by arbitration administered by the  
16 payment intermediary itself. This measure's scope will depend upon the rules applied  
17 by the companies in the country in question. For this, some States require that the  
18 purchaser be defrauded. In others, it is enough for there to have been absence of or  
19 defective compliance.<sup>42</sup> Additionally, the financial intermediary has its own decision-  
20 making process and this is not always transparent: it asks the purchaser to support the  
21 chargeback request before making a decision. It should be borne in mind that  
22 reimbursements are in any case limited in scope, given that they are only applied in  
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48 <sup>41</sup> See *The Consumer Conditions Scoreboard – Consumers at home in the single market*, European Union, SWD, 9th  
49 edition – July 2013, p. 291 available at

50 [http://ec.europa.eu/consumers/archive/consumer\\_research/editions/docs/9th\\_edition\\_scoreboard\\_en.pdf](http://ec.europa.eu/consumers/archive/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf)

51 <sup>42</sup> In the European Union chargebacks are regulated by Directive 2007/64/EC of the European Parliament and of the  
52 Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC,  
53 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC. OJ L 319, 5.12.2007, p. 1–36 and Directive  
54 2008/48/EC of the European Parliament and of the Council of 23 April 2008, on credit agreements for consumers and  
55 repealing Council Directive 87/102/EEC. OJ L 133/66, 22.05.2008. EU-law only covers credit card chargeback,  
56 purchases where debit cards are not covered by EU-law but can be covered by national law such as in Denmark and  
57 Portugal. See *Chargeback in the EU/EEA. A solution to get your money back when a trader does not respect your  
58 consumer rights*, ECC-Net, 2015, p. 8 – 9, available at  
59 [http://ec.europa.eu/consumers/ecc/docs/chargeback\\_report\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/chargeback_report_en.pdf)  
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3 cases of credit card payments and outcomes do not affect the validity of the contract  
4 which could be challenged in court.<sup>43</sup>  
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9 Escrow accounts<sup>44</sup> have a broader scope of application than reimbursements, as  
10 they do not depend upon the issuing of a credit card: the purchaser deposits the payment  
11 in a third-party account and, after a certain period of time has passed and if there have  
12 been no complaints or if it has been verified that the goods were received as expected,  
13 the money is released to the trader. Just as with the traditional escrow, the Internet  
14 escrow account works by consigning a financial sum to the control of a third party that  
15 safeguards consumer and vendor rights in a transaction. When both parties have  
16 confirmed that the transaction has been concluded in accordance with the agreed terms,  
17 the third party disburses the money to the vendor. If, on the other hand, a conflict arises,  
18 the intermediary offers a resolution mechanism that will decide upon and enforce the  
19 outcome.  
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33 Problems may arise if a fraudulent trader creates a false escrow account. To  
34 prevent improper use of these forms of payment, the European Union passed Directive  
35 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on  
36 payment services in the internal market,<sup>45</sup> which governs and authorises the use of this  
37 kind of services, which are today mostly administered by banks. As the Directive notes,  
38 low value payment instruments should be a cheap and easy-to-use alternative in the case  
39 of low-priced goods and services and should not be overburdened by excessive  
40 requirements. Even so, it should be borne in mind that, in order to reduce the risks and  
41 consequences of unauthorised or incorrectly executed payment transactions, the parties  
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52 <sup>43</sup> S. Drake, M. Smith *New Directions in the Effective Enforcement of EU Law and Policy*, (Edward Elgar Publishing,  
53 2016) at p. 218.

54 <sup>44</sup> The first company in the field authorized to operate was Escrow.com.

55 <sup>45</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in  
56 the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive  
57 97/5/EC. OJ L 319, 5.12.2007, p. 1–36

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3 should inform the payment service provider as soon as possible and by a deadline about  
4  
5 any complaints they may have. Once a user has informed a payment service provider  
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7 that its payment instrument may have been fraudulently used, the former should not be  
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9 held liable for any subsequent losses that may be caused by unauthorised use of the  
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11 instrument. In order to assess possible negligence by one of the parties, all of the  
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13 circumstances should be taken into account and the degree of alleged negligence should  
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15 be evaluated according to national law. Contractual terms and conditions relating to the  
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17 provision and use of a payment instrument, the effect of which would be to increase the  
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19 burden of proof on the consumer, should be considered null and void. Furthermore,  
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21 these systems are designed so that trader users should be able to rely on the proper  
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23 execution of a complete and valid payment order if the payment service provider has no  
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25 contractual or statutory ground for refusal. Nevertheless, according to the Directive,  
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27 legal disputes arising within the relationship underlying the payment order should be  
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29 settled only between the payer and the payee. In this regard, it also provides that, to  
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31 guarantee the fully integrated straight-through processing of payments and for legal  
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33 certainty with respect to the fulfilment of any underlying obligation between payment  
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35 service users, the full amount transferred by the payer should be credited to the account  
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37 of the payee. Accordingly, it does not authorise the making of any deductions from the  
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39 amount transferred in the execution of payment transactions, beyond the deduction of  
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41 any agreed payment service provider charges.  
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### 48 3. Existing consumers ADR/ODR 49 50

