INDUSTRY SELF-REGULATION MODELS
IN DISPUTE RESOLUTION OF E-COMMERCE B2C

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Contents

List of Abbreviations

ADR	Alternative Dispute Resolution
B2C	Business – to – consumer
ccTLDs	Country Code Top Level Domains
CESL	Common European Sales Law
ECD	E-Commerce Directive
ECJ	European Court of Justice
gTLDs	Generic Top Level Domains
GBDe	Global Business Dialogue on Electronic Commerce
ICANN	Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ITU	International Telecommunication Union
ODR	Online Dispute Resolution
OECD	Organization for Economic Co-operation and Development
RIA	Regulatory Impact Analysis
SME	Small Medium-sized Enterprises
UDRP	Uniform Domain-Name Dispute-Resolution Policy
UK	United Kingdom
UN	United Nations
US	United States
WIPO	World Intellectual Property Organization
WEB	World Wide Web

INDUSTRY SELF-REGULATION MODELS IN DISPUTE RESOLUTION OF E-COMMERCE B2C

1. Introduction

1.1. Background

The International Telecommunication Union (ITU) [1] expected by the end of 2014, there would be almost 3 billion Internet users and according to eMarketer [2] the global business-to-consumer (B2C) electronic commerce (e-commerce) market would grow 20,1 percent in 2014 to reach total sales of $1.5 trillion.[3] Growth would be influenced primarily by the rapidly expanding online and mobile user bases in emerging markets, increases in e-commerce sales, improving shipping and payment options, and the entrance of new brands into new international markets. [4] Nevertheless, the rapid growth of e-commerce is accompanied by an increasing number of complaints. According to econsumer.gov, they received 26.674 complaints in 2008, number that has increased to 37.609 complaints by the end of 2014.[5]

Additionally, according to the Complaints Reported to the European Consumer Centers Network (ECC-Net) [6] between 2010 and 2012, they recollected 222 cases related with online transactions. [7] This report showed that 72 cases out of 222 received, the ECC-Net's contacted traders directly on behalf of consumers, 12 were reported to the relevant enforcement

[1] International Telecommunication Union (ITU), *The World in 2014: ICT facts and* figures, retrieved on 15th of December of 2014 from http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx

[2] eMarketer is an independent market research company that provides insights and trends related to digital marketing, media and commerce further information http://www.emarketer.com/

[3] eMarketer, *Global B2C E-commerce Sales to Hit $1.5 Trillion This Year Driven by Growth in Emerging Markets:* Asia-Pacific leapfrogs North America to become world's largest regional e-commerce market, 2014, retrieved on 15th of December from http://www.emarketer.com/Article/Global-B2C-E-commerce-Sales-Hit-15-Trillion-This-Year-Driven-by-Growth-Emerging-Markets/1010575

[4] Ibid.

[5] European Consumer Centers Network (ECC-Net) (1), *10 years serving Europe´s consumers anniversary report 2005-2015*, ECC-Net and European Commission, 2015, p. 8, retrieved on May 29th of 2015 from http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm

[6] ECC-Net is a Europe-wide network of all the European Consumer Centers, who co-operate closely to help settle complaints between consumers and traders based on different European Union countries, Norway and Iceland. The Centers provide free advice and assistance; they are co-financed by the European Commission and national governments. See more information in http://ec.europa.eu/consumers/ecc/

[7] European Consumer Centers Network (ECC-Net) (2) . *Enhanced Consumer Protection – the Services Directive 2006/123/EC: Analysis of Article 20.2 and Article 21 related consumer complaints reported to ECC-Net between 2010 and 2012*, retrieved on 15th of December of 2014 from http://ec.europa.eu/consumers/ecc/docs/ecc-services_directive_en.pdf

authorities, but only one resulted in a decision made by an enforcement authority.[8] Besides, the ECC-Net's presents that over the last 10 years they have dealt with nearly 50.000 cases involving e-commerce, being the distance and the online sales factors, which had a majority percentage in 2014 with 31,7% over the rest of the complaints.[9] Therefore, the fact that only a few cases of this nature are brought to a state administrative procedure can be consequence of the increase over the last decade in the number of rapid and inexpensive cross-border dispute resolution options.[10] Although, some B2C cases are not reported[11] due to the perception that cross-border litigation is complex and typically very costly.[12]

These statistics show how the constant growth of the Internet is also associated with conflicts between retailers and consumers, which in most of the cases imply jurisdiction difficulties as a result of the new boundary-less environment.[13] As an example, B2C cross-border transactions are subject to the existing framework on applicable law and jurisdiction, which also implies problems, such as conflicts of law, expense, complexity and potential language difficulties.[14] Furthermore, international courts proceedings can be expensive and often exceeding the value of the goods or services in dispute.[15] In consequence, cross-border B2C relationships claim for a fast, user-friendly and inexpensive solution that make the market a scenario for the free flow of goods and services.[16]

Moreover, the consumer community points the economic imbalances, whereby businesses are financially better prepared to deal with the costs associated with being sued in a foreign

[8] Ibid.
[9] European Consumer Centers Network (ECC-Net) (1), Op. Cit., p.11.
[10] Ibid, p. 26
[11] European Consumer Centers Network (ECC-Net) (3). *Fraud in cross-border e-commerce*, 2012, p.6, retrieved on 16th of December of 2014 from http://ec.europa.eu/consumers/ecc/docs/ecc-report-cross-border-e-commerce_en.pdf
[12] S. Dan & C. Roger. *A best practice model for e-consumer protection*, Bond University, Computer Law and security review, 26 (1), 2010, p. 11-13, retrieved on 19th of December of 2014 from http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1345&context=law_pubs *See also* Commission of the European Communities, *Green Paper: On consumer collective redress*, European Commission, 2008, p. 5, retrieved on 23th of April of 2015 from http://ec.europa.eu/consumers/archive/redress_cons/greenpaper_en.pdf
[13] G. Michael, *Jurisdiction and the Internet: "The real world" meets cyberspace,* ILSA Journal of International and Comparative Law, 2000, p.149, retrieved on 21st of April of 2015 from http://www.sciencedirect.com/science/article/pii/S0267364905001688
[14] L. Ann, *A comparison of Model Laws as a Starting point for the Development of and Enforceable International Consumer protection Regime,* Int'l. Trade & Business, 2003, p. 271, retrieved on 17th of December of 2014 from http://heinonline.org/HOL/LandingPage?handle=hein.journals/itbla8&div=13&id=&page=
[15] Global Business Dialogue on Electronic Commerce (GBDe), *Alternative Dispute Resolution Guidelines: Agreement reached between Consumer International and the Global Business Dialogue on Electronic Commerce*, 2003, p. 54, retrieved on 15 of December of 2014 from http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_Nov03.pdf *See also* ECC-Net (1), Op. Cit., p. 25-27.
[16] Ibid, p.56

jurisdiction, especially given that e-commerce provides sellers with an unprecedented access to a significantly wider market than in the traditional commerce.[17] Even though, this statement holds true only in relation to highly profitable, large e-businesses, whereas for small medium-sized enterprises (SME) the onus of dealing with multiple jurisdictions usually represents an excessive financial burden.[18] For this reason, in not all of the cases the company has the possibility to afford the cost and expenses of be sued in a different jurisdiction and in consequence the over protection of consumers can also have an undesirable impact in the market.[19]

One of the first cases related with jurisdiction concerns, is *LICRA*[20] *v. Yahoo!*.[21] According to LICRA, Yahoo¡ was allowing their online auction service to be used for the sale of remembrances from the Nazi period, contrary to the French Criminal Code.[22] The jurisdiction problem did not wait, by one side the defense rested on the fact that these auctions were conducted under the jurisdiction of the United States (US).[23] It was claimed that there were no technical means to prevent French residents from participating in these sales, at least without placing the company in financial difficulty and compromising the existence of the Internet.[24] The defendants noted that their servers were located on US territory, their services were primarily aimed at US residents and the First Amendment to the United States Constitution guarantees freedom of speech and expression, and that any attempt to enforce a judgment in the US would fail for unconstitutionality.[25]

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[17] E. Lanza, *Personal Jurisdiction Based on Internet Contracts*, Suffolk Transnat'l L. Rev., 24, 2000, p. 125, retrieved on 23th of April of 2015 from http://heinonline.org/HOL/LandingPage?handle=hein.journals/sujtnlr24&div=9&id=&page=

[18] Eurobarometer 320, European contract law in business-to-business transactions, p. 24, retrieved on 17th of April of 2015 from http://ec.europa.eu/public_opinion/flash/fl_320_sum_en.pdf *See also* European Commission, 2011, Op. Cit., p. 3.

[19] E. Tucker & J. Eaglesham, *Legislative Threat to E-Commerce*, FIN. TIMES, 1999, p. 2, retrieved on 17th of May of 2015 from http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.199.633&rep=rep1&type=pdf *The author affirm that legislation that attaches jurisdiction to the consumer's computer would affect small and medium sized companies the most.*

[20] The International League against Racism and Anti-Semitism established in 1927.

[21] Analysis of the case available at http://law.justia.com/cases/federal/appellate-courts/F3/433/1199/546158/

[22] O. Elissa, *Yahoo!, Inc. v. LICRA: The French challenge to free expression on the Internet*, American University International Law Review 18, no. 1, 2002, p. 309, retrieved on 17 of December of 2014 from http://www.tamilnet.com/img/publish/2012/01/FrenchCaseFreeSpeech.pdf

[23] J. Sommer, *Against Cyberlaw*, 2000, Berkeley Technology L.J., p. 11158, retrieved on 22nd of January of 2015 from http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1295&context=btlj The author argues that jurisdictional problems existed before the advent of the Internet, as did privacy, intellectual property, and free speech problems.

[24] O. Elissa, Op. Cit., p. 311-312

[25] Ibid, p. 312-313

On the other hand, the French Court established that there were sufficient links with France to give it full jurisdiction to hear the complaint. In particular, the Court found that the auctions of Nazi memorabilia were open to bidders from any country, including France; the display of such objects, and the viewing of such objects in France, caused a public nuisance and it were forbidden under French criminal law.[26] Furthermore, Yahoo! Inc. was aware that French residents used its auction site, as it displayed French-language advertisements on its pages when they were accessed from computers in France.[27] Consequently, on the 22nd of May 2000, the Tribunal de Grande Instance of Paris issued an injunction against American internet service provider Yahoo!, which required Yahoo! Inc. to take all possible measures to prevent the access in France of web pages that auction Nazi objects.[28] This decision of the French Court generated some reactions due France was destroying "free speech" on the Internet by forcing its rule on anyone who used the Internet anywhere. [29] Nevertheless, the case has therefore become the landmark case on the difficulty to apply national laws to a global medium such as the Internet.[30]

In addition, governments have claimed for standardization in consumer law because it leads to reduced cost and improved efficiency.[31] Nevertheless, around the world each jurisdiction has their own scheme of consumer protection and their approach could be in conflict with other jurisdictions. For example, the US have a system that standardizes Internet transactions by placing all of the risk on the consumer.[32] On the other hand, the European Union (EU) uses uniform regulations combined with active enforcement.[33] There is no conclusive evidence that demonstrates which system finds the accurate balance between technological development

[26] Ibid, p. 314-315
[27] Ibid, p. 315-316
[28] UEJF & LICRA v. Yahoo!, Inc. & Yahoo! France, T.G.I. Paris, May 22, 2000. Retrieved on 15th of December of 2015 from http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (The Court ordered Yahoo! to interrupt a connection when a French citizen views material constituting an apology for Nazism).
[29] S. Evan. *Yahoo! Inc. V. La Ligue contra le racisme et L´antisemitism: Court refuses to enforce French order attempting to regulate speech occurring simultaneously in the U.S and in France*, 2002, 19 Santa Clara High Tech. L.J. 549, p. 554-555, retrieved on 21st of January of 2015 from http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1332&context=chtlj *See also* R. Mathias. *Introduction: the Yahoo! case and conflict of laws in the cyberage*, 2009, *International Law: Classic and Contemporary Readings*, Lynne Rienner Publishers, p. 663, retrieved on 1st of October of 2015 from https://www.law.umich.edu/library/guests/pubsfaculty/facultypages/Pages/reimann_mathias.aspx
[30] European Commission's Information Society and Media Direct rate-General, *Legal analysis of a Single Market for the Information Society: New rules for new age?*, DLA piper, 2009, p.3.
[31] B. Beheshti, Op. Cit., p. 65.
[32] Ibid, p. 65 *See case* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451, 1996, available at http://jolt.law.harvard.edu/articles/pdf/v10/10HarvJLTech353.pdf
[33] M. Rustad & T. Lambert, Op. Cit., p. 593.

and consumer benefit.[34] For this reason, the divergent nature of regulatory schemes forces online businesses to adapt their policies to multiple standards.[35]

In the context of B2C transactions, once a consumer has a disagreement with the seller, usually the consumer has a chargeback as a remedy to reverse or to block the transaction made, for instance when fraudulent usage has occurred.[36] Likewise, the EU industry have the 3D secure protocol in association with some financial corporations, for instance MasterCard secure code is verified by VISA.[37] However, despite this arrangement, the fact that blocking payments or chargebacks are not always extended internationally, limiting the scope of this solution for e-commerce transactions.[38] As an example, in the case *ADSL Servicios Informáticos S.L. v Banco Español de Crédito* the national court mentioned that in on-line transactions, the titleholder of a credit card that is used to acquire goods through the Internet does not assume responsibility for the risks of its fraudulent use and can cancel the charge provided that the consumer had been act under the necessary due diligence.[39] However, in the same case the court pointed that the seller, not the titleholder of the card or the bank that is acting as an intermediary, takes on the risks of this transaction.[40]

Furthermore, the rules for this remedy vary among different countries, for instance, in United Kingdom (UK) unlike other EU countries consumers have the right to claim damages from the credit card issuer when an UK consumer deals with a foreign business, which eliminates the need for the consumer to initiate a legal action in a foreign jurisdiction.[41] Nevertheless, these remedies are considered inefficient for large and small businesses since the credit card company acts as an arbitrator without engaging in an adversarial hearing process, which prima facie tends to favor consumers.[42] Thus, these alternatives of blocking or cancel the

[34] Ibid, p.590
[35] B. Beheshti, Op. Cit., p. 67.
[36] P. Cortés, *Developing Online Dispute Resolution for Consumers in the European Union,* International Journal of Law & Information Technology, 2010, retrieved on 21st of January of 2015 from http://ijlit.oxfordjournals.org/content/19/1/1.abstract
[37] Europol, *Payment card fraud in the European Union: Perspective of Law enforcement agencies.* Situation Report, Europol Public Version, 2012, p. 11, retrieved on 2nd of June of 2015 from https://www.europol.europa.eu/content/page/publications
[38] S. Martin, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-To-Consumer E-Commerce*, 20 Boston University International Law Journal, 2002, p. 125, retrieved on 2nd of June of 2015 from http://www.lexisnexis.com/en-us/gateway.page
[39] Audiencia Provincial Barcelona (Appeal Court), 22.12.2004, no. 906/2004, "ADSL, Servicios Informáticos S. L." v "Banco Español de Crédito S. A." available at http://www.eu-consumer-law.org/caselaw182.pdf
[40] Ibid.
[41] Consumer Credit Act 1974 s 75(3)(b) available at http://www.legislation.gov.uk/ukpga/1974/39/section/75
[42] P. Cortés, Op. Cit., p. 71.

payment do not apply equal around the world and each payment provider has different procedures, which make these procedures inefficient for both parties.[43]

In this sense, e-commerce transnational disputes still occur despite bank mechanisms or return policies because jurisdiction continues to be an unsolved subject. For example, the joined cases C-585/08 and C-144/09 address jurisdiction problems even when consumers and sellers are part of the EU.[44] The first case is a dispute concerning a cruise, between Mr. Pammer, Austrian resident, and a company established in Germany. Mr. Pammer refused to embark because the description that he had from the company did not, in his view, correspond to the conditions on the vessel. The case was initiated in Austrian courts, but the company claimed that the court lacked jurisdiction because they did not pursue any professional or commercial activity in Austria.[45] The second case is a dispute between Mr. Heller, German resident who booked some rooms in a hotel from a company, which operates in Austria. The dispute started when Mr. Heller left the hotel without paying due to a fault with the hotel´s services. The company initiated the pleading at Austrian court, but Mr. Heller argued that the court lacked jurisdiction because he, as a consumer, can be sued only in the courts of the Member State of his domicile.[46]

In both cases the conflict of jurisdiction is undeniable, for this reason, the Supreme Court of Austria asked the European Court of Justice (ECJ) to decide whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be "directing" its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001.[47] This Regulation provides that in principle proceedings against persons domiciled in a Member State must be brought before the courts of that State. Nevertheless, it also contains specific rules governing consumer contracts, which afford

[43] J. de Lange et.al., *Online payments 2012: moving beyond the web*, Ecommerce Europe & Innopay, 2012, retrieved on 15th of December from http://www.thepaypers.com/reports/innopay-online-payments-report-2012-moving-beyond-the-web/r749111

[44] European Court of Justice (ECJ), joined cases C-585/08 and C-144/09 December 7th of 2010 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68743

[45] Case C-585/08, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG, European Court of Justice (ECJ), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68743

[46] Case C-144/09, Hotel Alpenhof GesmbH v Oliver Heller, European Court of Justice (ECJ) available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68743

[47] Ibid.

greater protection to consumers. In particular, under Articles 15 and 16 of the Regulation, where a consumer has concluded a contract with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities. The consumer will then have the possibility to bring proceedings before the courts of the Member State of his domicile or before those of the seat of the other party, whereas this other party will only be able to bring proceedings before the former.[48]

In this sense, the applicability of the rules of jurisdiction protecting the consumer depends on the interpretation of the concept of "activities directed to the consumer's domicile", especially in electronic transactions. The ECJ gave a non-exhaustive list in order to identify the evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile and it is for the national courts to ascertain whether such evidence exists. Finally, the jurisdiction problem does not have a black and white solution and each national court has to define according with the guidelines of the ECJ which court does or does not have jurisdiction, which is going to be explained in detail in Chapter 4.

