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ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION MECHANISMS: PRINCIPLES EMERGING FROM THE CJEU JURISPRUDENCE

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Abstract

The digitalisation of justice is an ongoing process that characterises all EU Member States with different scopes and, most importantly, at a different pace. This process also extends to creating Alternative dispute resolution mechanisms that enhance citizens' access to justice (social network users, consumers, or business entities). ADRs are deemed a faster and cheaper process than judicial proceedings; they can adapt to the time and place constraints of the parties, allowing the possibility to meet or communicate in a diachronic manner. Although this seemed a solution that could easily enable citizens to exercise their rights, courts, particularly the Court of Justice of the EU, slowed down this process. The (few) cases decided by the CJEU show that the Court was initially sceptical in the use of alternative dispute resolution mechanisms to exercise EU-granted rights, and only through the repeated clarifications provided by the Member States in the arguments presented during the proceedings was able to change its approach. Still, the response of the CJEU was not simply accepting the member states' positions but instead providing them with a framework where the alternative dispute resolution mechanisms may ensure a fair trial and effective protection outside judicial proceedings. Thanks to this dialogue, we may identify a set of criteria that may guide policymakers' choices.

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Keywords

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1. The ongoing process of digitalisation of the European justice system

Online interactions may not only bring increasing opportunities to connect with others, engage in public discourse and exploit more comprehensive commercial options, reaping the benefits of a digitalised social, cultural and professional life; at the same time, these interactions also include the risk of conflicts and disputes among the subjects involved.[1] Examples may range from disputes regarding the goods or services bought from an online marketplace (e.g. refunds for flights or accommodation, defective pieces of clothing, etc.) to disputes concerning the content posted on a social network (e.g. content disabled due to violation of the terms and

[1] See the statistics available on the European Online Dispute resolution platform, available at https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show.

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conditions) or disputes related to data collected by AI-based software tools (e.g. unlawful collection of personal data for profiling activities).

In all these cases, users/citizens wanting to present a claim before a national authority or court and seek redress for the damage suffered will be based on different legislative acts. Until recently, online conflicts were bound to become in-person proceedings before national judges. However, this path is not an easy one. Starting a judicial proceeding means initiating a long journey, which may last for almost a year,[2] with increasing costs (primarily due to the cross-border nature of the dispute and the need for a legal representative). The proceeding, moreover, may not avoid the risk of lack of participation of the counterparty. Considering these challenges, it is more than understandable that, according to the most recent statistics regarding consumer disputes occurring in the online context, only 2,9% of consumers decide to pursue the judicial path whenever a problem regarding purchasing goods and services online occurs.[3]

Among the initiatives European legislator took to overcome such problems and enhance access to justice, the digitalisation of justice takes a prominent place. This digitalisation process was carried out by adopting several legislative acts to face the challenges of the available technology solutions and their possible coordination.[4] If the effort to modernise the European justice system was running at a reasonable pace until the 2020s, the process sped up as a result of the impact of the pandemics,[5] which

[2] According to the European Commission for the Efficiency of Justice (CEPEJ), the disposition time of civil and commercial litigious cases in the EU is, on average, 237 days. See https://public.tableau.com/app/profile/cepej/viz/EfficiencyEN/Efficiency.

[3] See the results of the 2022 Consumer conditions survey - standard survey, available at https://commission.europa.eu/document/download/0cdcc170-e877-4b3b-b4eb-404f47596896_en?filename=Consumer%20Conditions%20Survey%20-%20standard%20survey.xlsx. This perception is then confirmed by the statistics addressing business-to-business disputes, particularly regarding late payments, where the potential use of alternative dispute resolution vis-à-vis judicial proceedings is seen as a measure that could enhance the possibility of companies exercising their rights across all EU countries. See EU Payment Observatory, Enforcement measures combating late payments in commercial transactions - 2nd Thematic Report, March 2024, available at https://cdn.ceps.eu/wp-content/uploads/2024/04/Thematic-report-on-enforcement-measures_Final.pdf

[4] Elena Alina Onţanu, 'The Digitalisation of European Union Procedures: A New Impetus Following a Time of Prolonged Crisis' (2023) 5 Law, Technology and Humans 93.

[5] European Commission for the Efficiency of Justice (CEPEJ), "Lessons learnt and Challenges faced by the judiciary during and after the COVID-19 Pandemic", CEPEJ (2020)8rev, 2020, available at https://rm.coe.int/declaration-en/16809ea1e2; Marco Fabri, 'Will COVID-19 Accelerate

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- as a response to the limitations imposed to (in person) access to justice - required the digitalisation and dematerialisation of national judicial systems to guarantee access to justice also in a remote manner. The interventions of the EU focused on cross-border disputes, where the effects of the limitations and restrictions on the possibility of accessing court premises are even more evident.[6] Among the interventions aimed at improving access to justice[7] lies also the recent project to revise the overall online dispute resolution (ODR) mechanism package,[8] which includes the Directive on Consumer Alternative Dispute Resolution Mechanisms 2013/11 and the Consumer Online Dispute Resolution Regulation 524/2013.[9] This intervention should be read

Implementation of ICT in Courts?' (2021) 12 International Journal for Court Administration 2; 'Access to Justice and the COVID-19 Pandemic' (OECD 2020).