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52 Once a conflict has arisen, conflict resolution mechanisms may take on a key role, given  
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54 that studies have in recent years repeatedly made it clear that resorting to the jurisdiction  
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3 of the courts is not the best option, particularly when there are cross-border and  
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5 consumers are increasingly reluctant to exercise their rights as a result of a lack of  
6  
7 confidence in the effectiveness of the diverse redress mechanisms made available to  
8  
9 them.<sup>46</sup> The barriers to obtaining effective redress constitute a significant source of  
10  
11 vulnerability for consumers.<sup>47</sup>  
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14 In its Communication of 13 April 2001 on the Single Market Act, the European  
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16 Union included legislating on ADR as one of its twelve priorities, and its different  
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18 Resolutions<sup>48</sup> have stressed that any global focus must prioritise simple, affordable,  
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20 quick and accessible resources. Nevertheless, emphasis has still not been placed on one  
21  
22 aspect that is crucial for ensuring that the necessary trust is placed in the system: its  
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24 effectiveness, in terms of the enforcement and satisfaction of consumer rights, above  
25  
26 and beyond the contents of the principle of effectiveness included in Article 8 of  
27  
28 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013,  
29  
30 on alternative dispute resolution for consumer disputes ('the Consumer ADR  
31  
32 Directive').  
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36 Under the terms of said Directive, the principle of effectiveness requires  
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38 Member States to ensure that: the procedure is available, easily accessible and free of  
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40 charge or at a symbolic fee for consumers; the consumer is aware of and receives the  
41  
42 documentation; and that the outcome is made available within a reasonable period of  
43  
44 time (90 days). However, this does not guarantee the effective exercise of their rights if  
45  
46 traders do not participate or the outcomes of the procedures are not respected and  
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51 <sup>46</sup> P. Cortés, F. Esteban de la Rosa "La normativa europea, *op. cit.* p. 6 - 7. See to the same effect, "Flash  
52 Eurobarometer 300: Retailers, Attitudes towards cross border trade and consumer protection" (2011) Conducted by  
53 The Gallup Organization upon the request of Directorate-General Health and Consumers available at  
[http://ec.europa.eu/public\\_opinion/flash/fl\\_300\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf)

54 <sup>47</sup> See P. Cartwright "Understanding and Protecting Vulnerable Financial Consumers" (2015) *Journal of Consumer*  
*Policy*, June 2015, Volume 38, Issue 2, 119–138.

55 <sup>48</sup> Resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters  
56 (2011/2117(INI)) and Resolution of 20 May 2010 on delivering a single market to consumers and citizens  
57 (2010/2011(INI))  
58

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3 consumers are not provided with the proper channels for their enforcement. This is  
4  
5 because effectiveness arises from the real application of a right by its beneficiaries and  
6  
7 depends upon two factors: that the beneficiaries voluntarily or spontaneously accept the  
8  
9 conduct provided for by the regulation and that the regulation is enforced by judges and  
10  
11 other competent bodies. This has to do with behaviour and requires conformity with, or  
12  
13 non-opposition to, the regulations.<sup>49</sup> With good reason, Article 47 of the Charter of  
14  
15 Fundamental Rights of the European Union<sup>50</sup> states “Everyone whose rights and  
16  
17 freedoms guaranteed by the law of the Union are violated has the right to an effective  
18  
19 remedy before a tribunal”. This principle of effective remedy before a tribunal is a  
20  
21 general principle of EU law, which arises from the constitutional traditions common to  
22  
23 Member States and which has been enshrined in Articles 6 and 13 of the Charter.<sup>51</sup>  
24  
25 Community Law could govern this specific matter to harmonise or unify criteria but,  
26  
27 given that it fails to do so, it falls to the domestic legal systems of each Member State to  
28  
29 designate the bodies and arrange the resources designed to ensure that this right is  
30  
31 safeguarded, and it is their responsibility to guarantee, in each given case, effective  
32  
33 protection of these rights.<sup>52</sup>  
34  
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36

37 Focusing once again on non-adjudicative methods, negotiation, mediation and  
38  
39 conciliation have reached the greatest implementation in EU Member States for reasons  
40  
41 that go beyond the scope of this study. Closely linked to the principle of freedom which  
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49 <sup>49</sup> L. Díez-Picazo *Experiencias jurídicas y teoría del derecho* (ed. Ariel S.A., 3th edition, 1999), at p. 206.

50 Proclaimed on 7 December 2000 in Nice, as amended on 12 December 2007 in Strasbourg, OJ C 303, p. 1, entitled “Right to an effective remedy and to a fair trial”.

51 According to settled case-law, the principle of effective judicial protection is a general principle of Community law. See Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, [2007], ECLI:EU:C:2007:163, paragraph 37; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU: C:2008:461, paragraph 335; Case C-12/08 *Mono Car Styling v Dervis Odemis and Others* [2009], ECLI:EU:C:2009:466, paragraph 47.