The cases above illustrate that dispute resolution procedures on the Internet are intrinsically complex, due to the difficulty to apply traditional rules of jurisdiction to an international medium. Even in more straightforward cases, such as consumer disputes over goods or services bought on the Internet, the dispute resolution procedures still lack in effectiveness, despite the emergence of new dispute resolution models and a variety of initiatives that have been undertaken over the years, which is going to be explained in Chapter 5 of this study.[49] At first sight, complete international harmonization might be the ideal solution in theory, but cross-border trade is being slowed down not because there is a lack of regulation but because there are no means to enforce the existing law; in other words, there is no effective method to resolve disputes.[50] This thesis has the purpose to show how self-regulation backed up by enforcement tools can be a practical and advantageous method in order to generate trust in e-

[48] Article 15 and 16 of Regulation No 44/2001.
[49] A. Patrikios, *The role of transnational online arbitration in regulating cross-border e-business – Part I,* Computer Law & Security Report, 2008, p. 67.
[50] World Wide Web Consortium, *A Framework for Global Electronic Commerce*, 1997, retrieved on 21st of may of 2015 from http://www.w3.org/TR/NOTE-framework-970706.html *See also* P. Cortés, Op. Cit., p. 16.

commerce and build confidence between sellers and consumers for the solution of B2C e-commerce conflicts.

1.2. Scope

This thesis concerns about B2C transaction through electronic commerce leaving out other type of online relations such as business-to-business (B2B), government-to-business (G2B), government-to-consumer (G2C), peer-to-peer (P2P) and consumer-to consumer (C2C) with the purpose to analyze how self-regulatory models are working but it needs enforcement tools to generate confidence in electronic trade. The scope focuses its analysis in European Union cases because it has a harmonized regulation about distance selling and consumer rights and some United States cases in relation with specific situations.

1.3. Outline

Chapter 2 presents the concept of B2C relationships in e-commerce and their principle drawbacks in relation with cross-border transactions. Chapter 3 shows the main problem of cross-border transactions, for instance jurisdiction issues. Chapter 4 defines the jurisdiction rules at international and European Union level in connection with the dispute resolution in B2C transactions. Chapter 5 gives a compilation about self and co-regulatory instruments have been integrated in the market and how the self-regulatory scheme has been incorporated as a solution when it comes jurisdiction problem in cross-border transactions. Chapter 6 gives general conclusions.

2. Features and Concepts

2.1. E-commerce

E-commerce refers to the use of Internet and the World Wide Web (Web) to transact a wide range of online business for products and services. [51] It also represents digital support in commercial transactions between and among individuals that includes all transactions negotiated by digital technology in exchange of value rather than by physical exchanges.[52] Thus, the new market needs and the development of new information technologies have led the policy makers, entrepreneurs and in general the society to accept that e-commerce is an economic and social transformation mechanism.[53]

This environment is characterized by the ubiquity that means it is available everywhere, extending beyond traditional boundaries and removed from a temporal and geographic location, in contrast with traditional commerce that is limited by a physical space.[54] This characteristic allows commercial transactions to cross cultural and national boundaries more conventional and cost-effectively than in traditional commerce.[55] Furthermore, through the new technologies, it is becomes possible that merchants can target their marketing messages to specific individuals by adjusting the message to a person´s name, interests and past purchases. [56] Thus, personalization of e-commerce makes this new ecosystem more interactive, which enables two-way communication between merchant and consumer as a

[51] C. Kenneth & C. Guercio, *E-commerce 2012: business, technology and society*, Pearson Education Limited, 2012, p. 49. *See also*, R. Anita, *The E-commerce Question and Answer Book*, American Management Association, 2000, p. 5. *See also* L. Thomas, *Measuring Electronic Business: Definitions, Underlying Concepts, and Measurement Plans*, Technical report, U.S. Census Bureau, 2000, p. 4-7, retrieved on 21st of January of 2015 from https://www.census.gov/econ/estats/papers/ebusasa.pdf

[52] MK, Euro Info Correspondence Centre, *E-commerce-Factor of Economic Growth*, 2013, retrieved 20 of December of 2014 from http://www.eicc.co.yu/newspro/viewnews.cgi?newsstart3end5. *See also* Grupo de Estudios en Internet, Comercio Electrónico, Telecomunicaciones e Informática (GECTI), 2002, *Internet Comercio Electrónico & Telecomunicaciones*, Andes. Ed, Legis, p.67 "*refers to all commercial transactions or systems based on electronic processing and transmission of information*" own translation. *See also* C. Kenneth & C. Guercio, Op. Cit., p. 49.

[53] H. Hocsman, *Negocios en Internet*, Astrea, 2005, p. 45-49. Own translation.

[54] C. Kenneth & C. Guercio, Op. Cit., p. 51-52. *See also* S. Carl & R. Hal, *Information Rules: A strategic guide to the Network Economy*, Cambridge, MA: Harvard Business School Press, 1999, p. 55-60, retrieved on 21st of January of 2015 form http://www.jstor.org/stable/259025?seq=1#page_scan_tab_contents

[55] E. Phillips & S. Thomas, *Strategy and the New Economics of Information*, 1997, Harvard Business Review, p. 23, retrieved on 17th of May of 2015 from https://hbr.org/1997/09/strategy-and-the-new-economics-of-information *See also* C. Kenneth & C. Guercio, Op. Cit., p. 53.

[56] B. Summan & C. Amiya, 2005, *Price Setting and Price Discovery Strategies with a Mix of Frequent and Infrequent Internet Users*, retrieved 15th of January 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650706

similar experience as face-to-face question that occurs in traditional commerce but in a massive way.[57]

The e-commerce scenario is one of the principal catalysts of global economy where both large corporation and SME currently transact business over the Internet, showing that the growth rate of this new marketplace will continue well into the new decade.[58] According to Statistics Brain, e-commerce global online sales have reached in 2013 the threshold of 1.250 trillion USD, up compared to 2012, when they stood at 1 trillion USD.[59] As a consequence, the Internet is a global medium that is open across all frontiers where websites, transactions and promotional material become global.[60]

2.2. B2C online transaction

E-commerce represents the creation of a new market conducting transactions in the electronic environment such as corporate websites (Michael Kors),[61] marketplaces (Zalando,[62] eBay[63]) social networking sites (Facebook[64]) where buyers and sellers are interacting.[65] Inside of this environment the B2C relationships are characterized by the communication between a business and an individual customer that faced consumer´s desires with the barriers of space and time of the companies.[66] Therefore, the impersonal nature of e-commerce makes it more

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[57] B. Marco & W. Luc, 2012, *Putting Customer Back into Customization: A Pricing* Intervention, retrieved 17th of January 2015 from http://ssrn.com/abstract=2069755 *See also* C. Kenneth & C. Guercio, Op. Cit., p. 55.
[58] Ibid.
[59] Statistic Brain, *E-commerce / Online sales statistics*, 2014, retrieved 15 of January 2015 from http://www.statisticbrain.com/total-online-sales/
[60] International Chamber of Commerce (ICC), *Jurisdiction and applicable law in electronic commerce*, 2001, Electronic Commerce Project Ad Hoc, p. 1-7, retrieved on 21st of February of 2015 from http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2001/Jurisdiction-and-applicable-law-in-electronic-commerce/ *See also* P. Cortés, Op. Cit., p. 3.
[61] Web shop of Michael Kors at http://www.michaelkors.com/
[62] Marketplace Zalando at https://www.zalando.nl/dames-home/
[63] Marketplace eBay at http://www.ebay.com/
[64] Social Media networking https://www.facebook.com/
[65] D. Iacobucci & H. Jean, *Toward an encompassing theory of business marketing relationships and interpersonal commercial relationships: An empirical generalization*, Journal of Interactive Marketing, Vol. 13, 1999, p. 13–33, retrieved on 18th of march of 2015 form http://www.researchgate.net/profile/Dawn_Iacobucci/citations?sorting=citationCount&page=1
[66] D. Hanssens, D. Thorpe & C. Finkbeiner, *Marketing when customer equity matters*, 2008, Harvard Business. Rev. 86(5), p. 117- 123, retrieved on 14th of April of 2015 from https://hbr.org/2008/05/marketing-when-customer-equity-matters *See also* G. Andrei & P. Diacon, *Increasing market transparency: The role of the Internet and E-commerce*, Central and Eastern European Online Library, 2012, p. 187, retrieved on 18th of April of 2015 form http://www.ceswp.uaic.ro/articles/CESWP2013_V2_DIA.pdf

difficult for consumers identify if a product will satisfy their needs due the absence of the object in a tangible form.[67]

Besides, the relationship between consumers and sellers on the Internet is regulated by a contract, which has been, in theory, accepted by the consumer once he or she agreed with the Terms and Conditions of the web shop.[68] However, few or even none consumers actually read the terms and conditions before they use the website.[69] In this regard, it will be necessary to develop tailored mechanisms that reflect the requirements of cyberspace in order to ensure the enforcement of consumers' rights.[70]

Finally, laws and enforcement procedures across the world are significantly different, which result in differences between terms and conditions from one country to another. For example, the US has an approach that shifts costs and risks to the consumer while the EU, along with many other jurisdictions, has developed a regulatory regime to protect consumers from risk.[71] Other jurisdictions that follow the same approach as that the EU are Australia[72], Canada[73], Colombia[74] and Singapore.[75] In this sense, geographic, linguistic and cultural barriers increase the likelihood of misunderstandings in the terms and conditions provided, which proliferate the potential problems in resolving complaints.[76]

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[67] Ibid, p.189
[68] P. Carey, *The Internet and E-Commerce A Hawksmere Report.* Hawksmere, 2001, p. 45-50.
[69] J. Matthewson, *A Jargon-Free Practical Guide.* Butterworth Heinemann, 2002, p. 34-35.
[70] P. Cortés, Op. Cit., p. 2.
[71] B. Beheshti, *Cross-Jurisdictional Variation in Internet Contract Regulation: Is There a Viable Path to Globally Uniform Internet Contracting Laws?*, 8 J. Int. Com. L. & Tech., 49, 2013, p. 54, retrieved 11th of January 2015 from http://heinonline.org/HOL/Page?handle=hein.journals/jcolate8&div=6&g_sent=1&collection=journals
[72] *See*, Australian Competition & Consumer Commission, Legislation, retrieved 11th of January 2015 from https://www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation
[73] *See*, Justice Laws, retrieved 11 of January from http://laws-lois.justice.gc.ca/eng/acts/c-1.68/
[74] *See*, Superintendence of Industry, Trade and Tourism, retrieved 11th of January 2015 from http://www.sic.gov.co/drupal/proteccion-del-consumidor
[75] *See* Unfair Contract Terms Act, retrieved 11th of January 2015 from http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%22036b6041-12a6-4175-84ad-42cd4e62d9f6%22%20Status%3Ainforce%20Depth%3A0;rec=0
[76] K. Alboukrek, *Adapting to a new world of e-commerce: the need for uniform consumer protection in the international electronic market place*, The George Washington International Law Review, 35, 2003, p. 425-428, retried on 22nd of January of 2015 from http://www.globalresearch.com.my/journal/management_v02n01n02/0014_Article_511_Final_PG204_215.pdf

3. E-commerce Disputes

E-commerce provides opportunities for businesses to expand their markets and offer services to an ever larger groups of consumers, which will sometimes lead to disputes, as occurs in off-line transactions. The main challenge is to ensure that these conflicts will be resolved adequately and also prevent uncertainty over the electronic legal framework related with cross-border disputes.[77] Therefore, during the online transaction, the consumer can face problems such as: i) Goods or services are not delivered, ii) the good is delivered in a faulty or erroneous manner, iii) consumers may have problems to exercise the right of withdrawal, among others.[78]

The ECC-Net provides information about cross-border shopping, procedure of filling complaints against traders in EU and mechanisms to solve disputes to consumers.[79] In 2009 according to ECC-Net the prime source of complaints in that year was associated with poor contract information with almost 56%.[80] As an example, in *Step Saver Systems Inc. v Wyse Technology*, the US Court ruled the agreement unenforceable because users had not been informed about licensing terms and procedures until after payment.[81] Therefore, e-commerce is fraught with contentious issues and the potential for disputes, which denote the need for global cyber consumer protection.

3.1. Jurisdiction Debate

The electronic medium raises issues regarding privacy, security, contract formation and enforceability.[82] Besides other difficulties that come with e-commerce transactions, the main problem to discuss is cross-border dispute resolution. In this sense, despite technological and legislative developments governments still grapple with the question of whose laws apply

[77] U. Kohl, *Jurisdiction and the Internet - regulatory competence of online activity*, Cambridge University Press, 2007, p. 4
[78] Ibid, p. 6-10
[79] European Consumer Centers Network (ECC-Net) (1), Op. Cit., p.11.
[80] European Communities. *The European Consumer Centers Networks Fifth Anniversary Report (ECCT-NET)*, 2010, p.7-11, retrieved on 13th of March of 2015 from http://www.eccbelgium.be/20101026/the-european-consumer-centres-network-fifth-anniversary-report-2005-2009-Attach_s62511.pdf
[81] Step-Saver Data Sys Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991), retrieved 18th of April of 2015 from http://cyber.law.harvard.edu/metaschool/fisher/contract/cases/step.htm
[82] J. Hill, *Cross-Border Consumer Contracts*. Oxford University Press, 2009, p. 332.

in cyberspace, and the parties themselves all too often exhibit no clear understanding as to whose rules govern the arrangement and what recourse is available in the event of a dispute.[83]

Jurisdictional uncertainty may result in disadvantages for both consumers and businesses. On one side, companies decide to limit the countries to which they offer their services to avoid jurisdictional uncertainty; for instance, companies through their websites may restrict the delivery or sell to some products to certain countries.[84] On the other hand, consumers may be frustrated because attractive products or services are denied to them simply on the basis of their residence.[85] Also, some customers may be wary of foreign websites, regardless of its selling limitations, because they do not feel assured that familiar rules and protections will apply or that they will have adequate remedies in the event of difficulties.[86] Thus, a principal area of disagreement is whether e-commerce transactions and online dispute resolution should be regulated by governments or self-regulated by industry.

In many instances, courts are claiming jurisdiction over and applying their countries' laws to websites of companies located outside of their geographic boundaries.[87] Such broad scope could subject companies to the laws of virtually any country over the world from which their website can be accessed. [88] In addition, current international laws do not provide for effective enforcement options for judgments obtained in a consumer's country of residence against a merchant in a foreign jurisdiction.[89] Therefore, the inability to enforce foreign judgments is the result of a lack of harmonization in consumer law, leading to a set of decisions without compliance.[90]

As an example, in the case of Ms Mühlleitner, Austrian resident, against Autohaus Yusufi, a firm based in Hamburg, Germany, which specializes in selling cars, the Supreme Court of Austria asks the ECJ about the possibility to sue in the national courts when the contract

[83] ICC, 2001, Op. Cit. p.1-7
[84] J. Hill, Op. Cit., p. 334.
[85] Ibid, p. 336
[86] Ibid, p. 345
[87] A. M. Alghamdi, *The law of e-commerce: e-contracts, e-business*, Bloomington, 2011, p. 149.
[88] M. Khosrowpour, *Utilizing and Managing Commerce and Services Online*, Idea Group Inc., 2006, p. 51.
[89] P. Cortés, Op. Cit., p. 35.
[90] ICC, Op. Cit., p. 5. *See also* N. Solovay & C. Reed, *The Internet and Dispute Resolution: Untangling the Web*, Law Journal Press, 2003, p. 5-19. *See also* N. Rosner, *Jurisdictional Issues in International E-Commerce Contracts*, University of Groningen, Faculty of Law, 2005, p. 3, retrieved on 12 of March of 2015 from https://www.rug.nl/research/portal/files/2942014/jurisdictional.pdf

between the consumer and the trader must also be concluded at a distance.[91] Ms Mühlleitner came across the offer from Autohaus Yusufi by searching on the Internet. However, in order to sign the contract and take delivery of the vehicle, the consumer went to Hamburg. Later, the consumer discovered that the vehicle was defective and since Autohaus Yusufi refused to repair the vehicle, Ms Mühlleitner brought proceedings in the Austrian courts. The Court of final appeal considers that their commercial activities were indeed directed to Austria, because their website was accessible from there, and that there were contacts at a distance (telephone, emails) between the parties to the contract.[92]

However, the Austrian court ask for preliminary ruling to ECJ about the interpretation of the Article 15(1)(c) of the Brussels I Regulation (Brussels I) related with limitation in consumer contracts that have been concluded at a distance because in this case although the consumer ordered the car online, the contract was signed in person in the Member State of the defendant. First, the ECJ clarified that Article 15(1)(c) of the Brussels I constitutes a derogation both from the general rule of jurisdiction laid down in Article 2(1) of the regulation, which confers jurisdiction on the courts of the Member State in which the defendant is domiciled, and from the rule of special jurisdiction for contracts, set out in Article 5(1) of the regulation, which confers jurisdiction on the courts of the place of performance of the obligation on which the claim is based. Nevertheless, such exception to a general rule must be interpreted strictly because the special protection for consumers does not imply that protection is absolute.