[6] Note that the Regulations on Service and Taking of Evidence Recast (Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence), OJ L 405, 2.12.2020, 1-39) and the e-CODEX Regulation (Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters, OJ L 150, June 1, 2022, 1–19) were quickly adopted. In contrast, the proposal for a Regulation on the Digitalisation of Cross-Border Judicial Cooperation and review of the Electronic Identification and Services (eIDAS) Regulation (Proposal for a regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, COM(2021)281) is ongoing.

[7] For a comprehensive analysis of the most recent developments, which are not always following a unified path, Onţanu (n 4). See also Xandra E Kramer, 'Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe' [2022] SSRN Electronic Journal <https://www.ssrn.com/abstract=4034962> accessed 25 August 2023.

[8] Proposal for a Directive amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, Brussels, 17.10.2023, COM(2023) 649 final and Proposal for a Regulation repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and Regulation (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, Brussels, 17.10.2023 COM(2023) 647 final. On the critical issues emerging from the existing framework of consumer alternative dispute resolution, see European Commission, Report to the European Parliament, the Council and the European Economic And Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, Brussels, 17.10.2023 COM(2023) 648 final and EESC opinion on the Proposal for a regulation of the European Parliament and of the Council repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, and the Proposal for a directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, INT/1047.

[9] Regulation (EU) No 524/2013 on consumer Online Dispute Resolution, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524.

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in the light of a wider strategy that sees alternative dispute resolution as one of the mechanisms to enhance access to justice, which includes the Digital Services Act,[10] the European Media Freedom Act,[11] the Data Act,[12] and the P2B Regulation.[13]

Before delving into the analysis, it is important to clarify the concept of alternative dispute resolution, which collects different types of procedures that provide means to resolve conflicts between two or more parties without a need to litigate the matter before a national (or supranational) court. In particular, one can distinguish between mediation,[14] negotiation,[15] adjudication or arbitration,[16] and conciliation. Depending on the type of mechanism selected, the result of the alternative dispute resolution mechanisms can be an agreement that has a binding or non-binding effect on the parties.[17] Moreover, the procedures may involve the assistance of a third party (such

[10] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102.
[11] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083, 17.4.2024.
[12] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2854, 22.12.2023
[13] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79.
[14] On the standards applicable to mediation in different sectors see CEPEJ, *Recommendation Rec(98)1 on family mediation; Recommendation Rec(2002)10 on mediation in civil matters; Recommendation Rec(99)19 concerning mediation in penal matters*, <https://www.coe.int/en/web/cepej/cepej-work/mediation> accessed 29 April 2024.
[15] Negotiation is widely used in various fields, including not only divorce and parental disputes, but also legal proceedings, see H Raiffa, *The Art and Science of Negotiation* (Belknap Press 2002). It is interesting to note that the use of technology is also applicable in negotiations leading to two alternatives: fully automated negotiation or assisted negotiation.
[16] See M. Piers, C. Aschauer (eds) Arbitration in the Digital Age, Cambridge University Press, 2018.
[17] For instance, as regards mediation, the most recent reform of the judicial system in Italy (so-called Riforma Cartabia) supported the use of this ADR mechanism and set it as a condition on for the admissibility of judicial proceedings as regards a list of specific disputes. See the text of art. 5 Decreto Legislativo 4 marzo 2010, n. 28, recante attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Legislative Decree no. 28 of 4 March 2010 implementing Article 60 of Law no. 69 of 18 June 2009 on mediation in civil and commercial matters) as amended by Decreto Legislativo n. 149 del 10 Ottobre 2022, di attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di

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as a professional mediator, an arbitrator or a lawyer) or may based on fully or partially automated tools.[18] Although distinctions among the different mechanisms exist, the analysis of such differences is outside the scope of this article. Therefore, in the following, the terminology used will be the most encompassing one, namely alternative dispute resolution.

ADR mechanisms have been qualified as means to enhance access to justice: they are a faster and cheaper process than judicial proceedings, and they can adapt to the time and place constraints of the parties. Moreover, in the case of online dispute resolution, the parties have the possibility to meet online or to communicate in a diachronic manner. Although this seemed a solution that could easily enable (online) users to exercise their rights, courts, particularly the Court of Justice of the EU, slowed down this process. The (few) cases decided by the CJEU show that the Court was initially sceptical in the use of alternative dispute resolution mechanisms to exercise EU-granted rights, and only through the repeated clarifications provided by the Member States in the arguments presented during the proceedings was able to change its approach. Still, the response of the CJEU was not simply accepting the positions of the member states but instead providing them with a framework where the alternative dispute resolution mechanisms may ensure a fair trial and effective judicial protection outside judicial proceedings. Thanks to this dialogue, we may identify a set of criteria that may guide European policymakers' choices. However, it must be highlighted that a step forward in the analysis is still needed: the criteria identified emerge from cases that deal with 'offline' ADR with limited attention afforded by the CJEU regarding the safeguards that should be applicable to the online ADR. However, given that the number of legislations referring to alternative dispute resolution mechanisms is increasing, it is possible that new cases will soon reach the court, requiring a finetuning of the aforementioned criteria.