52 Case C-268/06 *Impact* [2008], ECLI:EU:C:2008:223, paragraphs 44 and 45.

1  
2 ensures that consumers are not deprived of their right to resort to the judicial system,<sup>53</sup>  
3  
4 the effectiveness of their outcomes is key to conflict resolution procedures. Analysis of  
5  
6 specific mechanisms to obtain effectiveness requires, firstly, that we distinguish  
7  
8 between: (i) the effects of commencing a negotiation, mediation or conciliation  
9  
10 procedure, and (ii) the effects of any settlement that may be reached by the parties.  
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13  
14 With regard to the former point, one should first note the positive socioeconomic  
15  
16 effects that are caused by the mere fact of attempting an ADR/ODR procedure, in that  
17  
18 this helps avoid escalating the dispute and also, in part, in many cases, to cut the  
19  
20 workload of the courts in reducing the amount of litigation they have to deal with.<sup>54</sup> It  
21  
22 has been seen how the simple fact of commencing a dispute resolution procedure  
23  
24 results, in a significant number of cases, in the avoidance of escalating this dispute.  
25  
26 However, it is true that, on occasion, agreements cannot be reached for a number of  
27  
28 different reasons: differences between the two parties are irreconcilable; one or both of  
29  
30 the parties exercise their entitlement to deem the procedure concluded in advance; the  
31  
32 maximum agreed or legally established deadline for the duration of proceedings has  
33  
34 passed; or a cause for termination of the proceedings has arisen.  
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37  
38 With reference to the later -the effects of any agreement that may be reached by  
39  
40 the parties- there are no econometric studies allowing us to establish the percentage of  
41  
42 successfully administered cases that are subsequently escalated and whose enforcement  
43  
44 is requested because the agreements reached have not been respected. What we do  
45  
46 know, however, is that the costs of judicial proceedings greatly exceeds those of any  
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52 <sup>53</sup> Article 10 and 12 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on  
53 alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive  
54 2009/22/EC (Directive on consumer ADR). OJ L 165, 18.6.2013, p. 63–79.

55 <sup>54</sup> Namely, the empirical study on the benefits of Green Paper the Commission of the European Communities, *Green*  
56 *paper on alternative dispute resolution in civil and commercial law*, 19.04.2002, COM (2002) 196 final. Also,  
57 regarding the evaluation of cost and time benefits, see ADR Center, *The Cost of Non ADR - Surveying and Showing*  
58 *the Actual Costs of Intra-Community Commercial Litigation*, June 2010.

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3 out-of-court one, something that in itself explains the adoption of measures to  
4 encourage the later.  
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9 A. The mediation attempt. The *Study on Citizens' Rights and Constitutional Affairs* for  
10 the Directorate-General for Internal Policies (PE 493.042)<sup>55</sup> shows that mediation is still  
11 underused (in less than 1% of disputes). Even though the study fails to identify the  
12 specific reasons for such a low uptake, it does list some specific measures that seem to  
13 have been effective in implementing it,<sup>56</sup> for example: establishing compulsory  
14 mediation in certain types of cases; holding compulsory mediation information sessions;  
15 referring by the courts; granting tax incentives for parties opting for mediation<sup>57</sup>;  
16 sanctioning parties that do not attend compulsory mediation. Following a comparative  
17 analysis of the legal frameworks existing in the 28 Member States, it has been noted  
18 that only a degree of compulsion in the use of mediation leads to a significant increase  
19 in the number of mediations. Indeed, the introduction of a compulsory mediation  
20 attempt in some spheres has given rise to positive effects, even in voluntary mediation.  
21 One example of this is been provided by Italy, where mediation attempts were  
22 obligatory between March 2011 and October 2012 and, during this period, the number  
23 of voluntary mediations increased significantly. The Italian paradigm shows that certain  
24 legislative policies can lead, as a whole, to positive outcomes. Additionally, Directive  
25 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain  
26 aspects of mediation in civil and commercial matters<sup>58</sup> establishes an obligation aimed  
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50 <sup>55</sup> *Rebooting The mediation Directive: assessing the limited impact of its implementation and proposing measures to*  
51 *increase the number of mediations in the EU*, European Parliament, January 2014, Brussels, available at  
52 <http://www.europarl.europa.eu/studies>

53 <sup>56</sup> It is interesting to note that other measures to promote mediation, such as reinforcing the protection of  
54 confidentiality, increasing the number of invitations to mediation by judges and courts, or a more demanding system  
55 of accreditation of experts have not generated, by themselves, the expected results.

56 <sup>57</sup> See Report of the General Directorate or Internal Policies, 2014 *Rebooting the Mediation Directive, assessing the*  
57 *limited impact of its implementation and proposing measures to increase the number of the mediations in the EU*.

58 <sup>58</sup> Official Journal of the European Union L 136/3, dated 24 May 2008.