Likewise, the ECJ decision was based on the interpretation of the Article 15(1)(c) of the Brussels I, which does not expressly make its application conditional on the fact that the contracts falling within its scope have been concluded at a distance. The court mentioned that the provision applies if two specific conditions are fulfilled: a) the trader pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State and, b) the contract at issue falls within the scope of such activities. For this reason, the answer to the question must be interpreted as not requiring the contract between the consumer and the trader to be concluded at a distance, and in this sense, the consumer may bring

[91] Case C-190/11, Daniela Mühlleitner v Ahmad Yusufi, Wadat Yusufi, European Court of Justice (ECJ) available at http://curia.europa.eu/juris/documents.jsf?num=C-190/11
[92] Ibid

proceedings before the courts of his own Member State against the trader, even if the contract was not concluded at a distance, as long as the two requirements mentioned above are satisfied.[93]

Besides, according to the country of origin principle, each Member State applies its own law to services providers establishes in its territory or in other words, the services or goods that are selling on the Internet are governed by the law of their country of origin.[94] Nevertheless, in the event of B2C cross-border disputes, Article 15(1)(c) of the Brussels I Regulation derogates the general rule of *country-of-destination principle* and instead gives a choice for consumers to sue sellers in their own Member State or in the Member State of the seller.[95] The application of this exception first would impose costs on large business and SME, and second would be aggravated with the use of intermediaries to purchase goods or services that are digitally transmitted, which does not identify the buyer.[96] In this situation, a business would never know the law and forum to which it subjects itself as the intermediary prevents a company from knowing the identity and location of an individual consumer.[97] Therefore, instead to looking for complete and universal harmonization of this topic, it has to be possible for e-commerce companies that they can build trust through their own guidelines taking the protection of consumer rights into consideration.[98]

[93] Ibid. *See also Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*
[94] L. Moerel, *Binding Corporate Rules: Corporate Self-Regulation of Global Data Transfers*, Oxford University Press, 2012, p. 80.
[95] N. Solovay & C. Reed, Op. Cit., p. 5-44.
[96] ICC, 2001, Op. Cit., p. 6.
[97] N. Rosner, Op. Cit., p. 8.
[98] P. Cortés, Op. Cit., p. 21.

4. Regulation in E-commerce Dispute Resolution

4.1. International Initiatives

Consumer protection in the domestic market is obstructed by a lack of international cooperation. In the networked economy, consumers buy and sell online without noticing that they get involved in cross-border situations.[99] However, applicability, jurisdiction and enforcement of consumer legislation are based on a jurisdictional approach, which has its limit in the concept of sovereignty.[100] This principle, *"where a state is deemed to exercise exclusive power over its territory can be considered [to be] the fundamental axiom of classical international law*".[101] States usually regulate consumer rights in the national market, but they remain unwilling to legislate about cross-border consumer contracts because it means to interfere with the sovereignty of other states, however, practice has demonstrated that Internet dissolves the concept of sovereignty because it often reduces national ability to control legislation within its territory.[102]

International organizations such as the United Nations (UN)[103], the Organization for Economic Co-operation and Development (OECD)[104] and the International Chamber of Commerce (ICC)[105] have called for co-regulatory efforts in addressing the fact that businesses, consumer representatives and governments should work together and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms with special attention to cross-border transactions.[106]

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[99] G. P. Calliess, 2003, *Coherence and Consistency in European Consumer Contract Law: a Progress Report*, German Law Journal Vol. 4 No 4. Retrieved 17th of January 2015 from http://www.germanlawjournal.com/article.php?id=265

[100] L. Moerel, Op. Cit., p. 68-69.

[101] C. Prins, *Should ICT Regulation Be Undertaken at an International Level?*, in *Starting points for ICT Regulation. Deconstructing Prevalent Policy On-Liners*, TCM Asser Press, 2006, p. 172, retrieved on 14th of March of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934493

[102] Ibid, p. 190

[103] United Nations & Department of Economic and Social Affairs, *The United Nations Guidelines for Consumer Protection*, 1999, available at http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx

[104] OECD, Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999, available at http://www.oecd.org/gov/regulatory-policy/46466287.pdf

[105] ICC, Op. Cit., p. 13.

[106] D. Gawith, *A comparison of model laws as a starting point for the development of a enforceable International Consumer Protection Regime*, Int'l. Trade & Bus. L. Ann. 247, 2003, p. 247, retrieved on 10th of May of 2013 from http://www.austlii.edu.au/au/journals/IntTBLawRw/2003/10.html

The OECD Guidelines for Consumer Protection are designed to ensure that consumers are not less protected shopping online than they are when they buy from their local store.[107] Even though, these Guidelines are non-binding, the OECD presented in 2007 a recommendation is the Consumer Dispute Resolution and Redress.[108] In this guide, the OECD emphasized that consumer disputes can often be resolved in the first early stage where consumers and businesses should attempt to resolve their disputes directly before seeking recourse through third party mechanisms.[109]

In conclusion, the International framework indicates that national legislations have lack of relevant consumer protection laws despite the importance of consumer confidence for B2C e-commerce.[110] According to UNCTAD, out of the 119 countries for which data are available, 93 have adopted consumer legislation related to e-commerce.[111] Despite of the progress in the adoption of international model laws into national laws, these last in many cases are not in accordance with the new model of business increasing the imbalance between consumers and businesses.[112] In the first place, some national legislations remain silent about international contractual terms such as choice of law, which is one of the potential issues of conflict in cross-border e-commerce.[113] The second issue concerns the lack of capacity regarding the enforcement of e-transaction laws. In this sense, judges often have limited knowledge of and experience with cyber laws.[114] As a result, the fragmentation of the legal framework at international and national level leads to incoherence between countries.

4.2. The European Union Law

The EU has a legal framework based on Directives and Regulations related with e-commerce transactions and consumer protection.[115] The consumer law compendium is an

[107] OECD, OECD Recommendation on Consumer Dispute Resolution and Redress, 2007, p. 8, retrieved 17th of April 2015 from http://www.oecd.org/sti/consumer/
[108] Ibid, p.9
[109] Ibid, p.10
[110] UNCTAD, *Information Economy Report 2015: Unlocking the Potential of E-Commerce for Developing Countries*, United Nations publication. New York and Geneva, 2015, p. 69, retrieved on 25th of April of 2015 from http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf
[111] Ibid, p.63
[112] Ibid, p. 64
[113] Ibid, p. 65
[114] UNCTAD, Op. Cit., p. 70.
[115] Electronic Commerce Directive (2000/31/EC), Consumer Rights Directive (2011/83/EU), Distant Marketing of Financial Services Directive (2002/65/EC) and European Union Regulation for electronic identification and trust services for electronic transactions in the internal market (910/2014).

extensive structure [116] but this study focuses on the rules related with jurisdiction and applicable law in the electronic commerce context.

Leading, this legal scheme Article 1(4) of the E-Commerce Directive (ECD)[117] establishes that the Directive does not deal with the jurisdiction of the Courts, [118] which brings the jurisdiction problem to the common law rules or the so called "Brussels Regime".[119] The first review of the regulation was back in 2001 with the implementation of the Brussels I that was not drafted specifically about e-commerce and instead contains technology-neutral provisions. [120] Finally, the last version of the regulation came into force in January 2015 under the title "Recast Brussels Regulation" (Recast Brussels), [121] and the key changes can be summarized in five issues as follows: I) Amendments to the rules relating to jurisdiction agreements, expanding the scope of the application of those rules; II) Changes to the related actions provisions where there is an exclusive jurisdiction clause; III) New rules concerning third state matters and defendants; IV) An enhanced arbitration exclusion and V) The abolition of the exequatur, further simplifying the recognition and enforcement of Member State judgments in other Member States.[122]

Nevertheless, the regulation related with applicable forum in e-commerce cases between Brussels I and Brussels Recast did not change and it retains the provisions of current law protecting consumers as a weak party. [123] Therefore, Section 4 (Articles 17 to 19) of the Brussels Recast, about jurisdiction over consumer contracts, determines the situations when it

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[116] See the complete consumer law compendium in http://www.eu-consumer-law.org/ or http://www.codaction.eu/?q=EU_LAW

[117] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN

[118] Directive 2000/31/EC, article 1 (4): This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts. In this study is excluding the discussion about the complexity between Article 1(4) and Article 3(1), which mentioned the country of origin principle.

[119] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 27th of September of 1968, available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm

[120] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R0044&from=EN

[121] Regulation No 1215/2012 of he European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF

[122] P. Hay, *Notes on the European Union's Brussels-I "Recast" Regulation: An American Perspective*, Private International Law and International Civil Procedure, The European Legal Forum, 2013, p. 1-2 retrieved on 3rd of May of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267816

[123] Articles 17-19 of the Regulation No. 1215/2012 (Brussels Recast)

is considering as a consumer transaction and establishes that these provisions should apply in any case where a party is a consumer and when the other party pursues commercial or professional activities.[124]

Consequently, the jurisdiction rule establishes that a consumer domiciled in a Member State has the choice of suing the other party either before the court of the place of his or her domicile or in the Member State where the other party is domiciled.[125] This rule should be complemented with article 17 of Brussels Recast, which determines that jurisdiction is covered by section 4 when a contract is for the sale of goods on installment credit terms,[126] or is for a loan repayable by installments,[127] or is concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile,[128] or is with a party who has a branch, agency or other establishment in one of the Member States,[129] or a contract that for an inclusive price, provides for a combination of travel and accommodation.[130]

In sum, EU legislation provides that a consumer can bring litigation against a business either in the consumer's domicile or in the defendant's domicile. In the same way, a company can sue a consumer in the consumer's domicile just if the business pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several states including that Member State, and the contract falls within the scope of such activities.[131] However, it is unclear what "*pursue in*" and "*direct to*" mean in ecommerce transactions because the concept is not further explained in the Regulation and each concept can encompass a wide range of activities.[132]

[124] P. Hay, Op. Cit., p. 5.
[125] Regulation No. 1215/2012 (Brussels Recast) Article 18 (1)
[126] Ibid, Article 17 (1) (a) *See also* Case C-150/77, Bertrand v Paul Ott KG, European Court of Justice (ECJ)
[127] Ibid, Article 17 (1) (b)
[128] Ibid, Article 17 (1) (c)
[129] Ibid, Article 17 (2)
[130] Ibid, Article 17 (3)
[131] P. Cortés, Op. Cit., p. 36.
[132] D. Batta & S. Havrankova, *Better regulation and the improvement of EU regulatory environment institutional and legal implications of the use of "soft law" background note*, Directorate-General Internal Policies, Policy Department Citizens Rights and Constitutional Affairs, 2007, p. 16, retrieved on 28th of April of 2015 from http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/pe378.290-en.pdf

In this sense, the ECJ had given guidelines to interpret these fragments of the legislation.[133] The Court hold that the mere use of a website by a trader with a view to engaging in e-commerce does not mean that its activity is directed to other Member States.[134] Also, it established that is essential to identify if the trader was envisaging doing business with consumers domiciled in one or more Member States.[135] Finally, a certain elements the Court considered relevant in order to identify if the requirements of the fragments apply in each case, for instance, the professional's overall activity; the international nature of the activity; the use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established or mention of telephone numbers with an international code.[136] However, the Court left to national courts to ascertain whether such evidence exists considering that the list is not exhaustive.[137] In this sense, when the offer is not directed specifically to the country of the consumer but rather to a global audience, the company, which can be domiciled inside or outside the EU, can expect to be sued in any of the Member State where consumers are domiciled.[138]

On the other hand, proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.[139] As a result, one could reasonably expect that, as long as a consumer has his or her permanent domicile on the territory of a Member State, the jurisdiction of e-commerce contract can be only from this domicile even when the contract was concluded outside the EU.[140] Therefore, EU enterprises not just have to operate with 28 different sets of national rules for conducing cross-border trade but also they need to identify the provisions of the applicable laws of

[133]Case C-218/12, Lokman Emrek v Vlado Sabranovic, European Court of Justice (ECJ) available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0218&from=EN

[134] European Court of Justice (ECJ), joined cases C-585/08 and C-144/09 December 7th of 2010 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68743

[135] Euromarket Designs Incorporated v. Peters & Anr, 25 July 2000, HC (1999), No. 04494. *See also*, Z. Tang, *An effective dispute resolution system for electronic consumer contracts*, Computer Law & Security Report, 2007, p. 45, retrieved on 25th of March of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2080552

[136] European Court of Justice (ECJ), joined cases C-585/08 and C-144/09 December 7th of 2010 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68743

[137] Ibid.

[138] M. Rustad & T. Lambert, *Circles of E-Consumer Trust: Old E-America v. New E-Europe*, Legal Studies Research Paper Series, 07-37, 2007, p. 595, retrieved on 26th of April of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023659

[139] Articles 18 (2) of the Regulation No. 1215/2012 (Brussels Recast)

[140] M. Rustad & T. Lambert, Op. Cit., p. 590.

particular countries, and assume the costs associated with translation, legal advice and adaptation of contracts.[141]

Likewise, a company outside the EU may be subject to the Brussels Regulation in two ways. Firstly, when EU courts apply the Brussels Regulation to parties outside of Europe, for example, the ECJ ruled that the Brussels Convention applied to a Canadian company in a contract action brought in a French court.[142] Secondly, the Brussels Regulation will apply if companies from outside the EU have subsidiaries in the Union.[143] Therefore, the company's uncertainty about the jurisdiction forum emphasize the challenges in on-line consume contracts on the grounds that, first not all of the countries are required to enforce foreign judgments when those decisions are against their national law and second not all of the companies have the income required to pursue a trial in EU.[144]

Additionally, the EU through the new legislation on Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) will allow consumers and sellers to solve their disputes in a quick, low-cost and simple way.[145] The first instrument is the Directive 2013/11/EU, which will ensure that consumers can turn to quality alternative dispute resolution entities for certain contractual disputes that they have with traders, no matter if they purchased the good or service online or offline, domestically or across borders.[146] This Directive proposes full ADR coverage at EU level, which means that there will be a centralized procedure available in every market sector, excluding health and higher education, and in every Member State.[147] The idea is to provide guidelines, principles and procedures to all ADR entities in each Member State in order to operate in a transparent and efficient way.[148] Finally, according to

[141] UNCTAD, Op. Cit., p. 70. *See also* P. Cortés, Op. Cit., p. 16.
[142] European Court of Human Rights (ECHR), Air Canada v. United Kingdom, 20 Eur. H.R. Rep. 150, 1995. The court suggested that the fact that the applicant was a resident in Canada affected its rights under that provision. *See also* M. Rustad & T. Lambert, Op. Cit., p. 592.
[143] Ibid, p.592
[144] P. Cortés, Op. Cit., p. 35
[145] C. Hodges & N. Creutzfeldt, *Implementing the EU Consumer ADR Directive*, Foundation for Law, Justice and Society in the Centre for Socio-Legal Studies and Wolfson College, University of Oxford, 2013, p. 3, retrieved 20th of May of 2015 from http://www.csls.ox.ac.uk/documents/FLJSCDRPolicybrief2013.pdf
[146] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF
[147] Ibid, p.9
[148] CSIS & University of Oxford, *Swiss Re/CMS Research Programme on Civil Justice Systems Third Oxford Consumer ADR Conference: Consumer Dispute Resolution- Implementing the Directive.* 2014, p. 3, retrieved on 20th of May of 2015 from http://www.csls.ox.ac.uk/documents/Conferencereport.pdf

Article 24 of the Directive, Member States have until July of 2015 to entry into force of the Directive to transpose it into their national legislation.[149]

The second instrument is the Regulation EU No. 524/2013, which proposes a EU-wide online platform to set up for disputes that arise from online transactions.[150] The main idea is that the digital platform will be set up for disputes that arise from online transactions, linking all the national ADR entities, notified by Member States to the Commission, and also will operate in all EU official languages.[151] In this sense, this approach may solve the jurisdiction and language barriers that online transactions have and courts solve according to national legislation and jurisprudence.[152]

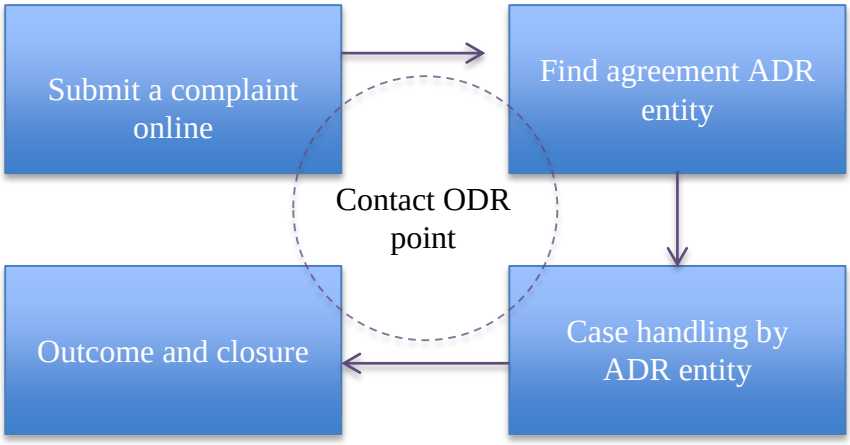

Table 1. Online Dispute Resolution Procedure according to the Regulation 524/2013. Elaborated by the author.

In sum, this scheme initiates with a digital platform, which enables EU consumers to submit a complaint against to a EU trader in the language of their choice. Then, the ODR platform will notify the trader that a complaint is lodged against him and they will agree on which ADR entity to use to solve their dispute.[153] After that, the chosen ADR entity will receive the details of the dispute via the ODR platform and it will bring the parties together with the aim

[149] Ibid, p.7-10
[150] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF
[151] Regulation (EU) No 524/2013, article 5, 8 and Directive 2013/11/EU, article 7(h)
[152] S. Vogenauer & S. Weatherill, *The European Community's Competence for a Comprehensive Harmonization of Contract Law*, Empirical Analysis' 30, European Law Review, 2005, p. 827.
[153] Regulation (EU) No 524/2013, article 9

of facilitating an amicable solution.[154] Finally, the parties could adopt the decision and the case will be closed or the dissatisfied party could bring the case into courts.[155]

Moreover, the ODR platform will help to accelerate the solution of the dispute by allowing ADR entities to conduct the proceedings online and through electronic means in a centralized digital tool for EU countries.[156] This platform will have national contact points acting as ODR advisors in their respective countries, which are linked electronically to the platform, in order to provide general information on consumer rights, redress in relation to online purchases, the submission of complaints and facilitate communication between the parties and the competent ADR entity.[157] Therefore, the aim of the Directive and Regulation is ensure that consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the EU.[158]

Nevertheless, this digital tool is planning to be implemented in all Member States by July of 2016 and it has some restrictions for the scope of applicability.[159] Firstly, the new electronic case management tool is not designed to serve the goal of law enforcement because it purports to facilitate the resolution of conflicts by the parties themselves, with the intervention of ODR and national ADR, rather than to resolve the dispute for them by deciding the case under the applicable law.[160] Secondly, in any case, it remains the possibility to bring the case to the courts by a consumer protecting the fundamental asymmetry of power between individuals and companies.[161] Thirdly, the implementation of this model is not a global alternative, continuing with the problem of the cross-border jurisdiction in the air.[162]

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[154] Regulation (EU) No 524/2013, article 10 and Directive 2013/11/EU, article 2(1)

[155] Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.