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diritti delle persone e delle famiglie nonchè in materia di esecuzione forzata (Legislative Decree n. 149, of 10 October 2022, implementing Law N. 206 of 26 November 2021, delegating to the Government the efficiency of the civil process and the revision of the regulation of alternative dispute resolution instruments and urgent measures for the rationalisation of proceedings on personal and family rights and on enforcement). See G. Matteucci, Mediazione civile e commerciale in Italia dopo la Riforma Cartabia, Aracne 2024; A. M. Tedoldi, Le ADR nella riforma della giustizia civile, in Questione Giustizia, 2023, 1, 208.

[18] See also the *CEPEJ Glossary*, CEPEJ(2020)Rev1, 5, available at https://rm.coe.int/cepej-2019-5final-glossaire-en-version-10-decembre-as/1680993c4c.

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This contribution will proceed as follows: after a preliminary analysis of the role of alternative dispute resolution as a means to enhance access to justice will be provided (sect. 2), the study of the two strands of the CJEU case law on alternative dispute resolution will be presented. This core part will show the different approaches adopted by the court towards alternative dispute resolution and the responsiveness of the Court towards the arguments of the member states (sect. 3). Conclusions will follow.

2. Access to justice through alternative dispute resolution mechanisms

Access to justice, qualified as judicial protection of rights, has become the central pillar of the rule of law system since the 19th century.[19] From the perspective of the effective protection of rights, the concept encompasses both the right of defence and the right of action, considering the judicial path as the primary and indefectible form of protection of rights. Based on this right, the state must arrange for free and speedy access to the court, ensuring trial publicity and correcting mistakes.[20]

Many national Constitutions include the reference to access to justice for the protection of rights and legitimate interests.[21] Similarly, Art 6 and 13 of the European Convention of Human Rights (ECHR) provide, respectively, for the right to a fair trial and the right to an effective remedy, while Art. 47 of the European Charter of Fundamental Rights (EU Charter) provides for effective protection at the European level. According to the EU Charter, the right to effective protection requires fairness, transparency, reasonable length of the trial, independence, the judge's impartiality pre-

[19] Daniel Bonilla Maldonado, The Right to Access to Justice: Its Conceptual Architecture, in Ind J Global Legal Stud, n. 1, 2020, 15-33; Francesco Francioni (ed.), Access to justice as a human right (Oxford University Press 2007).

[20] Nicola Trocker, Costituzione e processo civile: dall'accesso al giudice all'effettività della tutela giurisdizionale, in Giust. proc. civ., n. 1, 2019, pp. 15-48.

[21] See art. 24 of the Italian Constitution, art. 18(2) of the Dutch Constitution, etc. See more in EVA STORSKRUBB and JACQUES ZILLER, 'Access to Justice in European Comparative Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) <https://doi.org/10.1093/acprof:oso/9780199233083.003.0006> accessed 7 November 2023.

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established by law and the guarantee of means for those who cannot afford a technical defence.[22]

The wording of the EU Charter and the ECHR explicitly refers to 'tribunal', thus adopting the view that access to legal protection shall be understood as access to courts, being them in the EU context, both the national and the European ones. In the latter case, legal actions can be brought before national courts according to national laws to enforce the rights granted by the EU law.[23] Applying the doctrine of direct effect and the primacy of EU law justifies this. These principles cannot be used if the rights granted by the EU legislator cannot be enforced with the substantive work of courts.[24]

Although the case law of the CJEU clarified that access to justice could not be interpreted as the ability to take legal action at every stage of the procedure,[25] the approach adopted by the EU Charter is the traditional one, where the administration of justice lies only in the hands of public courts. However, EU legislation and academic literature put forward a broader interpretation of access to justice, including methods to provide substantial law protection.[26] In this sense, access to justice is not

[22] See also Fundamental Rights Agency, 'Access to Justice in Europe: An Overview of Challenges and Opportunities', report, (2010), p. 14, available at fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf; Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing 2022) <http://www.bloomsburycollections.com/book/article-47-of-the-eu-charter-and-effective-judicial-protection-volume-1-the-court-of-justices-perspective> accessed 25 August 2023.

[23] This suggests that the concept of access to justice under EU law is narrow, formal, and pertaining to procedural rather than substantive rights of EU citizens to access courts. See Barbara Warwas, 'Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice in the EU' (Nomos Verlagsgesellschaft mbH & Co KG 2019) <https://www.nomos.elibrary.de/10.5771/9783748900351-325/access-to-privatized-consumer-justice-arbitration-adr-and-the-future-of-value-oriented-justice-in-the-eu?page=1> accessed 15 November 2023.

[24] Jagna Mucha, 'The Role of ADR in the Materialisation of Consumer Access to Justice', in Dan Wei, James P Nehf and Claudia Lima Marques (eds), *Innovation and the Transformation of Consumer Law: National and International Perspectives* (Springer Singapore 2020) <http://link.springer.com/10.1007/978-981-15-8948-5> accessed 4 October 2023.

[25] See Case C-69/10 Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration [2011] ECLI:EU:C:2011:524, para 56, where the court clarifies that it is sufficient that a court can review the final decision regarding EU claim.

[26] This wider interpretation is also used to justify the other developments of 'digital' justice, such as predictive justice systems. See Erik Longo, *Giustizia digitale e Costituzione* (FrancoAngeli 2023); Siddharth Peter de Souza and Maximilian Spohr, 'Introduction. Making Access to Justice Count:

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limited to the formal possibility of bringing an action before a judicial authority.[27] Still, in the procedural dimension, it expands to that set of rules and institutions of the process and the judicial system, making judicial protection not only activatable but also 'effective'.