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2  
3 at Member States so that, by means of policies focused at encouraging mediation, they  
4  
5 effectively ensure that the use of such mechanisms achieves a balanced relationship  
6  
7 with judicial proceedings, which entails making greater endeavours to this end.  
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11 Yet, it should be stressed that the right of access to courts must be always  
12  
13 preserved and thus, limitations upon access must not be excessive. Noteworthy is the  
14  
15 Case of *Alassini v. Telecom Italia SpA*<sup>59</sup> which posed the question whether a provision  
16  
17 that required consumers to use an out-of-court process before having access to a court  
18  
19 may breach Article 6 of the European Court of Human Rights (ECHR). The European  
20  
21 Court of Justice found that this provision was compatible with the requirements of the  
22  
23 European Union legal framework provided that the mandatory process should not only  
24  
25 be available on the Internet and also that it should not cause excessive delay.<sup>60</sup>  
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31 B. Fighting against fraudulent practices. The European Union, committed to bolstering  
32  
33 the internal market and promoting cross-border transactions, has adopted some  
34  
35 measures to boost consumer confidence and prevent fraudulent practices. In this regard,  
36  
37 it has recently presented a proposal for review of the Consumer Protection Regulation,  
38  
39 in the aim of granting greater powers to national authorities to immediately shut down  
40  
41 websites committing frauds and to request information from domain registrars and  
42  
43 banks to find out the identity of the trader responsible, all to boost consumer confidence  
44  
45 in e-commerce. Article 21a of Regulation 2006/2004 on cooperation between national  
46  
47 authorities responsible for the enforcement of consumer protection laws ('the CPC  
48  
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51 <sup>59</sup> See *Alassini v Telecom Italia SpA* (C-317/08) [2010] 3 CMLR 17 available at <http://swarb.co.uk/alassini-v-telecom-italia-spa-environment-and-consumers-c-31708-ecj-19-nov-2009/>. For more detailed explanation, S. Prince  
52  
53 "Access to Court?" at *The New Regulatory Framework for Consumer Dispute Resolution*, edited by P. Cortés  
54  
55 (Oxford University Press, 2016) at 83.

56  
57 <sup>60</sup> Currently the Court of Justice of the European Union is studying a preliminary question from The Tribunal  
58  
59 Ordinario di Verona (Italy) in Case [C.75/16] *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare – Società Cooperativa*, asking whether the requirement of mandatory mediation with legal representation in consumer  
60  
61 matters is compatible with the ADR Directive.

1  
2  
3 Regulation')<sup>61</sup> established that the Commission shall assess the effectiveness and  
4  
5 operational mechanisms of this Regulation and thoroughly examine the possible  
6  
7 inclusion in the Annex to the Regulation of additional laws that protect consumers'  
8  
9 interests. Accordingly, this Regulation provides a legal basis for extending national  
10  
11 procedural regulations such that they can be applied to cross-border situations when  
12  
13 trader malpractice occurs, such as unfair trading practices; use of unfair contract terms;  
14  
15 infringement of consumer *ius cogens* or of compulsory warranties; violation of laws  
16  
17 governing e-commerce, ADR, e-privacy, of sector-specific legislation on passenger  
18  
19 rights or consumer credit, to give some examples.  
20  
21

22  
23 According to the Proposal's preamble, there continues to be a high degree of  
24  
25 non-compliance with consumer regulations. The top five grounds for complaints noted  
26  
27 are, in order of importance: (i) non-delivery; (ii) defective products; (iii) problems with  
28  
29 contracts; (iv) goods or services not in conformity with the order; (v) unfair trading  
30  
31 practices.  
32

33  
34 Between October 2013 and February 2014, the Commission held a public  
35  
36 consultation. Stakeholders were invited to give their views on how to improve the  
37  
38 functioning and effectiveness of the CPC Regulation. In total, 222 responses were  
39  
40 received that were overall sufficiently representative of all stakeholders directly  
41  
42 involved in consumer e-commerce (public authorities, consumer associations, ECCs,  
43  
44 businesses and individual consumers). More than 50% expressed support for giving  
45  
46 explicit powers against infringing traders, as well as the power to request penalty  
47  
48 payments to cover illicitly obtained gains and to require interim measures. 88% of  
49  
50 respondents supported the possibility of introducing common procedural criteria and  
51  
52 introducing standards authorising the publication of enforcement decisions, access to  
53  
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56 <sup>61</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on Cooperation  
57 between national authorities responsible for the enforcement of consumer protection laws (the Regulation on  
58 consumer protection cooperation)Text with EEA relevance, OJ L 364, 9.12.2004, p. 1–11.  
59

1  
2 documents, the collection of evidence and the investigation of websites. Furthermore,  
3  
4 almost all enforcement authorities supported the idea of developing and improving  
5  
6 surveillance mechanisms and the majority of European Consumer Centres (83%),  
7  
8 consumer associations (75%) and businesses (62%) called for more mechanisms to  
9  
10 signal infringements via alert systems or tools.  
11  
12

13  
14 Lastly, the European Union has established a general regulatory framework for  
15  
16 ADR/ODR<sup>62</sup> systems and has promoted the creation of a Union-level consumer ODR  
17  
18 platform to handle domestic as well as cross-border complaints arising from online  
19  
20 transactions to provide the necessary more detailed regulatory cover for resolution  
21  
22 procedures. In this regard, also worthy of note is the work begun in 2010 by  
23  
24 UNCITRAL's Working Group III, whose efforts to secure an international instrument  
25  
26 to facilitate the online resolution of disputes that involve small claims arising in the  
27  
28 context of cross-border online B2B and B2C transactions, has given rise to some  
29  
30 technical notes or guidelines (the *Technical Notes on Online Dispute Resolution*) an  
31  
32 upcoming descriptive and non-binding document that contemplates the principles and  
33  
34 elements that should be included in ODR procedures. It proposes an open formulation  
35  
36 of the description of ODR, to provide future coverage for other technologies that may  
37  
38 be developed for the same purposes.  
39  
40

41  
42 Nevertheless, little has been achieved to date with regard to the effectiveness of  
43  
44 consumer's rights, and less still in terms of what should be their ultimate goal: the  
45  
46 satisfaction of their interests. Unlike the case of service providers, in online  
47  
48 transactions, consumers do not generally know who they are dealing with, nor do they  
49  
50 know what they will receive in the end, as they are unable to see and check the product  
51  
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54  
55 <sup>62</sup> Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013, on online dispute  
56 resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC  
57 (Regulation on consumer ODR available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>)