[156] G. Wagner, *Private Law enforcement through ADR: Wonder drug or snake oil?*, Kluwer Law International. Printed in the United Kingdom Common Market Law Review 51, 2014, p. 166, retrieved on 26th of May of 2015 from https://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2014006

[157] C. Hodges & N. Creutzfeldt, Op. Cit., p. 3.

[158] C. Pablo & L. Arno, *Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress*, Maastricht Journal of European and Comparative Law, 2014, p. 14, retrieved on 1st of June of 2015 from http://ssrn.com/abstract=2414098

[159] In G. Wagner, Op. Cit., p. 165 The author has several critiques about the new system and mentioned that the Directive 2013/11 "*does nothing to improve national court systems but instead forces Member States to set up another system that allows parties to altogether avoid the judicial resolution of disputes"*

[160] G. Wagner, Op. Cit., p. 166.

[161] C. Pablo & L. Arno, Op. Cit., p. 17.

[162] G. Wagner, Op. Cit., p. 167.

Finally, either in the Directive 2013/11/EU or in the Regulation EU No. 524/2013 exists the possibility for a trader or seller to submit a complaint against a consumer.[163]

In sum, this new model propose a innovative structure of dispute resolution for EU countries but it still has some obstacles which make it a local solution without real enforcement.[164] Nonetheless, the European Commission is aware that in early stages of a consumer relationship is possible to achieve the solution of a dispute preventing the use of ADR, ODR or even courts mechanisms.[165] For this reason, both Directive and Regulation make emphasis in the improvement of local provisions related with out-of-court mechanisms such self and co regulatory schemes that Member States, trades or consumers can implemented, making strong the complete scenario not just for consumers in EU but also in a global structure.[166]

[163] Regulation (EU) No 524/2013, article 2 and Directive 2013/11/EU, article 2(2)(g)
[164] *See* complete analysis for enforcement of the new model in G. Wagner, Op. Cit., p. 170-190.
[165] C. Pablo & L. Arno, Op. Cit., p. 19.
[166] Directive 2013/11/EU, article 2(2)(e) and in the preamble of the Regulation (EU) No 524/2013

5. Self and Co-regulatory schemes as dispute resolution mechanisms in e-commerce

The borderless in online transactions and the subsequent problems related with the enforcement of substantial and procedural law, show that national regulatory measures of a certain state affect the activities of Internet users outside the regulatory jurisdiction of that state; challenging both the substantive national legislation and the enforcement measures.[167] For example, the fact that goods or services are forbidden for sale in some countries but not in the seller´s country, allowing the seller to offer the product in other jurisdictions, or the fact that some countries have special requirements for online sales such signatures.[168] Thus, the background in e-commerce transactions and the regulatory legal framework has shown that governmental interest and commitment for consumer law harmonization is far from reality because it implies to diminish the national legislation and accept the intervention of international bodies and institutions, which affect the ancient concept of sovereignty.[169]

However, legislation is only part of a broader solution of jurisdiction debate because effective regulation requires the combination of different policy instruments in order to enforce their objectives.[170] For this reason, international organizations[171] have opted for a concrete national legislation in consumer law combined with other non-binding tools such as recommendations, guidelines, or even self-regulation, in order to be able to react more rapidly to changing market conditions.[172] Considering also the purpose of the European Commission about simplification and deregulation as keywords to reach one of the objectives of "*do less in order to do better"*.[173] It is essential to ensure that some regulations are no longer necessary or that the increase of laws is not always the best response to change, and instead more objectives will can be achieved effectively through alternative mechanisms.[174]

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[167] C. Prins, 2006, Op. Cit., p. 186.
[168] Ibid, p.190
[169] Ibid. 196.
[170] Commission of European Communities, *European Governance: A White paper*, European Commission, 2001, p. 19, retrieved on 27th of April of 2015 from http://europa.eu/rapid/press-release_DOC-01-10_en.htm
[171] United Nations (UN); the Organization for Economic Co-operation and Development (OECD); the International Chamber of Commerce (ICC) and the European Commission.
[172] Commission of European Communities, 2008, Op. Cit., p. 33.
[173]L. Senden, *Soft law, self-regulation and co-regulation in European Law: Where do they Meet?*, Electronic Journal of Comparative Law, vol. 9.1, 2005, p. 7, retrieved 15th of April of 2015 from http://www.ejcl.org/
[174]Ibid, p.5

In addition, seeing that the legal general framework of dispute resolutions in B2C relations results in the main challenge that states have to give up their national sovereignty.[175] Nonetheless, industry instruments face this principle with the purpose to expand and increase the marketplace at international level where the notion of self-governing online communities is reinforced by shared norms and customs.[176] In this sense, taking into consideration that in the real world norms, rules and customs are different in virtual communities, it is reasonable to create an effective model of dispute resolution and rule enforcement in cyberspace.[177] The current system based on traditional forms of jurisdiction, government regulation, dispute resolution and enforcement mechanisms have demonstrated the lack of applicability both in national and international levels, for this reason, industry self and co-regulation and alternative dispute resolution (ADR) would support a better alternative to solve enforcement issues in an international context.[178]

Self-regulation and co-regulation have been described as "*forms of interaction between Community processes and private actors*"[179] which implies the existence of some form of relationship between binding legislation and voluntary agreements in a particular area.[180] The European Commission has showed the interest and support for alternative initiatives based on self and co-regulation. As an example, the Commission launched the initiative "*e-Europe: An Information Society for All*",[181] which aims to provide sufficient incentives for consumer groups and businesses to establish self-regulatory rules, specially in the area of alternative dispute resolution with the purpose to build consumer trust in the market.[182]

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[175] J. Zekoll, *Online Dispute Resolution: Justice without the State?*, Max Planck Institute for European Legal History, Research papers series, 2, 2014, p. 3, retrieved on 10th of May of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398976

[176] D. Post, *Governing Cyberspace: Law*, 24 Santa Clara Computer & High Technology Law Journal, 2007, p. 883, retrieved on 17th of May of 2015 from http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1466&context=chtlj *See also* P. Berman, *The Globalization of Jurisdiction*, 151 University of Pennsylvania Law Review, 2002, p. 311, retrieved on 21st of January of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304621

[177] F. Abedi & S. Yusoff, *Consumer Dispute Resolution: the way forward*, Journal of Global Management, Vol. 2 No. 1., 2011, p. 209, retrieved 5th of May of 2015 from http://www.globalresearch.com.my/journal/management_v02n01n02/0014_Article_511_Final_PG204_215.pdf

[178] L. Moerel, Op. Cit., p. 74.

[179] E. Best, *Alternative Regulations or Complementary Methods? Evolving Options in European Governance*, Eipascope, 2003, p. 3, retrieved on 15th of April of 2015 from http://aei.pitt.edu/817/

[180] L. Senden, Op. Cit., p. 11.

[181] More information about the agenda of eEurope: An Information Society for All available in http://www.etsi.org/WebSite/document/aboutETSI/EC_Communications/eEurope2005_actionPlan.pdf

[182] C. Prins, *Consumers, Liability, and the Online World*, Information & Communications Technology Law, 12(2), 2003, p. 17, retrieved on 11th of April of 2015 form https://pure.uvt.nl/portal/files/548857/CICT_12_2_05LORES.pdf

Codes of practice, voluntary agreements and dispute resolution procedures that may be created under a self-regulatory regime are similar under a co-regulatory framework, but it is the degree of government involvement and legislative backing that determines the difference between the two.[183] For example, a group of firms may develop codes of practice to regulate the behavior or actions of members. This would be called a self-regulatory mechanism, but if legal backing requires members to abide by them and imposing penalties in the case of non-compliance supported these codes, it would become a co-regulatory regime.[184] In other words, the European Commission believes that where voluntary agreements already exist and may be appropriate to achieve the Union's objectives, it is preferable not to make a legislative proposal or it may suggest, by means of a recommendation, for example, that such an agreement be concluded by the parties concerned to avoid having to pass legislation.[185] These voluntary agreements are considered to constitute a form of self-regulation, unless concluded on the basis of a legislative act because in that case, they are considered to be a form of co-regulation, enabling the parties concerned to implement a specific piece of legislation.[186]

5.1. Self and Co-regulation as an asset for businesses and consumers

The inter-institutional agreement "*Better Lawmaking*" was concluded between the Parliament, the Council and the Commission, which identified and provided a framework for the practices of co-regulation and self-regulation within the single market.[187] Self and co-regulatory instruments have been used in three key areas such as regulation of the professions, industry and business standards and codes of practice.[188] Besides, the implementation of policies on refunds, the standards to replace of faulty good, the policies to administer complaints and dispute resolution mechanisms are some examples of the use of self or co-regulation by industry organizations or market players.[189] Even though, the focus of the study concentrates just on codes of practice and industry policies to show the success of these approaches in the e-commerce dispute resolution.

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[183] OECD, *OECD report: Alternatives to traditional regulation*, OECD, 2012, p. 35, retrieves on 28th of April of 2015 from http://www.oecd.org/gov/regulatory-policy/42245468.pdf
[184] Ibid, p. 35
[185] Communication from the Commission, *Action plan: Simplifying and improving the regulatory environment*, COM final, p. 11, retrieved on 11th of April of 2015 from www.EurActiv.com
[186] Commission of European Communities, 2008, Op. Cit., p. 11.
[187] European Parliament, Council Commission, *Institutional Agreement on better law-making*, 2003, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003Q1231(01)&from=EN
[188] Ibid, p. 36
[189] Ibid, p. 37

The European Commission has shown special preference for co-regulation but at the same does not show opposition to the use of other alternatives to legislation. [190] The Commission clarified that co-regulation should only be used where it clearly adds value and serves the general interest and the use of self-regulatory instruments should be combined with formal rules.[191] Nevertheless, the advantages and disadvantages of self and co-regulatory schemes will depend on the problem to which they are applied. The effectiveness, efficiency and fairness of these approaches can be different depending on the problematic that should be solved.[192]

5.1.1. Effectiveness

The effectiveness refers to how well the instrument achieves its objective. It is important for both self and co-regulatory instruments to have clearly specified objectives.[193] As an example, voluntary agreements by television stations to not show material that may be inappropriate for children early in the evening are clearly focused on reducing children´s exposure to such material. [194] Nevertheless, in some other cases the objectives may be less clearly defined, for example, when there are multiple objectives, it may be difficult to determine their priority.[195]

In the same way, industry players have to update the objectives in order to adapt to changing circumstances otherwise the scheme may fail. For example, in the case of a code of practice there may be potential conflicts between the objectives of ensuring a high reputation for the profession and also protecting the interests of consumers.[196] Therefore, the application of self or co-regulatory instruments in order to improve the dispute resolution in B2C e-commerce

[190] Commission of European Communities, Op. Cit., p. 20 *See also* K. Bert-Jaap et al, *Starting points for ICT regulation: Deconstructing Prevalent Policy One-liners*, TCM Asser Press, 2006, p. 247 for the preference of co-regulation in data protection.
[191] Commission of European Communities, Op. Cit., p.19 *See also* F. Cafaggi, *Private Law-making and European integration: Where do they meet, when do they* conflict, in D. Oliver, T. Prosser & R. Rawlings, *The Regulation State: Constitutional implications*, Oxford University Press, 2010, p. 212.
[192] OECD, 2012, Op. Cit., p. 43.
[193] U. Mandl, A. Dierx & F. Ilzkovits, *The effectiveness and efficiency of public spending*, European Commission, Economic Paper 301, 2008, p. 3, retrieved on 15th of May of 2015 from http://ec.europa.eu/economy_finance/publications/publication11902_en.pdf
[194] OECD, 2012, Op. Cit., p. 39.
[195] International Competition Network, *Agency Effectiveness: Competition Agency Practice Manual*, 2010, p. 9, retrieved on 15th of May of 2015 from http://www.internationalcompetitionnetwork.org/uploads/library/doc744.pdf
[196] OECD, 2012, Op. Cit., p. 39.

relationships has to first clearly identify the objective, which in this case can be minimizing the cross-border barriers for the solutions of conflicts online. Nevertheless, this objective has to be balanced with the objective of increase the market and profit of the industry players taking into account that the priority is the protection of consumer rights.

Besides, an effective self or co-regulatory regime must also be well integrated and consistent with the existing legal framework otherwise it will be impaired and therefore adds to the complexity of the overall regulatory system.[197] In some cases, a self or co-regulatory regime can complement the existing regulatory framework because unlike traditional regulation, self regulatory regimes could raise the bar higher by putting in place requirements that are more stringent than the minimum required by legislation.[198] Due to the active role of government officials in the development of co-regulatory arrangements, it is more likely to integrate better with existing regulatory arrangements than designed self-regulation.[199] Nevertheless, self-regulatory approaches are considered better to search for a global and cross-border standard.[200]

On the other hand, compliance is an essential factor if a policy instrument is looking to be effective. Hence, the design and implementation of self and co-regulatory instruments will most likely affect the level of compliance.[201] The OECD affirmed that to ensure effective compliance with a policy instrument it has to take into consideration that the industry sector or profession is i) aware of the regulation and understand it; ii) willing to comply whether through economic incentives or enforcement actions and; iii) able to comply.[202]

First, the fact that the industry sector must be aware of the regulation and understand it, indicates that the association or organization must be able to disseminate information to the membership and that the association covers a high proportion of the industry or profession being regulated.[203] Nevertheless, voluntary membership of an association, limitations for consumers to determine which firms are participating in the scheme and the lack of

[197] Ibid, p. 42
[198] Ibid, p. 44
[199] Ibid, p. 43
[200] L. Moerel, Op. Cit., p. 86.
[201] Ibid, p. 43
[202] OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, OECD, 2000, p. 11.
[203] Ibid, p. 13

information of outside players of the industry or profession are some limitations to achieve effectiveness in self or co-regulatory instruments.[204]

Second, membership of an industry association is connected with a reputable practice, which enforces a code of ethics on its members.[205] In this sense, members of the industry would regard signing up to the code to differentiate themselves from other elements in the industry and improve their competitive position.[206] Thus, where certification or registration is compulsory to practice compliance levels, the effectiveness of the self or co-regulatory instrument is likely to be high.[207]

Finally, self or co-regulatory instruments may require external monitoring or auditing to ensure that they are achieving their objectives in order to provide reassurance and information to the general public.[208] Nonetheless, there are concerns about the external monitoring because it imposes some constraints on the behavior of the industry or professional participants in the scheme.[209] Reporting, penalties, fines or apologies are the common examples to monitoring the effectiveness of the instrument but their applicability depend on the type of regulation that is taking into account.[210]

5.1.2. Efficiency

Efficient self or co-regulatory instruments should i) maximize benefits and minimize costs, ii) providing a degree of flexibility to allow the regulated finds the lowest cost way of complying with specified requirements and iii) minimizing compliance costs.[211] In this sense, an effective Regulatory Impact Analysis (RIA) can conduct a full evaluation of all options for achieving the policy objective.[212] The RIA aims to improve decision-making process and its implementation in the area of self and co-regulatory instruments can be a long-term policy

[204] OECD, 2012, Op. Cit., p. 45.
[205] OECD, 2000, Op. Cit., p. 15.
[206] OECD, 2012, Op. Cit., p. 45.
[207] Ibid, p. 46
[208] OECD, *Principles of Corporate Governance*, 2004, retrieved on 16th of May of 2015 from http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=151&InstrumentPID=147&Lang=en&Book *See also* H. Keller, *Corporate Codes of Conduct and their Implementation: The Question of* Legitimacy, University of Zurich, 2008, p. 12, retrieved on 16th of May of 2015 from http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf
[209] OECD, 2012, Op. Cit., p. 46.
[210] Ibid, p. 46
[211] Ibid, p. 47
[212] OECD, 2015, Op. Cit., p. 15.

goal. Thus, without the intention to deeply analyze this instrument, it is important to mention the main factors that the industry players or even consumers must take into consideration to develop a self or co-regulatory instrument. First, a clear design of RIA process and its methodologies, second, the level of formal authorities and political support for the process and third, the incorporation of specific quality assurance mechanisms.[213]

On the other hand, the more flexible the instrument, the more industry or sector specific information can be taken into account in determining the best way to achieve the objectives.[214] Traditional command and control regulation often imposes a prescribed solution for everyone but in some cases this approach may not be appropriate.[215] For example, when the regulated market players are able to find lower cost or more innovative ways of achieving the desired policy objective.[216] Thus, the complex inter-relationships and dynamic changes taking place on the Internet led to more flexible and innovation-friendly models of regulation accepted by governments.[217]

However, an excess of flexibility may end in a risk for the benefit of the community because industry players that implement self or co-regulatory instruments are free to consider a range of options to ensure that the objective is met.[218] This risk can be reduced with the compliance mechanisms analyzed above, especially with the applicability of the idea of business based in trust and reputation.[219] For this reason, transparency of the process in order to implementing self or co-regulation becomes a key factor in ensuring that the model is not changing it in a manner that disadvantages the community as a whole.[220]

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[213] OECD, 2009, Op. Cit., p. 19.
[214] OECD, 2012, Op. Cit., p. 46.
[215] OECD, *Working Party on Regulatory Management and Reform: Management-based regulation: Implications for public policy*, OECD, 2008, p. 5-6, retrieved on 29th of April of 2015 from http://www.oecd.org/gov/regulatory-policy/41628947.pdf
[216] European Economic and Social Committee (2), *Routes to better regulation: a guidance to alternatives to classic regulation*, Better Regulation Task Force, 2005, p. 26-27, retrieved on 29th of April of 2015 from http://www.eesc.europa.eu/resources/docs/routes_to_better_regulation.pdf
[217] K. Abbott & D. Snidal, *Hard and soft law in international governance*, International Organization, 54, 2004, p. 421-422, retrieved on 22nd of January of 2015 form http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402966 *See also* C. Marsden, *Internet Co-Regulation and Constitutionalism: Towards a More Nuanced View*, Essex School of Law, 2011, p. 3, retrieved on 10th of may of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973328
[218] OECD, 2012, Op. Cit., p. 47.
[219] OECD, 2000, Op. Cit., p. 15.
[220] OECD, 2012, Op. Cit., p. 47.