To frame the role of online dispute resolution mechanisms to enhance access to justice, it is necessary to look back in time and look at the seminal works developed in the late 1970s by Mauro Cappelletti within the so-called Florence Project.[28] Within this research, Cappelletti acknowledged three waves aimed at enhancing access to justice for citizens that can be pursued outside the judicial proceedings, all included in the definition of "co-existential justice". The first wave referred to legal aid for people experiencing poverty, the second concerned enhancing public interest litigation, and the third encompassed the need to reform judicial systems, inviting more substance-oriented justice. In this last wave, Cappelletti's premise was that conflicts are more prone to 'receive' justice from alternative methods rather than within the traditional path before courts. In these cases, there is no need to define – and eventually sanction - who is wrong and who is right, thanks to the *jus dicere* of the judge, but rather a need to provide the means that allow the parties in conflict to find their own (self-determined, and thus creative) solution to the dispute. Therefore, the solution can 'mend' the relationship with a view to its continuation in the future.

Debating the Future of Law' in Siddharth Peter de Souza and Maximilian Spohr (eds), *Technology, Innovation and Access to Justice* (Edinburgh University Press 2021) <https://www.jstor.org/stable/10.3366/j.ctv1c29sj0.9> accessed 6 November 2023.

[27] For an analysis of the caselaw of the Italian Constitutional law on the role of ADR bodies, see Maria Grazia Rodomonte, Tutela giurisdizionale effettiva e indipendenza del giudice tra principi costituzionali e orientamenti della Corte costituzionale. L'esperienza dell'ordinamento italiano, in Mario Bertolissi, Marco Lamandini, Roberto Nania (eds), La tutela giurisdizionale effettiva dei diritti Sfide e prospettive in materia economico-finanziaria nell'ordinamento italiano, Franco Angeli, 2024, 43.

[28] Mauro Cappelletti, Bryant Garth, Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report, in Access to Justice, I, 1, 1 ss., 49 ss., 54 ss.; Mauro Cappelletti, Bryant Garth, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, in 27 Buffalo. L. Review (1978), 181; Mauro Cappelletti, Bryant Garth and Nicola Trocker, Access to Justice – Variations and Continuity of a World-Wide Movement, in Rabels Zeitschrift, 1982, 664; Mauro Cappelletti, Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement, in 56 Modern L. Review (1993), 282.

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This idea of 'mending justice'[29] cannot be applied as a general rule but rather in some specific disputes, such as family disputes involving minor children, neighbourhood disputes, and disputes between business partners whose primary interest is continuing the business relationship. In the abovementioned cases, the mending justice approach may be more effective due to the features that characterise the dispute: the litigation occurs as an episodic (albeit conflictual) interruption of the relationship between the parties rather than its fatal and definitive fracture. In these cases, the sword of the court's decision, which inevitably 'separates' the wrong from the right, cannot provide effective remedies. In contrast, the conflict would be overcome more effectively by creating a shared solution between the parties, allowing them to "co-exist" even in continuing the relationship.

However, such alternative solutions are not without risks, in particular when they are applied in the absence of certain conditions, such as the guarantee of a balance of power between the disputants, the independence and impartiality of the bodies that collaborate with the parties towards the agreement, as well as their competence.[30] Hence, there is a warning about the pitfalls underlying a critical translation of the mending and co-existential justice paradigm into the realm of any litigation. For instance, in the case of consumer disputes, the fact that there is a disproportion between the modest value of the dispute and the high costs of the process would lead to including such disputes into the ones that need *ad hoc* solutions;[31] however, the imbalance between the consumer and the professional requires careful consideration. In particular, if alternative dispute resolution mechanisms were to be used to resolve consumer disputes, special arrangements should be put in place aimed at balancing the substantial inequality between consumers and professionals (for example, providing support to the consumer regarding their rights by consumer associations); guaranteeing that procedures are carried out by qualified bodies, that comply with quality standards and transparency in funding mechanisms; ensuring the management

[29] Cappelletti (fn 28) 288.
[30] Cappelletti (fn 28) 287.
[31] In consumer litigation, the individual is in a new form of poverty, namely 'organisational poverty', as he/she is only a small fragment of the harm perpetrated by the professional on consumers. The consumer is isolated individual, and inevitably lacks sufficient motivation, knowledge, and power to initiate and pursue legal action against his - on the contrary - motivated, experienced, and powerful counterparty. Cappelletti (fn 28) 284.

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of procedures by experts consumer law and its mandatory rules.[32] Only if these conditions are complied with, and consumer litigation is solved through alternative dispute resolution can it ensure effective enforcement of consumer rights, avoiding the risk of providing second-class justice that would not consider the weaker position of the consumer.

The previous conditions can be generalised, and thus, it is possible to affirm that the requirements applicable to alternative dispute resolution mechanisms that safeguard the objective of co-existential justice, or the objectives of substantial judicial protection are the following:

- Sufficient information was provided to the right holders.
- Recognition of qualified dispute resolution providers.
- Defined procedures for the dispute resolution.
- Transparency of funding and absence of conflict of interests.
- Expertise in dispute resolution providers.