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2  
3 before acquiring it, meaning they cannot judge the quality of the product or service,  
4  
5 important factors when making a purchasing decision. This asymmetry of information  
6  
7 in online commercial relations affects and damages trust and is an added factor in  
8  
9 consumer disputes.  
10

11  
12  
13 C. Harmonising the European Union's redress system. By virtue of Article 169 of the  
14  
15 Treaty on the Functioning of the European Union, the current Consumer ADR Directive  
16  
17 has proposed the establishment of a general regulatory framework for out-of-court  
18  
19 mechanisms, both traditional and online, aimed at consumers, whose goals include,  
20  
21 firstly, the establishment of minimum EU-wide quality values and standards and,  
22  
23 secondly but no less importantly, to harmonise and coordinate national legislations to do  
24  
25 away with disparities in terms of the coverage, quality and understanding of ADR.  
26  
27

28  
29 In this regard, on the one hand, it gives its seal of approval to certain principles  
30  
31 already included in the preceding Recommendations of 1998<sup>63</sup> and 2001,<sup>64</sup> making them  
32  
33 binding in nature. On the other, it opts for a minimum level of harmonisation of dispute  
34  
35 resolution schemes, and leaves up to Member States numerous issues in order to embed  
36  
37 the already existing schemes and the different legal traditions within the European  
38  
39 Union. In addition to this, the Directive authorise Member States to increase the level of  
40  
41 protection afforded to their consumers. To this latter end, the consumer ADR Directive  
42  
43 itself provides that, to ensure a greater level of consumer protection, Member States  
44  
45 may maintain or introduce rules that go beyond those laid down by the Directive.  
46  
47

48  
49 Therefore, a legal instrument that was initially conceived as a means to prevent  
50  
51 disparities has become a new obstacle to harmonisation, because, as noted in the

52  
53 <sup>63</sup> 98/257/EC Commission Recommendation of 30 March 1998 on the Principles applicable to the bodies responsible  
54 for out-of-court settlement of consumer disputes, OJ L 115, 17.4.1998, p. 31–34 R. 98/257/CE available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998H0257&from=EN>

55  
56 <sup>64</sup> Commission Recommendation of 4 April 2001 on the Principles for out-of-court bodies involved in the consensual  
57 resolution of consumer dispute, OJ L 109, 19.4.2001, p. 56–61 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001H0310&from=EN>



1  
2  
3 Explanatory Memorandum itself, these differences -and inconsistencies- constitute  
4 obstacles to the internal market and refrain from purchasing. Currently, we can find a  
5 myriad of diverse mechanisms offered among EU Member States, namely: (i)  
6 Adjudicative schemes of dispute resolution, whilst the vast majority have favoured the  
7 implementation of non-adjudicative models. Each type follow diverse procedural tracks  
8 which results in to great difficulties for consumers. (ii) It has also been left up to each  
9 Member State to establish a system of compulsory or voluntary participation or  
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Adhesion by businesses.<sup>65</sup>(iii) Additionally, penalties applicable to certain infringements by businesses depend mainly in each Member State internal regulation. (iv) Many different ways of funding ADR/ODR entities, some of them clearly controversial since allow private dispute resolution schemes be financed by business entities.<sup>66</sup> (v) The thresholds for accessing ADR/ODR schemes also vary significantly from country to country and member States may add new grounds of non-eligibility. In addition to this, some schemes are free of charge for the consumer and others charge the costs of the proceeding and there is no a common criteria among Member States<sup>67</sup>.(viii) Accredited and non-accredited dispute resolution entities may coexist under the same umbrella. (ix) Finally, binding enforceable outcomes are clearly the exception among Member States.

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<sup>65</sup> Although voluntary participation is the mainstream criteria -and companies refuse to participate- some Member States have standardized the attempt to mediate as a requirement before filling a court proceeding (Italian model). In some Member States membership to certain associations or chambers obliges them to be affiliated to a resolution system, which increases the participation rate of companies (v. gr. UK); others, like France, require business to participate in a mediation process when asked by a consumer; others, like Norway use complaint boards that process consumer complaints even when traders have not agreed to participate. See C. J. S. Hodges, I. Benöhr, N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Pub., 2012) 25–354. See also, J. P. Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2016).

<sup>66</sup> A number of countries authorize private entities financed by companies or its associations to administer ADR/ODR processes, as is the case of Germany, Belgium, the Netherlands, France, Ireland, or the United Kingdom. See C. J. S. Hodges, I. Benöhr, N. Creutzfeldt-Banda, *Consumer ... op. cit.* 25–354.

<sup>67</sup> For example, in Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxemburg, Portugal, Spain and Sweden, at the Air Passenger Rights sector the procedure is free of charge for consumers, who will only bear their own costs. Conversely, in Belgium and Denmark consumers have to pay a submission fee which will be recovered if the consumer wins the case or the case is dismissed. And in Cyprus the consumer must pay a submission fee depending on the claim and if the case is lost a supplementary fee depending on the value of the complaint. See “Alternative Dispute Resolution in the Air Passenger Rights sector” (*ECC-NET Joint Project* 2012) p. 14.