Finally, minimizing compliance costs, which includes the costs of operating the scheme in general and enforcement costs. This incentive is likely to be higher when membership of the association is voluntary.[221] However, it is frequently the case that the costs of the self-regulatory regimes may be passed onto consumers or the public in the form of higher prices for services or goods.[222]

5.1.3. Equity and fairness

A good regulatory instrument should be equitable and fair contrarily it will likely to suffer from lower levels of compliance and less effective in achieving their objectives.[223] For instance, perceptions that the regulatory regime is not being applied in a fair way and that some members of the community are being privileged relative to others are evidences of lack of transparency.[224] In this sense, a self or co-regulatory instrument must be transparent in both their operation and their impacts and should also contain appropriate appeals mechanisms.[225]

Besides, participative public discussions on the proposed regime by interested stakeholders such consumers and sellers help to ensure transparency in the process.[226] Self and co-regulatory regimes should develop mechanisms that ensure transparency such time limiting of responses or access to information. In this sense, all stakeholders are part of the process and understand why self or co-regulatory scheme is the best way to address the perceived policy problem.[227]

Therefore, appropriate appeal mechanisms are also important in a regulatory instrument that is to be regarded equitable and fair. Some examples to deal with conflicts would be the creation of a panel consisting of both association members and external independent representatives or the assignation of an independent industry ombudsperson to consider disputes. [228] The fairness in the model is not just the presence of a third party as a mediator

[221] Ibid, p. 48
[222] OECD, 2000, Op. Cit., p. 17.
[223] OECD, 2012, Op. Cit., p. 48.
[224] Ibid, p. 32
[225] European Economic and Social Committee (2), Op. Cit., p. 29.
[226] OECD, 2012, Op. Cit., p. 48.
[227] I. Bartle & P. Vass, *Self-regulation and the regulatory state: a survey of policy and practice*, University of Bath, School of Management, Center for the study of regulated industries, 2005, p. 2, retrieved on 10th of May of 2015 from http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/17_Bartle_Vass.pdf
[228] Ibid, p. 49

but also it implies the absence of obstacles in the process ensuring the agility of the mechanisms. Thus, in some cases a committee or group of association members convened specifically for that purpose might deal with disputes.[229]

However, there is still uncertainty about which approach of dispute resolution mechanisms should be applied on the global level, not just because each government has a different legal framework but also because the market itself goes forward faster and companies continuously improve their business models. For this reason, it is important to understand the difference between self-regulatory and co-regulatory to support the recommendation about dispute resolution through a self-regulatory mechanism empowered by governmental tools to build the trustability in a company and ensure the protection of consumer rights.

5.2. Co-regulation approaches

Co-regulation or private-public regulation[230] entails explicit government involvement, which makes possible to implement the objectives defined by the legislator through measures carried out by active and recognized parties in the field concerned.[231] It is frequently used in the professions and by industry associations, where detailed technical knowledge is likely to be important.[232] Therefore, this approach includes explicit legislative and regulatory actions with actions taken by concerned actors while drawing on their practical expertise.[233]

In the context of the EU, co-regulation is an implementing mechanism that presupposes the prior adoption of a piece of legislation.[234] Moreover, this approach supposes the direct involvement of a public actor in this regulatory process. Thus, co-regulation can be seen rather as a complement to legislation than as an alternative to this.[235]

[229] OECD, 2012, Op. Cit., p. 49.
[230] L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, *Mapping Self- and Co-regulation Approaches in the EU Context: Explorative Study for the European Commission, DG Connect*, Utrecht University and RENFORCE, 2015, p. 10-11, retrieved on 17th of April of 2015 from http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/dae-library/mapping_self-and_co-regulation_in_the_eu_context_0.pdf
[231] Ibid, p. 43
[232] M. Hiemstra, & K. Klinger, Op. Cit., p. 39. *See also* OECD, 2015, Op. Cit., p. 12.
[233] D. Batta & S. Havrankova, Op. Cit., p. 19.
[234] Commission of European Communities, 2008, Op. Cit., p. 12.
[235] D. Batta & S. Havrankova, Op. Cit., p. 14.

Additionally, in co-regulatory approaches the state entrusts the achievement of its objectives to recognize parties in the field such as economic operators, social partners, non-governmental organizations or associations, drawing on their practical expertise in order to achieve optimum regulatory results.[236] In the same way, co-regulatory initiatives should comply with the elements of effectiveness, efficiency and equity mentioned above in order to analyze if this approach is an alternative to regulation in B2C disputes resolutions.

Firstly, the effectiveness in co-regulatory schemes for B2C must reach the objective of minimizing the cross-border barriers for the solutions of conflicts online and at the same time must benefit the market and the industry players, ensuring global compliance. [237] Nonetheless, co-regulatory structures need to be attached to national regulation and to be enforced by national or local authority. [238] Hence, the co-regulatory scheme does not reach the adequate effectiveness for B2C dispute resolution because it does not apply at global level necessary.

Secondly, efficient co-regulatory instruments should i) maximize benefits and minimize costs, ii) providing a degree of flexibility to allow the regulated finds the lowest cost way of complying with specified requirements and iii) minimizing compliance costs.[239] However, co-regulatory structures are guided by national regulation, which does not imply that it would reduce costs due to the possibility for companies and consumers can be sued in other jurisdictions different than their own.[240] The co-regulatory alternatives can simplify costs and time for members of the structure but is not a broad solution.

Finally, the equity and fairness of the adequate alternative must reach transparency in both their operation and their impacts and also it should contain appropriate appeals mechanisms. [241] In this regard, co-regulatory schemes can demonstrate the necessary transparency because they are associated with governmental entities that provide a fair and equitable process. Nevertheless, the possibility to apply this approach for B2C dispute resolution in e-commerce results in minimum at global level because this model just must not

[236] European Commission's Information Society and Media Direct rate-General, Op. Cit., p.27. *See also* A. Patrikios, Op. Cit., p. 130 and J. Cave, C. Marsden & S. Simmons, *Options for and Effectiveness of Internet Self and Co-Regulation*, Report prepared for the European Commission, 2008, p. 8, retrieved on 3rd of February of 2015 from http://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR566.pdf
[237] U. Mandl, A. Dierx & F. Ilzkovits, Op. Cit., p. 3.
[238] L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, Op. Cit., p. 40.
[239] OECD, 2012, Op. Cit., p. 45.
[240] E. Tucker & J. Eaglesham, Op. Cit., p. 4.
[241] European Economic and Social Committee (2), Op. Cit., p. 29.

be linked with legislation or governmental entities but also the high degree of this association with the government restricting the applicability on national or transnational level.[242] Thus, co-regulatory efforts may fail at global level because states will have to diminish the national legislation and accept the intervention of international bodies and institutions, which affect their sovereignty.[243]

5.3. Self Regulatory approaches

Self-regulation or private regulation[244] typically involves a group of economic agents in a particular industry or a professional group, voluntarily developing rules or codes of conduct that regulate or guide the behavior, actions and standards of its members.[245] The group is responsible for developing self-regulatory instruments, monitoring compliance and ensuring enforcement.[246] Thus, self-regulation in *stricto sensu* refers to the substitution approach, which is developed independently of state regulation, and is not situated in a predefined legal framework developed by the state.[247]

Some examples of self-regulation include codes of practice; industry-based accreditation arrangements; and voluntary adoption of standards. Nevertheless, it can be possible that in a self-regulatory arrangement the government is part in the development without necessarily implying official backing for the scheme, which for some academics is called *conditioned self-regulation or hybrid self-regulation*.[248] For this reason, some academics argue that pure forms of self-regulation are rarely found.[249] Government assistance might take the form of advice or participation by officials in the discussions establishing the scheme, but with no formal legislative backing or government responsibility for the scheme.[250] Therefore, hybrid or conditioned arrangements are developed for activities that would be problematic for either state regulators or self-regulation in *strictu sensu* to be dealt with, such as the safe harbor arrangement for data transfers from EU to the US.[251]

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[242] L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, Op. Cit., p. 39
[243] C. Prins, 2006, Op. Cit., p. 196.
[244] L.A. Senden, et.al, p. 36.
[245] OECD, 2012, Op. Cit., p. 43.
[246] Ibid, p. 34 *See also* L.A. Senden, et.al, p. 34.
[247] European Commission's Information Society and Media Direct rate-General, Op. Cit., p.27.
[248] Ibid, p. 33
[249] I. Bartle & P. Vass, Op. Cit., p. 895.
[250] Ibid, p. 36
[251] M. Bonnici & G. Pia, *Self-regulation in cyberspace*, Amsterdam University, 2007, p. 15, retrieved on 13th of April of 2015 from http://www.ejil.org/pdfs/19/4/1672.pdf

Codes of conduct are the most well known types of self-regulation, which basically is a set of rules that outlines the proper practices for an association.[252] In this sense, each member of the organizations must be subscribed to the code of conduct, and undertake to comply with the rules contained in it. Therefore, in the EU legal framework some Directives, such as e-Commerce Directive and the Data Protection Directive[253] recommended the drafting of codes of conduct.

5.3.1. Categories of Self-regulation

For the purposes of this study, co-regulation in strict sense presupposes direct involvement of a public actor in the regulatory process and it can be seen as a complement to legislation rather than as an alternative to this.[254] For this reason, the co-regulation approach is excluded of this study because it is inadequate for the possibility to apply this approach at global level of B2C disputes resolution in e-commerce.[255]

According to the theoretical regulatory typologies found in literature, the following categorization of self-regulation includes both private and public actors at certain stages of the policy cycle.[256] In first place, the *tacitly supported self-regulation* refers to private forms of regulation without or with little explicit state involvement, however the governmental role can be influential.[257] This type of self-regulation comes close to the definition of pure self-regulatory arrangements because the involvement of the state exists only in an implicit way, such political support.[258] In addition, some conducts are exclusively of this kind of self-regulation, for instance the presence of i) discussions but no formal government recognition or approval; ii) consultation but no sanction, approval or process of audit; iii) informal negotiation with the government and iv) an informal policy role for the government.

The second category is the *substitute self-regulation* where the initiative of regulation is living on the side of the private actors, but where the government watches the process in order to

[252] European Commission's Information Society and Media Direct rate-General, Op. Cit., p. 28.
[253] Articles 10 (2) and 16 of the E-Commerce Directive and article 27 of the Data Protection Directive
[254] D. Batta & S. Havrankova, Op. Cit., p. 14.
[255] Ibid, p. 19
[256] L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, Op. Cit., p. 37.
[257] Ibid, p. 39 *See also* OECD, 2015, Op. Cit., Op. Cit., p. 17
[258] C. Marsden, Op. Cit., p. 12. *See also* L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, Op. Cit., p. 39.

safeguard the public interests that may be at stake.[259] In third place, the *conditioned self-regulation* refers to the freely develop of rules by non-state actors according to the legal framework, but in which the control of the government is prominent in the supervisory of the results.[260] In this category, the state chooses to encourage the formation of norms by private parties providing conditions for rule making or it sets out general regulatory goals but the consensus is achieved through open participation.[261] Finally, in this group the residual monitoring and enforcement role is left for the public agency.[262]

In fourth place, the *enforced self-regulation* is a form of subcontracting of regulatory functions to private actors.[263] As an example, the scheme of "*formal self-regulation*" introduced by the World Bank, under which two out of the three regulatory functions, rulemaking, supervision or enforcement, are delegated to a private self-regulatory organization.[264]

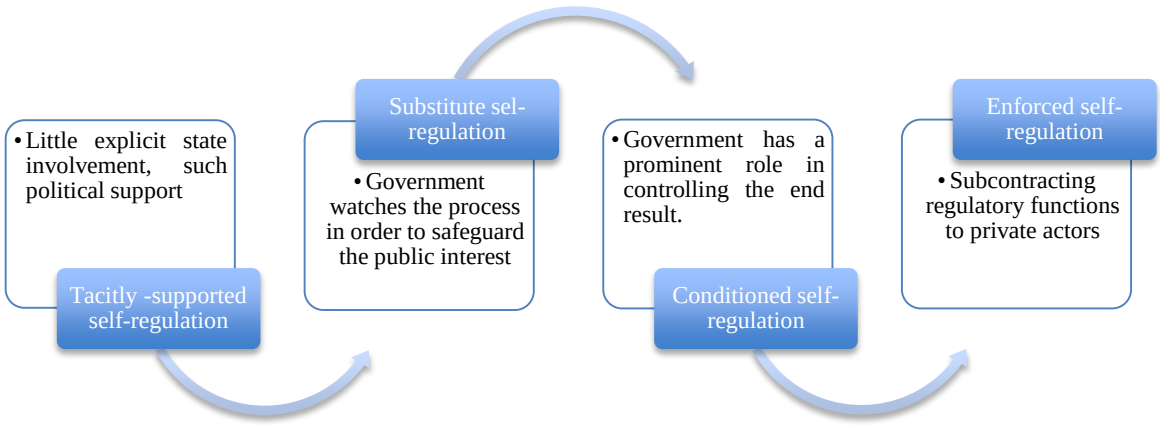

Table 2. Classification of self-regulatory approaches with the range of government intervention. Elaborated by the author.

Furthermore, considering that in the market different types of self-regulation schemes are

[259] P. Eijlander, *Possibilities and Constraints in the Use of Self-regulation and Co-Regulation in Legislative Policy: Experiences in the Netherlands – Lessons to Be Learned for the EU?*, Electronic Journal of Comparative Law, vol. 9.1, 2005, p. 4, retrieved on 17th of May of 2015 from http://www.ejcl.org/91/art91-1.PDF
[260] L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, Op. Cit., p. 38.
[261] Ibid, p. 38
[262] A. Ogus, *Rethinking Self-Regulation*, Oxford J. Legal Studies, 1995, p. 100-102, retrieved on 23th of March of 2015 from http://ojls.oxfordjournals.org/content/15/1/97.citation
[263] L.A. Senden, E. Kica, M. Hiemstra, & K. Klinger, Op. Cit., p. 38. *See also* I. Bartle & P. Vass, Op. Cit., p. 59.
[264] J. Carson, *Self-Regulation in Securities Markets*, Policy Research Working Paper, The World Bank, 2011, p. 5, retrieved on 15th of May of 2015 from http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5542#

presented, as it was discussed above, in the cases in which the self-regulatory instrument is operated by the industry, supervision is carried out by an ombudsman, which is an independent public authority.[265]In another cases, a non-profit organization is responsible for administration.[266] However, in all of the cases the operating body generally has the power to investigate members' compliance, review enforcement activities and publish some reports of the activities as well.[267]

In relation to sanctions contained in self-regulatory instruments can be included i) notification to the public of non-compliance;[268] ii) withdrawal of permission to use logos or trust marks;[269] iii) fines;[270] iv) suspension or termination of the membership;[271] and v) referral to regulatory authorities which might result in administrative action being taken.[272] Nevertheless, in case of complaints, the self-regulatory body first may compelled to corrective actions or issue warning letters.[273] In this sense, sanctions could play an important role for the effectiveness of the self-regulatory instrument itself because the potential loss of an operating license, for instance provide a strong incentive to apply the suggestions of the control body.[274]

5.3.2. Advantages and limitations of self-regulation

Both self-regulation and legislation have advantages and disadvantages, which show not just the strongest points in order to preserve them but also the drawbacks with the purpose to improve them and make self-regulation the most interesting option to create flexible online dispute resolution procedures.[275] Thus, within benefits of self-regulation it can be mentioned I) Speed, II) Expertise, III) No unnecessary regulatory costs and IV) Cross-border enforcement.

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[265] I. Bartle & P. Vass, Op. Cit., p. 23; OECD, 2015, Op. Cit., p. 30 *See, for example,* Framework Agreement for Mobile Content and Payment Services at http://www.rammeaftalen.dk/

[266] *See for example, Electronic Retailing Self-Regulation Program at* http://www.retailing.org/advocacy/self-regulation

[267] I. Bartle & P. Vass, Op. Cit., p. 32; OECD, 2015, Op. Cit., p. 31

[268] European Economic and Social Committee (1), 2005, Op. Cit. p. 23; *see for example* Safety Toy Mark and Electronic Retailing Self-Regulation Program

[269] Ibid, p.23 *See for example* Fair Competition Codes and Confianza Online.

[270] *See for example* Framework Agreement for Mobile Content and Payment Services

[271] *See for example* Vehicle Builders and Repairers Association Code and Direct Selling Association Code of Practice.

[272] *See for example* Children's Food and Beverage Advertising Initiative and National Advertising Division.

[273] *See for example* Direct Selling Association Code of Practice.

[274] OECD, 2015, Op. Cit. p. 30

[275] European Commission's Information Society and Media Direct rate-General, Op. Cit., p. 21.