Although these elements are well-defined in the academic literature[33] and later included in the legislation adopted at the EU level, [34] the approach of the CJEU on the role of alternative dispute resolution mechanisms was initially less welcoming. This approach, however, has changed over time, thanks to the responsiveness of the CJEU towards the needs of the member states regarding the reforms applied to their justice system to introduce alternative dispute resolution mechanisms.

[32] Cappelletti (fn 28) 289. See also Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 Fla. St. U. L. Rev. 1 (1991).

[33] See also ELI-ENCJ Report On The Relationship Between Formal and Informal Justice: the Courts and Alternative Dispute Resolution, 2018, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement_Final.pdf.

[34] For a detailed analysis of the steps leading to the adoption of the consumer ADR Directive, see Betül Kas, 'The Untapped Potential of a Structured Interaction between Courts and ADR for the Resolution of Consumer Disputes in the EU' in Xandra Kramer and others (eds), *Frontiers in Civil Justice* (Edward Elgar Publishing 2022) <https://www.elgaronline.com/view/book/9781802203820/book-part-9781802203820-8.xml> accessed 25 August 2023.

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3. CJEU jurisprudence on alternative dispute resolution

A few are the cases in which the CJEU decided on alternative dispute resolution mechanisms. However, they provide valuable insights into how the court has changed its approach to consider the member states' positions regarding the possibility of including mandatory alternative dispute resolution mechanisms. Moreover, the court provided a minimum set of requirements for such a mechanism to comply with the principle of effective judicial protection. The cases can be clustered into two groups: the cases *Fritsch, Chiari & Partner* case,[35] *Grossmann Air Service* case[36] the first one, and then the *Alassini* case,[37] which became famous as being the first occasion where the CJEU mentioned at that time, recently enforced EU Charter; the *Menini and Rampanelli* case,[38] and *Volksbank Romania* case in the second one.[39]

a. The first group of cases on out-of-court dispute resolution

The first occasion in which the CJEU addressed alternative dispute resolution mechanisms was in the case of Fritsch, Chiari & Partner, which addressed compliance with EU law with mandatory application to a conciliation commission for public procurement contracts. The preliminary ruling before the CJEU was presented by the Austrian *Bundesvergabeamt* (Federal Public Procurement Office) based on a claim by a group of companies regarding the award of a public service contract by an Austrian *Autobahnen- und Schnellstraßen-Finanzierungs-AG* (Asfinag) for which the companies had

[35] CJEU, Case C-410/01 Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v. Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag) [2003] ECLI:EU:C:2003:362.
[36] CJEU, Case C-230/02 Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich, [2004] ECLI:EU:C:2004:93.
[37] CJEU, Judgement of the Court (Fourth Chamber) of 18 March 2010, Rosalba Alassini v. Telecom Italia SpA and alii, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, ECLI:EU:C:2010:146.
[38] CJEU, Judegment of the Court (First Chamber) of 14 June 2017, Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa, Case C–75/16, ECLI:EU:C:2017:457.
[39] CJEU, Judgement of the Court (Fourth Chamber), 12 July 2012, SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor — Comisariatul Judeţean pentru Protecţia Consumatorilor Călăraşi (CJPC), Case C-602/10, ECLI:EU:C:2012:443.

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tendered. According to the Austrian implementation of Directive 89/665 on the application of review procedures to the award of public supply and public works contracts, the review procedure involved a preliminary conciliation phase aimed at reconciling '*any differences of opinion between the awarding body and one or more candidates or tenderers*'.[40] The newly created Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, hereinafter B-VKK) was the body in charge of such a conciliation phase. Although participation in the conciliation phase is not mandatory, any claim related to the application of federal law or its implementing regulations can only be carried out before the contract is awarded. After the award of the contract, any claim should be presented before the Bundesvergebeamt, which will have the power to adopt interim measures and, if required, set aside the unlawful decisions of the contracting authority.[41]

In the case presented before the CJEU, the claimants, Fritsch, Chiari & Partner, submitted a claim regarding the illegality of the tendering procedure before the Bundesvergebeamt. However, Asfinag argued against the admissibility of the claim, affirming that such a claim would have to be presented during the conciliation phase before the B-VKK.[42] The Bundesvergebeamt then suspended the proceeding and requested the CJEU a preliminary ruling, asking in particular if the review procedure could proceed even if the undertaking did not use the conciliation phase to prevent the contract from being awarded. The CJEU based its argument on the objectives of Directive 89/665, which provides effective and swift review procedures for disputes emerging in public procurement.[43] Article 1(3) provides that "Member States shall ensure that the review procedures are available"; thus, it was a choice of the national legislator to implement the directive through the procedure involving a conciliation phase and then a judicial proceeding before the Bundesvergebeamt. According to the Court, the Austrian implementation was contrary to the principles enshrined in Directive 89/665, as the conciliation phase contrasted with the objectives of effectiveness and speed: the fact that a prior application before the conciliation commission was a condition for the subsequent participation in the review procedure

[40] Para 109 of *Bundesgesetz über die Vergabe von Aufträgen* (Bundesvergabegesetz) - Federal Public Procurement Law, 1997, BGBl. I, 1997/56 (hereinafter BVergG).
[41] Para 113 BVergG.
[42] See CJEU, Fritsch, Chiari & Partner (fn 35) paras 15-16.
[43] See CJEU, Fritsch, Chiari & Partner (fn 35) para 30.