1  
2  
3 A number of Member States have legislated to equip themselves with specific  
4 resolution bodies in strategic or regulated sectors (energy, telecommunications,  
5 transport, insurance, finance and banking, travel agents, etc.). Such is the case of  
6 Germany, Belgium, France, Holland and the United Kingdom, which have mostly  
7 adopted the figure of the Ombudsman scheme. Nevertheless, not all of them have  
8 established a system of compulsory adhesion for businesses operating in said sectors,  
9 such that, in some Member States -namely Italy, Belgium, the UK, Holland, Romania,  
10 Austria and Portugal- businesses are legally compelled to participate, whilst in others  
11 adhesion is voluntary, resulting in very low business participation levels. Moreover, in  
12 few cases are the outcomes of these ADR/ODR binding upon businesses,<sup>68</sup> such that, if  
13 the system is not bolstered by the incorporation of certain reputation tools like name and  
14 shame schemes<sup>69</sup>, the level of non-compliance is extremely high.<sup>70</sup>

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Whilst some Member States have created platforms that serve as ‘online helpdesks’ to guide consumers towards existing accredited entities arranged by sector - as is the case of Portugal, the UK and Sweden- and others have created an integrated e-platform to handle online complaints<sup>71</sup>, in the vast majority of Member States, it is the consumer him/herself who must work out in each given case which of the entity that should solve the claim.

Finally, some countries have set up certain reputation mechanisms to ensure that businesses voluntarily adhere and participate in ADR schemes -namely by means of

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<sup>68</sup> Namely, Italy (ABF), France (The Médiateur de RATP for public transportation), United Kingdom (The Communications & Internet Services Adjudication Scheme, CISAS; the Ombudsman Services, OS), Czech Republic, Denmark (Civil Aviation Authority, NEB), Latvia (Civil Aviation Authority, NEB CRPC) or The Netherlands (SGC, Geschillencommissie).

<sup>69</sup> As is the case of Denmark, Finland, Sweden or Latvia. See “Alternative Dispute Resolution in the Air Passenger Rights sector”, (2012) *ECC-NET Joint Project*, 18-19.

<sup>70</sup> This is the case for example of Spain, at the banking and financial sector. The Ombudsman's Resolution of 17 July 2014 described this fact and stated that in order to strike a balance between the two sides of the relationship, bank and client, where there is conflict, it is essential the effectiveness of the results and the effectiveness of the control mechanisms offered to users of financial services. Citizens, who make a claim and obtain a favorable decisions from the Claims Services fail to see their rights protected effectively because banks are not formally obligated to comply with such results.

<sup>71</sup> Namely, Belmed platform in Belgium. See S. Voet “The New FPS Economy and its Mediation Task” (2012) *Consumer ADR in Europe*, Hart Pub., 2012, 25–36.

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2  
3 public quality trademarks<sup>72</sup>- or voluntarily comply with proceedings' outcomes –public  
4  
5 blacklists of non-compliant traders- although the vast majority have not yet included  
6  
7 rules establishing mandatory participation of traders and enforceability of outcomes,  
8  
9 giving rise to a significant uncertainty in terms of effectiveness.  
10

#### 11 12 13 4. Compliance of agreements and enforceability of settlement outcomes 14 15

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18 On a legal level, once an agreement between a consumer and a trader is reached, the law  
19  
20 enforcement effects attached to the outcome becomes a new concern. Indeed, in  
21  
22 consumer conflict resolution the vast majority of ADR/ODR schemes are  
23  
24 selfcompositive –namely, mediation or conciliation- and thus parties settle their conflict  
25  
26 for themselves by means of a new agreement. This outcome produces the novation of  
27  
28 the previous existing contract, takes on binding effects and, when applicable, also  
29  
30 enforceability.  
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32  
33 Taking into consideration the second effect, enforceability, the vast majority of  
34  
35 Member States are granting the outcomes the same authority as a judicial decision when  
36  
37 the agreement complies with certain legal requirements or “filters”. To briefly  
38  
39 summarise, two traditional set of filters can be identified: Firstly, the recognition of the  
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41 agreement reached after a referral by a Court -which is most common in Spain,  
42  
43 Portugal, Austria, Slovakia, Norway, the Czech Republic, Cyprus, Italy and Romania;  
44  
45 Secondly, the involvement of a public Notary, consisting in the conversion of the  
46  
47 agreement into a public deed that embeds enforceability–namely, Spain, Poland,  
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56 <sup>72</sup> Like for example, Spain, with its public seal: “El distintivo de Arbitraje de Consumo”, available at:  
57 <http://www.aecosan.msssi.gob.es/AECOSAN/web/consumo/detalle/distintivo.htm>