In the first place, self-regulation can be recognized because it is typically quicker to establish or change rules as opposed to state regulation.[276] Frequently, the response of the industry to new challenges through self-regulatory schemes can be adjusted more swiftly and easily than government regulations, because it implies time consuming.[277] In this respect, self-regulation seems to play an important role when enterprises need to regulate at the cross-border level.[278]

Secondly, industry players that are involved in self-regulatory approaches typically have a detailed knowledge of the issues at stake, as opposed the situation in most states where may not always have the necessary technical expertise to deal with cross-border issues.[279] In the same way, in some areas of expertise it may be disproportionately expensive or difficult for governments to acquire the specialist knowledge necessary to regulate effectively.[280] Thus, industry practitioners are able to keep knowledge up-to-date, which led to greater effectiveness and compliance.[281]

Thirdly, the elimination of the unnecessary regulatory costs refers to the usually hidden price for regulation such as distortion or institutionalization.[282] In the same way, unnecessary or inefficient regulation raises production costs for businesses without any corresponding benefits and consumers ultimately assume these costs.[283] Thus, the risk of incurring such societal hidden costs is less pronounced with self-regulation.[284]

Finally, self-regulatory initiatives integrate realistic sanctions in their enforcement model that can better apply cross-border implementation, compared to state legislation, for instance the use of the social media for 'named and shamed'.[285] In this regard, according to Colin Scott, the enforcement in consumer law has been accomplished by different actors such public

[276] Ibid, p. 33
[277] M. K. Engle, *Business Leadership in Consumer Protection - An OFT Conference on Self Regulation and Industry led Compliance: An International Perspective*, 2009, retrieved on 26th of January of 2015 from www.oft.gov.uk/shared_oft/consultations/speech.pdf
[278] OECD, 2015, Op. Cit., p. 18.
[279] J. Cave, et al, Op. Cit., p. 49. *See also* OECD, 2015, Op. Cit., p. 18.
[280] European Commission's Information Society and Media Direct rate-General, Op. Cit., p. 34.
[281] I. Bartle & P. Vass, Op. Cit., p. 7.
[282] Ibid, p.10
[283] D. Castro, *Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*, The Information Technology & Innovation Foundation, 2011, p. 8, retrieved on 15th of May of 2015 from http://www.itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf
[284] J. Cave, et al. Op. Cit., p. 46. *See also* OECD, 2015, Op. Cit., p. 18.
[285] M. Bonnici & G. Pia, Op. Cit., p. 75.

agencies, consumers and businesses.[286] In this context, the author mentioned that new remedies in the electronic commerce have given consumers alternative ways to enforce their legal entitlements, leaving apart the idea that the unique and effective way is the court action.[287] Due the market concerns related with reputation damage, consumers have been empowered through reputational mechanisms in order to achieve their rights.[288] This exercise of consumer´s voice could enable future customers to assess risks of default by traders and to avoid lower reputation traders.[289] Therefore, the limited capacity of consumers to enforce legal rights through litigation is recognized in the creation of new remedies that need not involve formal enforcement.[290]

In the same way, the importance for sellers of the reputational factor, adds to the norms that govern the relationship between business and consumers in order to resolve disputes straightforwardly.[291] Moreover, the ability for businesses to enforce themselves is desirable for both parties instead of unnecessary and legal enforcement.[292] Thus, the capacity to enforce their own rules, although it is questionable; it can be achieved through social sanctions.[293]

Finally, regulatory enforcement lies with existing agencies to which the responsibility was assigned by the government.[294] In addition, the implementation of non-governmental agencies may be indicative of a wider perception that pressing problems of cross-border enforcement can only be tackled effectively by cooperation between agencies.[295] For instance, the Office of Fair Trading in the UK and the Consumer Ombud offices in the Nordic countries.[296] For

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[286] C. Scott, 2009, *Enforcing Consumer Protection Laws*, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 15, 2009, p. 2, retrieved 25th of November of 2014 from http://ssrn.com/abstract=1441256

[287] C. Scott, *Regulatory Innovation and the Online Consumer*, Law & Policy 26, Vol. 6, 2004, p. 479.

[288] M. Kash & J. Rifkin, *Online dispute resolution: resolving conflicts in cyberspace*. San Francisco, 2001, p. 89.

[289] C. Scott, 2009, Op. Cit., p. 5. *See also* the analysis of feedback system as a mechanism to increase the users' confidence by giving them the information and experience of former users in P. Cortés, Op. Cit., p. 61.

[290] Ibid, p. 6 *See also* P. Cortés, Op. Cit., p. 35 where the author mentioned that consumers might also find redress by bringing cases as a group of affected parties.

[291] Ibid, p. 6

[292] Ibid, p. 10

[293] Ibid, p. 12

[294] M. Thatcher & A. Stone, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, West European Politics 25, 2002, p. 18, retrieved on 1st of June of 2015 from http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1073&context=fss_papers

[295] F. Cafaggi & H. Micklitz, *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community*, European University Institute, 2007, p. 6-7, retrieved on 4th of June of 2015 from http://cadmus.eui.eu/bitstream/handle/1814/6980/LAW-2007-22.pdf

[296] G. Kjersti, *A Study of the Consumer Ombudsman Institution in Norway with Some References to the Other Nordic Countries I: Background and Description*, Journal of Consumer Policy 9, 1986, p. 18, retrieved on 4th of June of 2015 from http://link.springer.com/article/10.1007%2FBF00380307

those reasons, self-regulation appears to emerge spontaneously and it frequently has legislative support or backing.[297]

On the other hand, the limitations of the self-regulatory approaches can be divided in two groups I) Difficulties to enforce and II) Difficulties surrounding the consumer. The first group refers to situations when not all members comply with the agreed rules and the approach does not have effective sanctions or there is a lack of compliance.[298] Also, when a self-regulatory body is excessively close to the industry player that it is supposed to regulate, it could lead to a regulatory capture risk.[299] In order to overcome this drawback, self-regulatory organizations, as an example, may have contractually agreed that a non-complying member will pay monetary damages, or lose certain securities.[300] Another option is the implementation of software code as a mechanism of enforcement, for instance, the Content Scramble System (CSS) used on DVDs or the "FairPlay" content protection system used by Apple's iTunes.[301] In this sense, the technical architecture of the Internet has become an instrument of control, which can be used by industry players to achieve effective enforcement through self-enforcement making their members dependent on specific software.[302] Of course, it should be recognized that not all of online behavior could be controlled through code.[303]

The second group of limitations focuses on the protection of consumer rights in the online environment.[304] Although self-regulation is at several levels intended to protect users, it should be recognized that at the same time it does not always sufficiently protect the fundamental rights of users, who are typically not involved in the drafting process of the rules.[305] Even though, consumers are still usually subject to standard form of adhesion contracts, over which they have no power to negotiate, complaining about this contracting nature would be synonymous to being unaware of the realities of modern competitive

[297] C. Scott, 2009, Op. Cit., p. 10.
[298] European Commission's Information Society and Media Direct rate-General, Op. Cit., p. 36.
[299] OECD, 2015, Op. Cit., p. 21. *See also* A. Ogus & E. Carbonara, *Self-Regulation*, chapter 3, in Production of Legal Rules, ed. Parisi, F., Edward Elgar Publishing, 2011, retrieved on 15th of April of 2015 from www.ceur.it/system/files/carbonara1.pdf
[300] M. Bonnici & G. Pia, Op. Cit., p. 77.
[301] Ibid, p. 78
[302] Ibid, p. 132 *See also* A. Patrikios, Op. Cit., p. 131.
[303] V. Mayer-Schönberger & J. Crowley, *Napster´s second life?: the regulatory challenges of virtual worlds,* Northwestern University Law Review, 2006, p 1789.
[304] A. Patrikios, Op. Cit., p. 135.
[305] J. Cave, et al. Op. Cit., p. 29.

markets.[306] In order to overcome this obstacle, the consumer, as it was mentioned above, has been empowered through reputation mechanisms in order to impulse business to comply with the agreement in fair terms.

In this sense, reputation of the industry is a crucial factor that, depending on how it is used, may be classified as and advantage for self-regulatory instruments, but its misuse could end as a strong limitation.[307] In this sense, self-regulatory stakeholders may see benefits in collectively promoting their trading standards to differentiate themselves from others in the industry, or to improve or enhance confidence in the industry as a whole.[308] This factor will be analyzed further but is important to mention that industry reputation depends also on the degree of transparency that it shows in the market.[309]

5.4. Self-regulation in consumer dispute resolution

In general, self-regulation provides the necessary flexibility to respond to the dynamic nature of the online environment.[310] In order to ensure consumer confidence it is the business's responsibility to provide rules of best practice that will enable contracting parties communicate and negotiate in the domain of legal B2C transactions.[311] Therefore, self-regulation can be accepted as a mainstream global solution to regulate global corporate conduct in the area of cross-border disputes in e-commerce and it can be described as a decentralized system of self-government.[312] As an example, the ICC developed a Code of Advertising and Marketing Communication Practice, which provides ethical guidelines in order to minimize the need for legislative or regulatory restrictions and to build trust with consumers by assuring them of advertising that is honest, legal and decent.[313]

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[306] N. Kim, *The Duty to Draft Reasonably and Online Contracts*, Chapter 8, in Commercial Contract Law: A Transatlantic perspective, Cambridge University Press, 2012, p. 186, retrieved on 23th of April of 2015 from http://ssrn.com/abstract=2170149
[307] European Commission's Information Society and Media Direct rate-General, Op. Cit., p. 35.
[308] Ibid, p. 12
[309] I. Bartle & P. Vass, Op. Cit., p. 5.
[310] D. Castro, Op. Cit., p. 6 *See also* ICC, 2001, Op. Cit. p. 5
[311] J. Cave, et al. Op. Cit., p. 8.
[312] J. Zekoll, Op. Cit., p. 3.
[313] International Chamber of Commerce, *Advertising and Marketing Communication Practice: Consolidated ICC Code: Building consumer trust through best practicing marketing*, ICC, 2011, p. 2, retrieved on 24th of March of 2015 from http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2011/advertising-and-marketing-communication-practice-%28consolidated-icc-code%29/

In addition, approaches of self-regulatory instruments related with consumers dispute resolution should help to build consumer trust, providing specialized, independent and low-cost mechanisms that facilitate problem solving and increase consumer confidence.[314] However, in cases where consumers do not obtain satisfaction in this earlier level, an effective self-regulatory scheme should also be able to provide them with an avenue to appeal to other approved bodies.[315] In this way, a valuable B2C business model implements trust as a key asset in order to convince consumers to enter global retail-market by employing various consumer protecting governance mechanisms.[316]

The level of trust and transparency built in consumers shows the effectiveness and fairness of self-regulatory systems with a truly transnational character, where business are developed outside the traditional international law sphere on the basis of efforts between states, industry, and consumers.[317] Consequently improved consumer protection in the e-commerce context will increase consumer confidence leading to the increase of sales, which not just benefits businesses but also consumers reflecting variety options in society.[318]

The concept of trust is a complex and a multi-dimensional phenomenon,[319] which exists in each stakeholder within the overall transaction process, namely the consumer, the seller and the system.[320] Moreover, consumers prefer to do business with web shops that they perceive to be reliable,[321] fair, responsible and different manifestations of trust.[322] In the same way, consumers want efficient and effective dispute resolution mechanisms, which facilitate their

[314] OECD, 2015, Op. Cit., p. 24.
[315] K. Rossoglou, *Powerful Consumers and Responsible Entrepreneurs, presentation the Consumer Environment Conference: Powerful Consumers and Responsible Entrepreneurs*, 2012, p. 32, retrieved on 13th of February of 2015 from http://ec.europa.eu/eesti/pdf/2012-11-konstantinos-rossoglou-the-european-consumerorganisation.pdf
[316] G. P. Calliess, *Transnational Consumer Law: Co-regulation of B2C –e-commerce*, 2007, Comparative Research in law & political economy (CLPE), Vol. 3 No. 3, p. 40-42.
[317] Ibid, p. 4
[318] D. Svantesson & R. Clarke, *A best practice model for e-consumer protection*, 2010, Computer law and security review, 26 (1), p. 31-37, retrieved on 21st of April of 2015 from http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1345&context=law_pubs
[319] M. Aslam, *B2C pre-dispute arbitration clauses, e-commerce trust, construction an jenga: keeping every cog and wheel*, Masaryk U. J.L. & Tech., 2013, p. 9, retrieved on 21st of October of 2014 from http://www.mujlt.law.muni.cz/
[320] Ibid, p. 11
[321] *See for example* the dispute avoidance software tool in Denmark that helps consumers to check whether an online business is reliable or not in P. Cortés, Op. Cit., p. 60-61.
[322] S. Alam & N. Yasin, What factors influence online brand trust: evidence from online tickets buyers in Malaysia, Journal of Theoretical and Applied Electronic Commerce Research, Vol. 5, 2010, p. 80, retrieved on 24th of April of 2015 from www.jtaer.com

experience online.[323] Consequently, the design and implementation of self-regulatory schemes must provide a structural assurance to facilitate trust in the system infrastructure.[324]

Besides, the application of self-regulatory agreements indicates the value that the instruments have played in building consumer confidence by helping to ensure product quality and good commercial practices, for example the use of trusts marks in improving the image of the industry self-regulation members.[325] Therefore, enhancing consumer confidence helps to improve the image of businesses and for this reason, reputation has been categorized as "*informal third-party control*".[326]

Due to business trust is arduous to build; there are two main optional models where the business can start. The first trust model is based on a third party's assurance where the independent third party such private organizations, give a mark or sign that is recognized as reliable.[327] There are some networked places that collect information about online stores and generate a trust mark for customers.[328] For instance, the 'Trusted Shops" is one of the providers of trust marks in Europe, which certificates the criteria in the field of distant selling and electronic commerce; analyzes credit ratings, safety technology, transparency of prices, customer services and privacy issues; and provides a central customer service and dispute resolution procedure.[329]

The second trust model is based on a self-proclaimed assurance by the business itself where the web shop is able to provide the necessary trust to their customers through their own mechanisms such personal communication or effective customer service.[330] Nevertheless, the building of a solid and reliable e-commerce business should mix the models of trust and give to customers the confidence that their web shop depends on both the third party sign of reputation and the personal experiences with a company.[331]

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[323] M. Aslam, Op. Cit., p. 11
[324] Ibid, p. 11
[325] OECD, 2015, p. 23.
[326] G. P. Calliess, 2007, Op. Cit., p. 4.
[327] D. Chaffety, *e-business and e-commerce management: strategy, implementation and practice*, Prentice Hall, 2009, p. 103, retrieved on 16th of May of 2015 from http://www.ttu.ee/public/m/mart-murdvee/Techno-Psy/Chaffey_2009_E-Business_and_E-Commerce_Management_-_Strategy_Implementation_and_Practice.pdf
[328] D. Svantesson & R. Clarke, Op. Cit., p. 40.
[329] G. P. Calliess, 2007, Op. Cit, p. 9. See http://www.trustedshops.co.uk/
[330] Ibid, p. 120
[331] Ibid, p. 123

Furthermore, the ICC launched a toolkit aimed at both companies and governments, which covers issues ranging from data protection to B2C and C2C online dispute resolution.[332] The entity presented four fundamental principles in order to avoid expansive jurisdictional claims. In first place, the principle of party autonomy supports freedom of contract, which embodies private agreements between parties, formalizing their intent to be bound by the terms of the contract.[333] However, in the context of B2C relationships, governments place conditions on private agreements in order to protect the interests of the considered weak part as consumers.[334] For this reason, it is the business's responsibility to provide rules of best practice that will enable to ensure both consumer rights and business success.[335]

In the second place, the country-of-origin principle provides legal forum and applicable law depending on where supplier has center of activities, but as it was mentioned before, an exception applies when it is concerned about consumer disputes because in these cases the procedure generally has to take place in the country of residence of the consumer.[336] In this sense, the body proposes that in the first early stage of the dispute resolution, the forum of the dispute is the cyberspace but in cases where the conflict cannot be solved the self-regulatory schemes are also able to provide effective connection with appeal organisms, preserving the flexibility that supports many of the emerging e-business models.[337]

The third principle is efficacy based on trustability because considering the complexity of the jurisdiction and applicable issues in B2C transactions and the quicker development of Internet and new business, ICC believes that in order to achieve a great economy, companies must be willing to approach the confidence of the consumer implementing technologies and practices that offer consumers choice through informed decision-making.[338] Thus, self-regulatory solutions should provide the flexibility that online environment requires and at the same time the protection of both parties interests.[339]

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[332] International Chamber Commerce (ICC), *ICC launches toolkit for e-business*, 2003, retrieved 17th of April 2015 from http://www.iccwbo.org/News/Articles/2003/ICC-launches-toolkit-for-e-business/
[333] Ibid, p. 6 *See also* UNCITRAL, Op. Cit., p. 38.
[334] A. Belohlavek, *Arbitrability Limitation in Consumer (B2C) Disputes?: Consumers' Protection as Legal and Economic Phenomenon*, Journal of Governance and Regulation, Vol.1, No 3, 2012, p. 160, retrieved on 23th of October from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344154
[335] ICC, 2003, Op. Cit., p. 7.
[336] A. Belohlavek, Op. Cit., p. 170.
[337] ICC, 2003, Op. Cit., p. 7.
[338] OECD, 2015, Op. Cit., p. 25.
[339] K. Rossoglou, Op. Cit., p. 34.

Finally, the fourth standard is based on strategies to combat fraud and crime on the Internet.[340] In this regard, is important to ameliorate the cooperation between business, governments and special consumers in order to make cyberspace a safe place to shop.[341] Consequently, international organizations are conscious of problems surrounding jurisdiction and applicable law and for this reason efforts against cybercrime will continue to be studied at national and international level.[342]

On the other hand, under self-regulatory schemes the concept of jurisdiction should be seen as articulated moments in networks of social relations instead of as a geographically determined territory bounded by borders.[343] According to this view, jurisdictional authority can be originated from non-state communities where members need not be bound to their geographical location.[344] Thus, self-regulatory approaches can be described as decentralized autonomous legal systems from private ordering, which consist of the creation of their own rules, the application of them in their own dispute resolution forum and ensuring their enforcement.[345]

In sum, industry self-regulatory approaches aim for i) improving industry practices and increasing consumer trust, ii) providing consumers with better information and iii) providing more efficient dispute resolution mechanisms.[346] In this sense, industry self-regulation agreements can be used to deal with the jurisdiction and geo-location principles of the states, especially in the area of dispute resolution schemes, which empower consumers and businesses to find a resolution directly between them or with the operating organizations.[347] This framework should allow business to calculate costs and risks and at the same time it should guarantee that consumers have an easy and cost-effective means to resolve disputes. However, the main limitation for these schemes of dispute resolution provisions is that decisions made by the organizations are not considered binding in some cases, remaining in

[340] ICC, 2003, Op. Cit., p. 9.
[341] M. Castells, G. Cardoso *et.al, The Network Society: From Knowledge to Policy*. Johns Hopkins Center for Transatlantic Relations, 2005, p. 183, retrieved on 24th of March of 2015 from http://www.umass.edu/digitalcenter/research/pdfs/JF_NetworkSociety.pdf
[342] ICC, 2003, Op. Cit., p. 9.
[343] P. Schiff Berman, Op. Cit., p. 154.
[344] J. Zekoll, Op. Cit., p. 4.
[345] T. Schultz, *Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle*, 19 International Journal of Law & Information Technology, 2011, p. 831, retrieved on 21st of January of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805831
[346] OECD, 2015, Op. Cit., p. 25.
[347] OECD, 2015, Op. Cit., p. 31.

this way the enforceability problem as a issue that can be manage by consumers, businesses or third party organizations.[348]

5.5. Two models of dispute resolution for a new approach in the area of B2C e-commerce

This study focuses on dispute resolution mechanisms for online B2C relationships, which can help businesses and consumers to alleviate the need for external resolution procedures. There are many types of dispute resolution mechanisms, and those referred to below are the main ones in order to describe and adequate scheme to achieve the objectives mentioned.[349] The first model is based on the terms proposed by eBay in their former and new platforms of dispute resolution and the second model is concentrated on the Uniform Domain-Name Dispute-Resolution Policy (UDRP) established by the Internet Corporation for Assigned Names and Numbers (ICANN).