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would only delay the introduction of the latter. Additionally, the Court stated that the conciliation commission does not have the powers the EU law requires to be granted by the Member States to the bodies responsible for carrying out the judicial review procedures, hampering the effective application of the relevant EU law. As a result, the Court affirmed that national legislation could not deprive those undertakings that failed to apply to the conciliation commission of the possibility of accessing the review procedure in advance.[44]

It must be highlighted that, in its analysis, the Court disregarded the arguments of the Austrian and French governments (as well as the Commission)[45] which compared the case with the Court's previous decisions in *Universale Bau*.[46] The latter case addressed the inclusion of limitation periods for bringing proceedings before the authority in charge of administrative review. According to the AG's Opinion,[47] sharing the positions of the member states, the effectiveness of the Directive was not undermined by a national procedure that "*requires a tenderer to take all steps reasonably available to it to prevent the contract from being awarded to another tenderer*", even if it also included a conciliation phase. On the contrary, the Court interpreted the effectiveness in light of the speediness of the procedure, and thus, any additional step was deemed as hampering the effective review.

Similarly, in the Grossmann Air Service case, the Bundesvergebeamt presented a new preliminary ruling addressing the position of an undertaking that did not participate in a tender or present any claim before the B-VKK during the conciliation phase.[48] The Court re-affirmed the principle already defined in Fritsch, Chiari & Partner, clarifying that access to the review procedures should not be made subject to prior referral to a conciliation committee such as the B-VKK because the national legislation would be contrary to the objectives of speed and effectiveness of the underlying directive.

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[44] See CJEU, Fritsch, Chiari & Partner (fn 35) para 35.
[45] See the reference to the arguments in the Opinion of Mr Advocate General Mischo delivered on 25 February 2003, Fritsch, Chiari & Partner, ECLI:EU:C:2003:104, paras 43-45.
[46] CJEU, Judgment of the Court (Sixth Chamber), of 12 December 2002, Universale-Bau AG, Bietergemeinschaft v Entsorgungsbetriebe Simmering GmbH, ECLI:EU:C:2002:746
[47] AG Opinion, Fritsch, Chiari & Partner (fn 45), paras 40-41.
[48] It must be clarified that in this case, a first tender procedure was initiated and then discontinued. The undertaking provided its bid in this first tender. Then, the tender procedure was represented with a narrower focus. In this second procedure the undertaking did not present its bid.

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The evaluation of the Court in the previous cases shows that the conciliation procedures, as forms of alternative dispute resolution mechanisms, were, in principle, considered an unnecessary step in the review procedure. The Court viewed them as a prolongment of the duration of the overall system without the possibility of providing an effective remedy to the parties to overcome potential conflicts. In this case, only a different authority, such as in the case at stake, the Bundesvergebeamt, was seen by the Court as having the (sanctioning) powers granting effective remedies.

A different approach was adopted a few years later when the second group of cases started. The shift was triggered by a different approach towards alternative dispute resolution mechanisms adopted at the national level. In particular, the Court acknowledged that the introduction of ADR mechanisms was aimed at enhancing the speed and limiting the costs of dispute resolution for the parties and enhancing the effectiveness of the administration of the justice system. [49]

b. The second group of cases on out-of-court dispute resolution

As a preliminary observation, it must be highlighted that this second strand of cases addresses different types of national disputes involving consumers as one of the parties. The European Commission acknowledged the opportunity to use alternative dispute resolution to settle disputes in this area. Already in 1993, the Green Paper on Consumer Access to Justice in the Internal Market[50] noted the increasing presence of consumer ADR, and this triggered the intervention of the Commission Action Plan on "Consumer access to justice and the settlement of consumer disputes in the

[49] See for instance the position of the Italian government, as referred in the Opinion of Advocate General Kokott delivered on 19 November 2009, Rosalba Alassini et al., ECLI:EU:C:2009:720, Para 45.

[50] Commission's Green Paper, 16 November 1993, on access of consumers to justice and the settlement of consumer disputes in the single market – COM(93) 576 Final, p. 76.

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internal market".[51] If the Action Plan was the starting point for the analysis of the challenges of cross-border consumer disputes to be solved in an alternative forum vis-à-vis courts, the subsequent Commission Recommendation on the out-of-court settlement of consumer disputes[52] could be defined as a reply to the different types of ADR already available on the market, laying down the principles that should apply to the settlement of consumer disputes. These measures show that the policy framework already acknowledged the use of out-of-court procedures for resolving consumer disputes as an effective technique to achieve the consumer protection objective, which may be equivalent to judicial enforcement. [53] Although no mention of this overall framework is included in the arguments of the CJEU in the cases that will be analysed below, it is presumable that the European approach towards alternative dispute resolution has affected the choices of the Court.