1  
2  
3 Germany, Austria, Slovakia, the Czech Republic, Croatia or Romania.<sup>73</sup> However, these  
4  
5 ‘filters’, once again, make the outcome dependent upon the intervention of the judiciary,  
6  
7 which has a negative impact on achieving the initial goal -the effectiveness of the rights  
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9 in a reasonable time and at a cost proportionate to the amount claimed. Looking at the  
10  
11 case of Spain, for example, enforcement of the agreements arising from mediation must  
12  
13 be converted into a public deed pursuant to the terms of the Law on Mediation and  
14  
15 processed afterwards in accordance with the Law on Civil Proceedings.<sup>74</sup>  
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18  
19 Other flexible and expeditious tracks to make a mediation outcome enforceable  
20  
21 have been implement by countries from the European economic sphere: Firstly,  
22  
23 mediation outcomes signed by the parties and their lawyers who certify that it complies  
24  
25 with and respects the law and public policy (v. gr. Italy).<sup>75</sup> (ii) Secondly, mediation  
26  
27 outcomes from certified mediators (Belgium); Thirdly, mediation outcomes containing  
28  
29 a declaration of parties authorising enforceability -“enforceability clause” (Croatia).  
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31  
32 An additional concern regarding mediation outcomes may be the myriad of  
33  
34 possible defences to the enforcement of settlement agreements. Even when the terms of  
35  
36 a mediation outcome meet the formal requirements for its enforcement, potential  
37  
38 grounds for opposition may prevent the agreement from eventually being enforced and  
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41 <sup>73</sup> *Rebooting The mediation Directive: assessing the limited impact of its implementation and proposing measures to*  
42 *increase the number of mediations in the EU*, European Parliament, January 2014, Brussels, 77–118, available at  
43 <http://www.europarl.europa.eu/studies>

44  
45 <sup>74</sup> The regulatory framework in Spain is established by Law 5/2012, of 6 July 2012, of mediation in civil and  
46  
47 commercial matters and also by Law 1/2000, dated 7 January 2000, of Civil Procedure. Both legal texts require that  
48  
49 the mediation agreement comply, in addition to natural formal requirements. Namely, (i) in writing; (ii) stating the  
50  
51 identity and address of the parties and mediator. (iii) As well as the place and date on which it is subscribed. (iv)  
52  
53 Relating the set of obligations assumed by each party. (v) Indicating that the mediation procedure has been followed  
54  
55 in accordance with the provisions of the Law. (vi) And finally, signed by the parties or their representatives. Specific  
56  
57 procedural formalities: both parties must submit it before a notary for it to be converted into a public document,  
58  
59 accompanied by copies of the proceeding’s opening and concluding sessions. The notary then checks compliance  
60  
with the requirements set by the Law on Mediation and that its content is not contrary to the law. Execution must be  
carried out before the court competent therefore, which shall be the Court of the First Instance of the place in which  
the mediation agreement was signed. When the mediation agreement must be enforced in another Member State, the  
requirements included in any international conventions to which Spain is a party and the rules of the European Union  
must also be added. Finally, if the mediation process is the result of judicial referral, for it to be regarded as an  
enforceable title, it must be judicially approved, and the court competent for the execution shall be that which  
approved the agreement.

61  
62 <sup>75</sup> Report from the European Association of Chambers of Commerce and Industry (Eurochambres) "Pan-European  
63  
64 Mediation Practices". Survey on the Use and the Practice of b2b Mediation, year 2012 and 2013. Co-financed by the  
65  
66 European Union. JUST/2011-2012/JCIV/AG/3373, p. 23.  
67  
68 [http://www.eurochambres.eu/custom/Volume\\_Pan\\_European\\_practises\\_in\\_EU-2014-00891-01.pdf](http://www.eurochambres.eu/custom/Volume_Pan_European_practises_in_EU-2014-00891-01.pdf)

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3 each country has its own regulations in this regard. Differing laws governing the filters  
4  
5 that have to pass to become enforceable has led the international community to start  
6  
7 work on correcting, in part at least, legislative inconsistencies. By way of example, at  
8  
9 international level, the UNCITRAL Model Law on International Commercial  
10  
11 Arbitration<sup>76</sup> that provides legal grounds for opposition to awards that may contain  
12  
13 settlements. Furthermore, the last initiative of this body consisting on a draft Model  
14  
15 Law for enforcing trade-related settlement agreements,<sup>77</sup> providing for direct execution  
16  
17 and possible defences or grounds for refusing enforcement.<sup>78</sup> At European level,  
18  
19 Regulation 1215/2012 of the European Parliament and of the Council of 12 December  
20  
21 2012 on Jurisdiction and the recognition and enforcement of judgments in civil and  
22  
23 commercial matters (the Brussels Regulation)<sup>79</sup> provides the grounds for the non-  
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25 recognition of a decision.  
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## 30 31 5. Some concluding insights

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35 This article has identified some existing efficient tools to secure the effectiveness of  
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37 consumers' rights and the satisfaction of their needs, which is a pending issue in conflict  
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39 resolution into the European Union. The attractiveness of this approach is that it  
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43 <sup>76</sup> With the amendments adopted in 2006 by the United Nations, UNCITRAL, New York available at  
44 [https://www.uncitral.org/pdf/spanish/texts/arbitration/ml-arb/07-87001\\_Ebook.pdf](https://www.uncitral.org/pdf/spanish/texts/arbitration/ml-arb/07-87001_Ebook.pdf)

45 <sup>77</sup> It includes any commercial operation of supply or exchange of goods or services, distribution agreement,  
46 representation or commercial mandate, transfer of credits for factoring, leasing of equipment with leasing,  
47 construction works, consulting, Engineering, licensing, investment, financing, banking and insurance. It has been  
48 preferred to exclude from its scope transaction agreements involving consumers.