The first example is eBay policies and their former outsourced dispute resolution platform, SquareTrade, which are been considered as an independent legal system.[350] SquareTrade is a private company, which deals with conflicts linked to electronic transactions in 120 countries and in five languages.[351] Likewise, SquareTrade was a dispute resolution provider of eBay and other members such California Board of Realtors, which agreed that disputes between their market players were going to be solved through this platform before judicial actions.[352] Therefore, this model of dispute resolution can be classified as an *assisted self-regulatory* scheme where industry players and consumers have the necessary forum to solve their difficulty through a third party.[353]

The dispute resolution procedure is arranged in two phases provided automated negotiation and human-assisted disputed resolution mechanisms.[354] First, there are direct negotiations between the involved parties through software that facilitates communications and provides

[348] I. Bartle & P. Vass, Op. Cit., p. 15. *See also* C. Scott, Op. Cit., p. 4.
[349] *See also* the complete analysis of the model proposed by Paypal.com in P. Cortés, Op. Cit., p. 60.
[350] T. Schultz, 2011, Op. Cit., p. 836-837.
[351] G. P. Calliess, 2007, Op. Cit., p. 12.
[352] P. Cortés, Op. Cit. p. 148-149.
[353] R. Morek, *Regulation of Online Dispute Resolution: between law and technology*, 2005, retrieved on 23th of April of 2015 from http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc
[354] European Commission's Information Society and Media Direct rate-General, Op. Cit., p. 14.

some alternatives to solve the inconvenient. [355] The software was able to limit the free text space, encourage the proposition of agreements, set deadlines and even shape the tone of exchanges.[356] In the same way, the software used a precedent system that recognized patterns in order to create a compendium of experiences about the behavior of the parties, providing some standardized solutions for repeated conflicts.[357] Second, in cases where the involved parties cannot achieve a settlement by themselves, each party can call in a mediator.[358] Thus, this third impartial party uses the electronic documentation available about the case and it is able to gain an overview of the conflict and to support the parties involved and after the party's request, the mediator makes a non-binding suggestion for a settlement.[359]

In order to provide enforceability, eBay provided two types of sanctions: I) Reputational system where members could be excluded when they have a negative assessment.[360] II) Administrative measures such as warnings, the temporary freezing of an account or the exclusion of an involved member.[361] Nevertheless, at present, eBay no longer has a third party provider but instead has integrated the service into the eBay code base and it is directly provided by the eBay Resolution Center.[362]

The current eBay´s model is divided also in two big stages, the first one is an arrangement between seller and buyer and the other one implicates the intervention of eBay mediator. In the first stage there are some steps that both buyer and seller must comply, as follow:

I. **Direct resolution:** Seller/buyer can initiate the first contact with the other party without the intervention from eBay. In this step the buyer/seller has the opportunity to write the other party directly in order to arrange a solution. Once the buyer/seller has sent the required, both parties receive an automatic message from eBay explained the

[355] G. P. Calliess, 2007, Op. Cit., p. 12.
[356] P. Cortés, Op. Cit., p. 67.
[357] S. Abernethy, *Building Large-Scale Online Dispute Resolution & Trustmark Systems*, in Katsh/Choi (ed), *Online Dispute Resolution (ODR)*, Papers and Proceedings of the 2003 United Nations Forum on ODR, 2003, retrieved on 23th of April of 2015 from http://www.odr.info/unece2003/pdf/Abernethy.pdf. *See also* P. Cortés, Op. Cit., p. 62-64.
[358] G. P. Calliess, 2007, Op. Cit., p. 13.
[359] R. Summer & C. Tyler, *From e-Bay to Eternity: Advances in Online Dispute Resolution*, University of Melbourne Legal Studies Research Paper No. 200, 2006, p. 21-26, retrieved on 23rd of May of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955968
[360] S. Mycoe, *The Great Big eBay Con*, Paperback, 2008, p. 44
[361] M. Bonnici & G. Pia, Op. Cit., p. 186.
[362] M. Albornoz & N. Martín, *Feasibility analysis of Online Dispute Resolution in developing countries*, U. Miami Inter-Am. L. Rev. 39, 2013, p. 46, retrieved on 21st of January of 2015 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184447

situation and the next steps.

II. **Open case at earlier stage:** From the instance that the platform send the automatic message to both parties, the case is opened on the eBay platform, which does not count against the seller performance, the case counts if after tree business days that the case was scaled to eBay it was not solved and it was in favor of the consumer. In this step if after the first contact between parties, the issue has been solved, it is no longer necessary to continue the case but if the conflict persists, the case is now taking by eBay´s mediator.

III. **Open case at eBay:** Is the beginning of the second stage, where the seller/buyer must repeat the procedure but in this scenario the case has a mediator provided by eBay. Following, the platform asks some questions regarding the item or the complaint in order to build a file.

IV. **Respond to the case:** The seller/buyer must respond the issue in favor or against to the other party. If the response is favorable and the problem was solved in a good manner, the case will be closed but if the response is not favorable and the problem persists, the parties can use legal procedures.

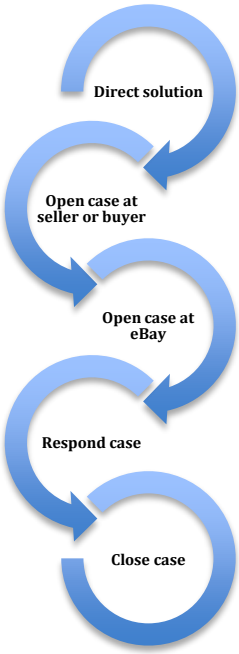

Table 3. The eBay Resolution Center process. Elaborated by the author.

In essence, this program can be defined as a conflict prevention mechanism rather than a resolution mechanism that relies heavily on the early, informal and direct communication between businesses and consumers.[363] Even though, the software platform implemented under this scheme can be also considered as a manner of self-regulation to face the disputes between sellers and buyers instead of taking the case to court.[364] In this sense, several numbers of disputes have been prevented or settled in this way, without precedent-setting decisions and outside of formalized procedures such as those previously offered by SquareTrade.[365]

Nevertheless, the effectiveness in e-Bay´s model for B2C must reach the objective of minimizing the cross-border barriers for the solutions of conflicts online and at the same time must benefit the market and the industry players.[366] This objective is partially achieved because even though the rules of this model have been operated within a transnational legal regime, these rules also are subject to state-based interpretation, adjudication, enforcement or annulment in place of pure self-governance.[367] As an example, e-Bay´s websites around the world change their structure on the basis of the state rules reducing the concept of self-regulatory approach, for instance a German website,[368] unlike the Spain[369] or Dutch[370] websites, has an explicit reference to the right to withdraw in the course of eBay auctions was the result of a court decision.[371]

In relation with the efficiency, this model can be considered as an exception for problems such as language barriers or lack of transparency because their platform is available in 5 languages and their initiative is less cost for both parties. Therefore, even when the platform is not completely global and sill has some geographical restrictions, the model in someway maximizes benefits and minimizes costs for buyers and sellers.[372]

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[363] P. Cortés, Op. Cit., p. 11.
[364] T. Schultz, Op. Cit., p. 162. *See also* J. Zekoll, Op. Cit., p. 7. Where the author expressed that the eBay model of dispute resolution implies the necessary use of complementary secondary rules, taking away the consideration of autonomous legal order. In this sense, this model is better studied as a developed commercial practice but does not per se mean it can be considered as a pure self-regulation.
[365] P. Cortés, Op. Cit., p. 6.
[366] U. Mandl, A. Dierx & F. Ilzkovits, Op. Cit., p. 3.
[367] P. Cortés, Op. Cit., p. 2. *See also* J. Zekoll, Op. Cit., p. 10.
[368] See http://pages.ebay.de/help/policies/user-agreement.html?rt=nc last accessed 29th of May of 2015.
[369] See http://pages.ebay.es/help/policies/user-agreement.html?rt=nc last accessed 29th of May of 2015.
[370] See http://pages.ebay.nl/help/policies/user-agreement.html?rt=nc last accessed 29th of May of 2015.
[371] Case law, Bundesgerichtshof, Decision of 3 November 2004(VIIIZR 375/03), retrieved on 21st of May of 2015 from http://www.eu-consumer-law.org/caseabstracts_en.cfm?JudgmentID=28
[372] J. Zekoll, Op. Cit., p. 7.

Finally, the eBay model achieves the principle of equity just in the first stage of the process where initiative establishes a time limit for responds between buyers and sellers, creating a range of transparency and trustability between parties.[373] Nevertheless, in the second stage when the mediator must intervene, the model could fail because i) the intervention of the mediator is automatized based on previous cases and in some cases it seems that it does not analyze the whole file and arguments of each party; ii) the neutrality of the scheme can be compromised.[374]

The second example is the Uniform Domain Name Resolution Policy (UDRP)[375] proposed by the Corporation for Assigned Names and Numbers (ICANN) [376] and suggested by the recommendations from the World Intellectual Property Organization (WIPO).[377] This policy is incorporated in the registration agreement between the registrar and the registrants, which contains a set of rules that govern the administrative proceedings for resolving disputes over the policy.[378] Section 15 (a) of the UDRP Rules evinces the autonomous non-state law status of the ICANN regime an it establishes that: *"[a] Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."*[379] In this sense, the application of the policy in conjunction with the rules has been considered as a non-state tool that implies the rebirth of transnational law without a state.[380]

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[373] J. Goldsmith & T. Wu, *Who Controls the Internet, Illusions of a Borderless World*, Oxford University Press, 2006, p. 59-63, retrieved on 25th of January of 2015 form http://jost.syr.edu/wp-content/uploads/who-controls-the-internet_illusions-of-a-borderless-world.pdf

[374] eBay sellers community has been posted videos and complaints about how is possible for some buyers to take an advantage of eBay policies in order to have a product without actual payment and also open a file against a seller. Open discussions available at http://community.ebay.com/t5/Archive-Shipping-Returns/Resolution-Centre-Decision-Failure/td-p/22361528 and also videos at https://www.youtube.com/watch?v=vO4UnBLgWkU

[375] See Uniform Domain Name Resolution Policy (UDRP) at https://www.icann.org/resources/pages/help/dndr/udrp-en

[376] Corporation for Assigned Names and Numbers (ICANN) at https://www.icann.org/

[377] Final Report of the WIPO Internet Domain Name Process, Geneva, 30 April 1999 available at http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1455.html, *See also* C. Easton, *ICANN's core principles and the expansion of generic top-level domain names*, International Journal of Law and Information Technology, vol. 20, No 4, p. 8, retrieved on 17th of May of 2015 from http://ijlit.oxfordjournals.org/content/20/4/273

[378] M. Froomkin, *ICANN´s Uniform Dispute Resolution Policy- Causes and (partial) cures*, Brooklyn Law Review, Vol. 67 No. 3, 2002, p. 47, retrieved on 17th of May of 2015 from http://osaka.law.miami.edu/~froomkin/articles/udrp.pdf *See also* J. Zekoll, Op. Cit., p. 9.

[379] See Uniform Domain-Name Dispute-Resolution Policy at https://www.icann.org/resources/pages/help/dndr/udrp-en

[380] T. Schultz, *Private Legal Systems: What Cyberspace Might Teach Legal Theorists*, 10 *Yale Journal of Law & Technology*, 2007, p 162, retrieved on 21st of January of 2015 from http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1040&context=yjolt

The UDRP applies on the basis of a chain adhesion contract system and it sets out the legal framework for the resolution of disputes between a domain name registrant and a third party in relation with the generic top level domains or gTLDs,[381] and those country code top level domains or ccTLDs[382] that have adopted the UDRP Policy on a voluntary basis.[383] All ICANN accredited registrars that are authorized to register names in the gTLDs and the ccTLDs that have adopted the Policy, have agreed to abide and implement the rules.[384] Any person or entity wishing to register a domain name in the gTLDs and ccTLDs in question is required to consent to the terms and conditions of the UDRP Policy.[385]

This policy follows the UDRP Rules setting out the procedures and other requirements for each stage of the dispute resolution administrative procedure, which is certainly quick and relatively cheap in comparison with national courts.[386] Consequently, the mixture between the rules and the policy from UDRP construct the dispute resolution forum as a non-state legal regime, vested with jurisdiction to prescribe rules to adjudicate disputes and to enforce the results.[387]

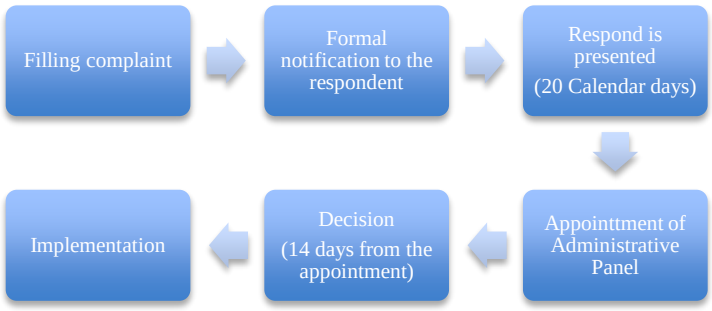

Table 4. The Uniform Domain Name Dispute Resolution Procedure. Elaborated by the author.

[381] See ICANN sources at https://www.icann.org/. A Generic Top Level Domain (gTLD) is an Internet domain name extension with three or more characters. It is one of the categories of the top-level domain (TLD) in the Domain Name System (DNS) maintained by the Internet Assigned Numbers Authority.
[382] See ICANN sources at https://www.icann.org/. Country Code Top-Level Domains (ccTLDs) are two-letter Internet top-level domains (TLDs) specifically designated for a particular country, sovereign state or autonomous territory for use to service their community.
[383] C. Easton, Op. Cit., p. 3.
[384] Ibid, p. 15
[385] J. Zekoll, Op. Cit., p. 10.
[386] M. Froomkin, Op. Cit., p. 66 and explanation about different cost with alternative dispute resolution in Note 175.
[387] T. Schultz, Op. Cit., p 151.

Disputes related to the domain names faced insuperable jurisdictional obstacles, in particular the friction between the limited reach of domestic intellectual property laws and the ubiquity of Internet domain names worked against the owners of trademarks.[388] For this reason, any person or company in the world can file a complaint using the UDRP Administrative Procedure, proving three specific elements: a) the domain name holder is identical or confusingly similar to a trademark or service mark in which the complainant has rights; b) the domain name holder has no rights or legitimate interests in respect of the domain name; and c) the domain name holder has been registered and is being used in bad faith.[389]

The procedure consists of six basic stages; first, the petitioner must fill out a complaint with an ICANN-accredited dispute resolution service provider, which can acknowledges receipt or requests to provide specific details.[390] Second, if the complaint fulfills all of the formal and substantial requirements and the required payment has been made, the center formally notifies the respondent of complaint.[391] Third, the person or entity against whom the complaint was made presents the response within 20 calendar days of formal commencement of administrative proceeding.[392] Fourth, regardless of whether the respondent defaults or not, the Center proceeds to appoint an Administrative Panel of 1 or 3 members, which is the organ that makes the final decision.[393] Fifth, the Panel is required to forward its decision to the Center within 14 days of its appointment and this decision will issue an order, and address it to the registrar, to either cancel the domain name or transfer the registration of it to the petitioner. Finally, the Center notifies the decision to both parties and makes the implementation of the Administrative Panel's decision.[394]

The UDRP Administrative Procedure typically provides a faster and cheaper way to resolve a dispute regarding the registration and use of an Internet domain name than going to court. [395] Also, this model has been considered more informal than litigation but the decision-makers

[388] J. Zekoll, Op. Cit., p. 10.
[389] C. Easton, *ICANN´s core principles and the expansion of generic top-level domain names*, International Journal of Law and Information Technology, Vol. 20, No. 4, Published by Oxford University Press, 2012, p. 281, retrieved on 14th of May of 2015 available online at www.bybil.oxfordjournals.org *See also* M. Froomkin, Op. Cit., p. 49.
[390]Uniform Domain-Name Dispute-Resolution Policy num. 4 (a) available at https://www.icann.org/resources/pages/policy-2012-02-25-en
[391] Uniform Domain-Name Dispute-Resolution Policy num. 4 (g)
[392] Uniform Domain-Name Dispute-Resolution Policy num. 4 (e)
[393] Uniform Domain-Name Dispute-Resolution Policy num. 4 (i) *See also* J. Zekoll, Op. Cit., p. 13.
[394] Uniform Domain-Name Dispute-Resolution Policy num. 4 (j)
[395] J. Zekoll, Op. Cit., p. 13.

are experts in areas such as international trademark law, domain name issues, electronic commerce and dispute resolution.[396] Furthermore, it has an international scope where is possible to resolve a domain name dispute regardless of where the registrar or the domain name holder or the complainant are located.[397] In consequence, ICANN's UDRP represents a successful type of an international dispute-resolution framework that consists of judicial, arbitral and ministerial components, which builds an apparatus with jurisdiction to adjudicate and enforce.[398]

Nevertheless, the effectiveness in ICANN´s model must reach the objective of minimizing the cross-border barriers for the solutions of conflicts online and at the same time must benefit industry players.[399] This objective is full achieved because their rules and procedures apply in an international scope where is possible to solve a dispute regardless of where the registrar or the domain name holder or the complainant are located.[400] Even though, the decision made by ICANN is by no means binding or irrevocable, for the parties involved in the process is a truly self-enforcing system.[401] In this sense, paragraph 4 (k) of the UDRP contains the pertinent opening clause which explains that trademark-owners can avoid the UDRP proceedings altogether by litigating their claims in national courts.[402] These appeals can be a real threat to UDRP decisions because in some cases, courts decided that parties are not at all bound by the decision rendered by the panel.[403] For example, the US Court of Appeals in the case *Barcelona.com, Inc. v Excelentisimo Ayuntamiento de Barcelona* held that the decision made under UDRP procedure was no more than an agreed-upon administration that is not given any deference under the US law.[404] Thus, as was described in eBay cases, courts keep interfering with the development of the self-regulatory schemes through ordinary jurisdiction.[405]

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[396] C. Easton, Op. Cit., p. 290. *See also* P. Cortés, Op. Cit., p. 82.
[397] Ibid, p. 83
[398] J. Zekoll, Op. Cit., p. 18; *See also* C. Easton, Op. Cit., p. 15
[399] U. Mandl, A. Dierx & F. Ilzkovits, Op. Cit., p. 3.
[400] Ibid, p. 83
[401] *See also* the complete analysis of the ICANN´s model in P. Cortés, Op. Cit., p. 114-126.
[402] M. Froomkin, Op. Cit., p. 67.
[403] J. Zekoll, Op. Cit., p. 14.
[404] US Court of Appeals for the Fourth Circuit in Barcelona.com, Inc. v Excelentisimo Ayuntamiento de Barcelona, June 2nd of 2003 available at http://www.ca4.uscourts.gov/opinions/published/021396.p.pdf. The Court emphasized the difference between the UDRP rules and domestic legal remedies and standards by holding that *"because a UDRP decision is susceptible of being grounded on principles foreign or hostile to American law, the ACPA authorises reversing a panel decision if such a result is called for by application of the Lanham Act"* p. 12.
[405] J. Zekoll, Op. Cit., p. 14.