The first case that showed a different approach by the CJEU was the decision in the Joined case, Alassini et al. The Joined cases, named after the first claimant, are all based on the application of the Italian implementation of the Directive 2002/22 on Universal Services and users' rights relating to electronic communications networks and services (Universal Service Directive), namely Legislative Decree n. 259/2003.[54] The latter, in article 84, included a pre-judicial mandatory out-of-court settlement procedure in litigation concerning electronic communications. The cases were resolved around the complaints lodged by consumers against different telecommunication service providers that failed to comply with the pre-trial out-of-court settlement procedure, which Italian law set as mandatory conditions to bring a complaint to court. The Italian courts presented a set of similar preliminary rulings on the compliance of compulsory such alternative procedure with the rights granted to consumers under the Universal Service Directive, and especially with Article 34 of

[51] Communication by the Commission on 14 February 1996, COM(96) 13 Final, "Action plan on consumer access to justice and the settlement of consumer disputes in the internal market".
[52] Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, COM(1998) 198 Final, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=1998&nu_doc=198>.
[53] See for an analysis of the telecom sector, Marta Cantero Gamito, 'Dispute Resolution in Telecommunications: A Commitment to Out-of-Court' (2017) 25 European Review of Private Law 387.
[54] Legislative Decree no. 259 of 1 August 2003, relating to the Electronic Communications Code (GURI no. 214 of 15 September 2003, p. 3).

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that Directive, under which Member States "*shall ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive […] without prejudice to national court procedures*."

The CJEU solved the dispute, assessing whether the mandatory alternative procedure complies with the principle of effectiveness and the right to an effective remedy enshrined in Art. 47 EU Charter.[55] A first point the Court addressed was that the Universal Service Directive was not deemed to be construed as explicitly prohibiting a pre-judicial mandatory settlement procedure.[56] Then, the court assessed the dimensions of effectiveness because the mandatory alternative procedure may hamper the substantive rights granted to consumers by the Universal Service Directive. Although the principle of procedural autonomy grants member states the possibility to define the procedural rules that govern the actions that safeguard the EU-granted rights, this autonomy must be exercised respecting the principles of equality and effectiveness. Thus, any procedural rule should not "*make it in practice impossible or excessively difficult to exercise the rights which individuals derive from the directive*". To test whether this is the case, the CJEU further stated six specific criteria:

- the procedure shall not result in a decision which is binding on the parties;
- the procedure shall not cause a substantial delay in bringing legal proceedings;
- the procedure shall suspend the period for the time-barring of claims;
- the procedure shall not give rise to significant costs for the parties;
- the procedure shall not be accessible only by electronic means and
- the mandatory requirement shall not prevent the grant of interim measures in exceptional cases where the urgency of the situation requires.

The CJEU then continues its reasoning, also addressing the compliance with Art. 47 EU Charter, as the mandatory alternative procedure, would potentially hinder

[55] Angiolini Chiara, Iamiceli Paola, "Access to justice and effective and proportionate Alternative Dispute Resolution (ADR) mechanisms", in Paola Iamiceli, Fabrizio Cafaggi and Mireia Artigot i Golobardes (Ed.), Effective Consumer Protection and Fundamental Rights, Fundamental Rights in Courts and Regulations (Fricore)-Scuola Superiore della Magistratura, Rome, 2022, p. 283 ff.
[56] See CJEU, Alassini et al. (fn 37) par. 42.

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consumers' access to judicial redress. The starting point of the CJEU is the fact that fundamental rights shall not be construed as unfettered prerogatives and may be restricted; however, such restrictions may only be considered lawful when they pursue objectives of general interest through proportional means and without excessively impairing the substance of the rights guaranteed.[57] According to these conditions, the imposition of a mandatory alternative procedure for dispute settlement is not contrary to Art. 47 EU Charter, as it pursued the general and legitimate objectives of offering a quicker and less expensive method for settling disputes and reducing the burden on the court system. Moreover, the alternative option of providing a merely optional procedure would not be as efficient. Implicitly, the Court interpreted art. 47 EU Charter in a wider sense, giving space for a broad notion of effective access to justice that may encompass access not only to a court but also to ADR.[58] However, such legitimacy is conditional on compliance with the principle of effectiveness.

It is essential to highlight that, in this case, the national government defended its choice with detailed arguments. The Court considered the position of the Italian government regarding the justification for adopting the national rule regarding the out-of-court dispute resolution procedure. The Italian Government pointed out that the mandatory requirement aims to achieve quicker and less expensive resolution of disputes, which could consequently reduce "*the burden on the court system as a whole and thus enhances the effectiveness of the administration of justice by the State*".[59] This was also confirmed in the AG's opinion, which acknowledged that the infringement of the right to judicial protection represented by the requirement to attempt out-of-court dispute resolution must be regarded as minor so that the advantages of that procedure far outweigh any possible disadvantages.[60]

The following case is the Menini and Rampanelli case, where the preliminary ruling revolved around the national implementation of the ADR Directive in Italy and, in particular, the mandatory pre-judicial out-of-court settlement procedure in some civil and commercial matters, including (as relevant for consumer litigation): tort liability

[57] See CJEU, Alassini (fn 37) par. 63.
[58] Kas (n 34).
[59] CJEU, Alassini (fn 37) para 64.
[60] AG Opinion, Alassini (fn 49) para 48.

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in healthcare, insurance, banking and financial contracts.[61] The validity of the mandatory ADR procedures was questioned by the national court when addressing a credit agreement-related dispute: the judge was asked to decide on the opposition to an enforceable payment order, but being one of the parties, a consumer, a mandatory pre-judicial ADR procedure should have been completed to access the judicial proceeding. On this point, however, the doubt raised by the judge concerned the possibility of imposing such mandatory procedure as an admissibility condition to legal proceedings.