49 <sup>78</sup> (A/CN.9/861, paragraph 93). As to the possible categories of defences, reference was made to: (i) Those pertaining  
50 to the genuineness of the settlement agreement (reflecting the parties' consent, not being fraudulent). (ii) Those  
51 pertaining to the readiness or validity of the settlement agreement to be enforced (being final, not having been  
52 modified or performed, binding on the parties). (iii) Those pertaining to international public policy. (iv) It was also  
53 argued that other defences that could be used include fraud, public policy and where the subject matter of the  
54 settlement agreement is not capable of being settled through a conciliation process, or when one party to the  
55 agreement has not signed it or does not consent to being bound by it and when the agreement does not reflect the  
56 conditions agreed by the parties. It was also agreed that some categories of defences might also be considered by the  
57 enforcing authority at its own initiative (A/CN.9/861, n. 97).

58 <sup>79</sup> To replace Council Regulation 44/2001 of 22 December 2000 on the same subject (Brussels I Regulation), Section  
59 3, "Refusal of recognition and enforcement", Sub-section 1 "Refusal of recognition", Article 45. Official Journal of  
60 the European Union, L 351/1, 20/12/2012 available at <https://www.boe.es/doue/2012/351/L00001-00032.pdf>

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3 provides a comprehensive view of this particular topic not falling into the trap of  
4 focusing on one piece of the jigsaw only disregarding other important and  
5 interconnected issues.  
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9 Highly innovative and sophisticated mechanisms in the ecommerce based in  
10 reputation of traders in order to build trust among users have emerged spontaneously  
11 and have opened new venues to empower consumers and ensure compliance of traders:  
12 trust marks, ratings, blacklists and escrow accounts have become essential dispute  
13 avoidance tools.  
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20 Consumers place their trust in products, services and businesses that are familiar  
21 to them or on which they have accurate information from other consumers with regard  
22 to their degree of satisfaction. They attach importance to other consumers' prior  
23 experiences. Beyond the protection offered by regulations, consumers place more trust  
24 in businesses that have been scored by other consumers, meet their needs and resolve  
25 problems quickly and efficiently. These mechanisms allow potential purchasers to  
26 familiarise themselves with traders, products, or services and learn to trust them.  
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35 The former were the first to emerge at businesses' own initiative although their  
36 value depends to a great extent on the level of user recognisability of their logo and the  
37 perception of independence they manage to create. Rating systems have been  
38 incorporated into the market very successfully on a massive scale since they meet users'  
39 needs for accurate information. Nevertheless, they are vulnerable to certain fraudulent  
40 practices and require uniform policies that avoid misleading practices and guarantee that  
41 the information is accurate. Blacklists allow to obtain a high degree of compliance from  
42 business due to fear of appearing in a list of risky or non-compliant traders. Connected  
43 with some public ADR schemes provide very satisfactory results. The visibility of the  
44 lists is a key issue for their efficiency. These reputational feedback tools alongside  
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3 private enforcement measures –namely, chargeback mechanisms and escrow accounts-  
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5 are becoming the driving forces behind the new digital economy. It is therefore  
6  
7 worthwhile advocating that Member States regulate and promote their implementation  
8  
9 in certain sectors -notably strategic or regulated ones- and interconnected to accredited  
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11 conflict resolution entities (ADR/ODR).  
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14 Furthermore, Europe’s experience to date has made clear three primary results:  
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16 Firstly, that the existence of reputational tools in the market -which play an essential  
17  
18 role in creating the necessary trust and credibility- reduce the number of consumers  
19  
20 claims; Secondly, although consumers have access to Courts, litigation is a last resort;  
21  
22 Thirdly, only a certain degree of business participation lead to positive outcomes.  
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25 There is thus little doubt as to the need to rethink the Consumer protection in  
26  
27 the aim of: (i) incorporating a minimum standardized legal framework for dispute  
28  
29 avoidance tools that defines principles and legal requirements to ensure transparency  
30  
31 and transferability of data alongside interoperability of such tools with any consumer  
32  
33 public authority or other public bodies; (ii) incorporating compulsory participation of  
34  
35 businesses from strategic or regulated sectors,<sup>80</sup> in conflict resolution schemes that  
36  
37 incorporate such dispute avoidance tools, which have been a success in those Member  
38  
39 States that have implemented them to provide protection to consumers in need of quick,  
40  
41 low-cost and effective solutions. This entails as well removing obstacles such as  
42  
43 difficulties in making contact and communicating with the businesses and avoiding  
44  
45 unnecessary formalities when making complaints.  
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49 This article has also shown the value, in the long run, of being more decisive in  
50  
51 making consumer affairs agreements enforceable. One plausible track might consist in  
52  
53 introducing quick and expeditious mechanisms for direct judicial approval of  
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57 <sup>80</sup> See also P. Cortés, *op. cit.* at 458.

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3 agreements reached. A process that could be carried out by conflict resolution entities  
4 themselves ADR/ODR) for the purposes of speeding up enforcement whether necessary  
5 and preventing ‘resisting’ attempts to avoid enforceability by one of the parties involved  
6  
7 in a conflict.  
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11 Again, given that making outcomes enforceable by simply standardized  
12 processes entails the adoption of more in-depth European Union legislative policies,  
13 dispute avoidance tools may play an essential role in the short and medium term,  
14 encouraging self-compliance with agreements and outcomes, and thus reducing very  
15 significantly the number of disputes.  
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