In relation with the efficiency, this model has a downside because the mere fact of sending the complaint via postal-mail, fax, and email addresses is sufficient to start the twenty day clock for the respondent's only chance to reply, which seems an arbitrary time and in many cases considered as an inadequate and unfair notice.[406] In this sense, the model does not provide an adequate time to reply the complaint or to ensure that the respondent has actual notice.[407] This disadvantage shows the weakness in the UDRP procedure during the first stage of the process, communications between complainant and respondent.

Finally, the ICANN´s model achieves partially the principles of equity and fairness because the intervention of the expert panel provides certainty and expertise to the decision. Nevertheless, in the process is the complainant who decides the selection and composition of the arbitral panel, contrasting with standard arbitration clauses where both sides have equal participation into who will decide the case.[408] Although, the respondent can select one member of a three-person panel at their own expense if the complainant opted for a single panelist and the respondent wishes three.[409] One of the solutions could be that ICANN must monitor the providers in order to ensure transparency and impartiality.[410]

Finally, according to the examples presented, the eBay and ICANN cases, it is suitable to affirm that it is unusual to find a pure self-regulatory scheme, where a private transnational agency controls, monitors and enforces the rules and decisions in the context of dispute resolution in B2C consumer relationships. However, these *quasi-autonomous regimes* appear to represent unique phenomena where the solution of disputes can be achievable through the mix of industry forum and government tools. Thus, the application of the strongholds of each example presented, adding to the principles of the adequate self-regulatory schemes can proportionate a suitable forum for e-commerce dispute resolution where the decisions can be addressed by non-governmental agencies and their enforceability is backed up with governmental and private initiatives as a feasible solution for cross border disputes.

[406] E. Rony & P. Rony, *The domain name handbook 26,* 1998, p. 32. *See also* M. Froomkin, Op. Cit., p. 73.
[407] Ibid, p. 67
[408] M. Froomkin, Op. Cit., p. 67
[409] UDRP Rules 6 (c), 6 (e)
[410] M. Froomkin, Op. Cit., p. 70.

5.6. Industry self-regulatory model backed up by governmental tools for e-commerce dispute resolution

Throughout this study, it has described the regulatory process as a combination of factors, principles and recommendations. The regulatory process for B2C dispute resolution model at international level consists of three stages: creating regulation, computer mediated communication, and enforcing regulation.[411] In addition, over the regulatory process it has been described that the main principles for an adequate self-regulatory model are efficiency, efficacy and equity.[412] Finally, the level of success of this model also depends on the level of compliance though the four main actors in this labor: consumers, businesses, agencies and government.[413] In this sense, the following is a description of how the combination of the elements mentioned above can be applied in the industry of e-commerce in order to ensure a fast, use-friendly and inexpensive dispute resolution model for B2C cross-border transactions that make the market a scenario for the free flow of goods and services.[414]

Before describing the appropriate approach it is important to differentiate between individual and intermediate business models. It is not the same to buy a product directly from the website of the trademark holder than to buy the same product from an intermediate platform such Zalando or eBay.[415] In this sense, is clear that both sites require a dispute resolution center in order to guarantee customer service as a priority and also to ameliorate their business model. For the purposes of this study both business models are identified as websites or web shops.

The first stage of the model consists of the creation of the regulation for e-commerce dispute resolution by any web shop.[416] The adaptation and modification of the main rules for a web shop may include a specific dispute resolution policy in order to provide a clear agreement that includes well-defined guidelines and procedures between involved parties. Thus, the construction of the rules may include three main elements: I) Definition of members; II) Transparent information; III) Participative forum; and IV) Clear objectives

[411] D. Castro, Op. Cit., p. 2.
[412] OECD, 2012, Op. Cit., p. 20-43; U. Mandl, A. Dierx & F. Ilzkovits, Op. Cit., p. 3-10; International Competition Network, Op. Cit., p. 9-15.
[413] C. Scott, Op. Cit., p. 3-10
[414] GBDe, Op. Cit., p. 56.
[415] According to the Article 2 of Directive 2000/31/EC defined as online market place, which allows consumers and traders to conclude online sales and service contracts on the online platform.
[416] D. Castro, Op. Cit., p. 3.

In first place, the adaptation of the policy may include the clear definition of the members that are bounded for this instrument. Considering first the variety of business models and second the possibility that more than one web shop belong to the same company or owner, the rules should clarify who are the members of this agreement in order to provide transparency to the model. [417] Unlike ICANN´s model, the probability that this policy applies for all websites is minimum because each enterpriser has the right to the free development of their business and, also not all of the web shops have the same resources. Nevertheless, companies can make agreements in order to combine efforts and sources. Thus, in this case, every web hop must inform who in their marketplace is considering consumer, seller or other if applies.

Then, the website should have the appropriate measures in order to provide complete, accessible and transparent information about the policy.[418] Likewise, the level of awareness of information that both parties have about the process and procedures demonstrate the level of equity of the model.[419] In the same way, perceptions that the regulatory regime is not being applied in a fair way and that some members of the community are being privileged relative to others can be a risks that have to be deal with the appropriate appeals mechanisms.[420] Thus, the website should provide an easy and understandable policy for both parties from the preparatory for the resolution of the problems.[421]

In third place, a participative forum in order to improve the model should be available in the website where all members involved can participate. [422] This approach should develop mechanisms that ensure that all stakeholders are part of the process and are equal parties.[423] Thus, if both parties are well informed about the policy, the parties will agree to follow the guidelines.[424]

Lastly, the dispute resolution should has a clear objective, which in this case can be minimizing the cross-border barriers for the solutions of conflicts online in a way that also

[417] G. Andrei & P. Diacon, Op. Cit., p. 187.
[418] P. Cortés, Op. Cit., p. 77-78.
[419] OECD, 2012, Op. Cit., p. 79.
[420] Ibid, p. 32
[421] European Economic and Social Committee (2), Op. Cit., p. 29.
[422] OECD, 2012, Op. Cit., p. 48.
[423] I. Bartle & P. Vass, Op. Cit., p. 2.
[424] P. Cortés, Op. Cit., p. 148.

benefiting consumers and sellers in the market.[425] In this sense, the policy should be a mixture between international legal framework and self-initiatives without violation of consumer rights. The UDRP in ICANN can guide this first step, where the entity has their own rules among their members and has procedure that applies at international level without matter the geographic position of the parties.[426]

The second stage of the model consists of the process of technology adaptation in order to provide computer-mediated communications. The technology development in this phase is divided in two parts, first the software provided to facilitate direct communication between parties, named early first stage, and second the digital mediation which provide a third party able to give an alternative solution.[427]

The improvement of the early first stage (buyer-seller) can be beneficial in order to avoid the investment in external procedures.[428] Moreover, this step can be made more convenient when it is complemented with technology, for instance, the use of software with appropriate management tools.[429] The technology adaptation begins with the creation of a digital platform for conflict resolution, which can be part of the web shop or can be outsourced. This decision depends on each business model, the size of the enterprise and their own resources.[430] In this regard, not all companies have the necessary income to create and provide their own platform with the technological standards but companies should make an effort to adequate their resources and personal force to create their own platform or to associate with others web shops or to pay for outsourced platform.[431]

Moreover, the real participation in the platform is a real challenge because it is still remain the preconception of the imbalance of power between parties.[432] Nevertheless, the policy in combination with the participative forum should provide the necessary measures to

[425] OECD, 2012, Op. Cit., p. 50.
[426] M. Froomkin, Op. Cit., p. 60-70 and P. Cortés, Op. Cit., p. 114-126.
[427] P. Cortés, Op. Cit., p. 77-78
[428] GBDe, *New York Recommendations*, GBDe, 2003, p. 56, retrieved on 3rd of June of 2015 from http://www.gbd-e.org/pubs/NYC_Recommendations_2003.pdf
[429] OECD, 2012, Op. Cit., p. 67 estimates between 60–80 per cent of consumer disputes can be resolved by using direct negotiation.
[430] C. Tyler, *Seventy six and counting: An analysis of ODR sites*, in E. Katsh & D. Choi, *Proceeding of the UNECE second forum of online dispute resolution*, 2005, retrieved on 2nd of June of 2015 from www.odr.info
[431] P. Cortés, Op. Cit., p. 75-77.
[432] C. Rule, *Online Dispute Resolution For Business: B2B, ECommerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, Jossey Bass eds, 2002, p. 216.

counterbalance this disparity and to improve a relationship where the dispute is not highly confrontational.[433] Therefore, based on the eBay´s and SquareTrade´s models this negotiation between consumer and seller should provide the technological adjustments such trust marks, in order to ensure due procedural fairness, keeping transparency and neutrality for both parties. [434]

Finally, the digital platform should be able to diminish the cross-border difficulties in B2C transactions. Regardless if the platform is owned or outsourced, this digital tool must be able to provide instant language translation or to be able in some agreed languages for communication between parties. [435] Also, it should receive, and store complaints as preliminary files where buyer and seller can deal with the conflict according to a set of rules previously informed. Likewise, the reception of the complaints should be in both ways consumer-seller but also seller-consumer.[436] There are some cases where consumers abuse their position and special protection and try to misuse the tools and procedures against honest sellers. Even when these cases are unusual, there is a possibility to occur and for this reason, sellers should also be able to submit a complaint against the consumers.[437] Lastly, this digital tool as a computer mediated between parties should be designed in a way that adds authority, quality and trust to the online process.[438] Thus, based on eBay´s models (Resolution Center and SquareTrade) the software should be able to limit the free text space, encourage the proposition of agreements, set deadlines and even shape the tone of exchanges.[439]

Although the desire of the model is that most disputes be solved in the first earlier stage and out-of-courts, for some cases it can persist the unconformity.[440] In these cases, the policy should provide a second instance that provides the intervention of a mediator or arbitrator who is expert and can provide an alternative solution.[441] Unlike eBay´s platform where the mediator interface is limited by automatized responses based on previous cases, in this case the digital mediation should adequate the interface similar to ICANN´s UDRP, which include

[433] Ibid, p. 220
[434] P. Cortés, Op. Cit., p. 80.
[435] Ibid, p. 154 *See also* M. Froomkin, Op. Cit., p. 707.
[436] E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, 2001, p. 137.
[437] C. Rule, Op. Cit., p. 123
[438] E. Katsh & J. Rifkin, Op. Cit., p. 123.
[439] P. Cortés, Op. Cit., p. 67.
[440] C. Pablo & L. Arno, Op. Cit., p. 23.
[441] P. Cortés, Op. Cit., p. 155

a third party that studies the case and it is a professional in the field.[442]

Besides, the effectiveness and efficiency of this digital mediation is based in the appropriate balance between flexibility, confidentiality and transparency. This model should demonstrate the adequate range of flexibility that overcomes the obstacles of time-consuming and circular process of the legal litigation.[443] In this sense, the third party should provide to parties feasible mechanisms to negotiate but also it should be able to deliver agreements that are enforceable.[444] Furthermore, as a transversal principle, confidentiality must be balanced with the principle of transparency in order to identify possible abuses from one of the parties.[445] For instance, in the feedback system, the website can provide examples of the agreements solved by the digital tool but withholding the personal details of the parties in order to safeguard the confidentiality and transparency principles, but also helping future participants to understand the functioning of the platform.[446]

Independently if the platform is owned or outsourced, the model should demonstrate that the mediator or arbitrator is independent and does not have a conflict of interest with the parties.[447] In this regard, the website should gives equal opportunity to the parties to put forward their case, showing the applicability of the equity and fairness principles.[448] Therefore, digital mediators should have the duty of ensuring that the decision is fair and based on the policy agreed to by the parties.

The third stage of the process consists of the enforcement of the regulation being this main challenge for self-regulatory schemes. Nonetheless, as it was mentioned, there are some strategies to enforce the agreements and encourage the use of these alternative mechanisms trough initiatives by consumers, businesses, agencies and government.[449]. First, governments needs to stimulate the use of self-regulatory structures in e-commerce dispute resolution and provide the tools and procedures to back up this administrative decision without losing their

[442] M. Froomkin, Op. Cit., p. 707.
[443] E. Rabinovich, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 Harvard Negotiation Law Review, 2006, p. 221.
[444] E. Katsh & J. Rifkin, Op. Cit., p. 130.
[445] C. Pablo & L. Arno, Op. Cit., p. 155.
[446] Ibid, p. 157
[447] L. Edwards & C. Wilson, *Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions*, International Review of Law, Computers and Technology 21(3), 2007, p. 218.
[448] Ibid, p. 220
[449] C. Scott, Op. Cit., p. 3-10

sovereignty. For example, in the EU scope, Member States can recognizes these procedures under the Directive 20013/11/EU according to certain requirements with the purpose to be included in the automatized system for dispute resolutions online as a second instance. [450]

Second, consumers and business can apply social binding mechanisms such the use of social media to be 'named and shamed'.[451] Likewise, the importance of the reputational factor for sellers, adds to the norms that govern the relationship between business and consumers in order to resolve disputes straightforwardly.[452] For this reason, the adequate use of reputational or feedback systems are strong and effective mechanisms. These non-legal mechanisms could provide full confidence to consumers and businesses and they do not eliminate hierarchies from the system in favor of markets, but rather implements non-state orders to support the market.[453]

Finally, taking into consideration that both parties remain the possibility to go to courts after this process, even if is undesirable, the model should also facilitate the filling of complaint in courts providing the necessary documentation.[454] This last step is not desirable solution because the objective of the industry model is to promote and ameliorate provisions and procedures for the out-of-court resolution of e-consumer disputes. [455]

[450] This is the position for UK statutory ombudsmen, such as those for financial services, pensions, and lawyers.
[451] M. Bonnici & G. Pia, Op. Cit., p. 75.
[452] Ibid, p. 6
[453] C. Scott, Op. Cit., p. 15.
[454] P. Cortés, Op. Cit., p. 156
[455] Ibid, p. 157

6. Conclusions

The Internet provides significant consumer empowerment through increased competition, evolving business models and technology. Consistent with this empowerment, businesses recommend governments a systematic approach in solving online consumer disputes where the first stage would be the internal customer satisfaction mechanisms and if the dispute persists, the second stage would be the legal actions. The measures and strategies implemented for companies to solve disputes with their customers, based on the concept of trust and confidence, should be a strong guarantee for both the business itself and the consumer. The negative result of jurisdictional ambiguity in e-commerce combined with detailed local rules when it is dealing with cross-border transactions is twofold. First, many goods and services are held back entirely from the global electronic marketplace. Second, other goods and services are offered only in a limited number of jurisdictions, and consumers in other places are denied access to competitive products and prices through the online marketplace.

Self-regulatory organizations must involve consumers, enforcement bodies and other stakeholders throughout the preparation of the rules. This is a key success factor in making sure that consumer codes of practice are relevant to real consumer needs. Self-regulatory initiatives must install a low-cost, responsive, transparent and user-friendly alternative dispute resolution mechanism, which is binding on members (sellers-consumers). In the same way, those initiatives should provide bilingual or multilingual information to foster cross-border confidence. Nevertheless, it is also a call for governments and international organizations to provide the necessary support in order to ameliorate these structures increasingly improved.

In conclusion, looking at the global scale, a choice of law and forum through self-regulatory schemes would seem to be a promising alterative to dispute resolution in B2C e-commerce transactions as long as governments provide the necessary support in order to ameliorate these industrial initiatives through international proposals such as the Online Dispute Resolution Platform in the EU but applied in a global scenario with the support of the countries, industry, consumers and consumer organizations. In this sense, companies around the world should take into account that if they base their business model on transparency, trustability and consumer´s desires, they would probably expand their trade and increase profit, making the e-commerce relationship a friendly and easy transaction for both parties.

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