The CJUE solved the case following the arguments already stated in Alassini. First, the court interpreted the terminology used in Art. 1 ADR Directive, saying that "*on a voluntary basis*" should be framed in light of the context and the objectives pursued. Moreover, the same article allows for mandatory procedures regarding the parties' right to access judicial proceedings to be maintained.[62] As a supporting argument, the court affirmed that this interpretation did not contradict the provisions of Directive 2008/52 on mediation, which in Art. 3(a) affirms that national legislation may use compulsory mediation only as "*such legislation does not prevent the parties from exercising their right of access to the judicial system*".[63] The Court then compared the national legislation with the criteria set out in Alassini. It affirmed that the additional step before accessing the court imposed by the participation in the mandatory ADR proceeding is not in principle in contrast with the principle of effective judicial protection if it is based on "*objectives of general interest pursued by the measure in question*" and the measure itself is proportionate with the objective. In the specific case, the mandatory ADR procedure can be compatible with effective judicial protection if it does not result in a binding decision, does not cause substantial delay for bringing judicial proceedings, does not

[61] See art. 5 of Decreto Legislativo 4 marzo 2010, n. 28, recante attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Legislative Decree no. 28 of 4 March 2010 implementing Article 60 of Law no. 69 of 18 June 2009 on mediation in civil and commercial matters).

[62] See CJEU, Menini and Rampanelli (fn 38) par. 48. It should be noted that the AG Opinion, frame the same issue considering directly art. 47 EU Charter, affirming that in the field of consumer law the procedural autonomy of the member states is constrained by respect of the right to an effective remedy and to a fair trial guaranteed by Art. 47 EU Charter, and he suggested that compliance of a mandatory pre-judicial procedure with such provision should be verified by taking into consideration the six tests stated in the Alassini case. See AG Opinion Saugmandsgaard Øe, Case C-75/16, Menini and Rampanelli v Banco Popolare, 16 February 2017, ECLI:EU:C:2017:132, par. 82.

[63] See CJEU, Menini and Rampanelli (fn 38) par. 49.

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give rise to costs for the parties, it is available both in online and offline context, and it suspends the period for the time-barring of claims.[64] Then, it is up to the national court to verify the application of such conditions to the national legislation.

The last case to be considered is the Volksbank Romania case, which addressed the interpretation of Directive 2008/48 on consumer credit directive, in particular Art. 24 affirming that Member States shall ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place. The national judge presented a preliminary ruling regarding compliance with EU law and national legislation implementing the directive into the Romanian legal system, namely OUG 50/2010.[65] According to the legislation, the consumer was able to present a direct recourse to the National Consumer Protection Authority (District Commissariat for Consumer Protection of Călăraşi, ANPC), being the latter empowered to impose penalties on credit institutions for infringements of the national regulation. However, such an option was available to the consumer without the need to pursue an out-of-court resolution procedure.[66]

The CJEU affirmed that the out-of-court dispute resolution procedures, according to Art. 24 Directive 2008/48, should be adequate and effective. However, no additional guidelines regarding these procedures are given in the Directive, leaving the Member States free to decide the details. This leeway extends also to a choice between voluntary or mandatory procedures as long as they remain effective.[67] The court recalled again the decision in the Alassini case and acknowledged that a mandatory pre-judicial dispute resolution procedure could strengthen the effectiveness of Directive 2008/48; however, the discretion left to Member states by Art. 24 still does not preclude the adoption of a rule that opens an additional option before consumer protection bodies. Such an option does not reduce the out-of-court proceedings' adequacy and effectiveness; instead, it is justified by the fact that "*consumers, who are as*

[64] See CJEU, Menini and Rampanelli (fn 38) par. 61.
[65] Government Emergency Order (Ordonanţă de Urgenţă a Guvernului) 50/2010, *Monitorul Oficial al României,* Part I, No 389 of 11 June 2010.
[66] Note that art. 85(2) OUG 50/2010 provided that : "*In order to settle any disputes amicably and without prejudice to the right of consumers to bring proceedings against creditors and credit intermediaries who have infringed the provisions of this emergency order and to their right to have recourse to the [ANPC], consumers may use the out-of-court complaints and compensation procedure for consumers, in accordance with the provisions of Law 192/2006 on mediation and the organisation of the profession of mediator, as amended and supplemented*".
[67] See CJEU, Volksbank Romania (fn 39) par. 95.

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a general rule in an inferior position to creditors so far as concerns both bargaining power and level of knowledge, will be unaware of their rights or encounter difficulties in exercising them".[68]

4. Conclusion

Access to justice is one of the fundamental rights that has always been on research and policy agenda, but the challenges that may hamper its exercise by citizens are never solved once and for all. The ever-present issues related to costs and delays of judicial proceedings are now coupled with the challenges (and opportunities) emerging from using technological innovations to deliver justice. This led to an ongoing revision and refinement of the justice system at national and supranational levels. At the European level, the legislation addressing these challenges has triggered the adoption of several legislative documents related to the improvements of features and elements regarding judicial proceedings and more detailed and efficient rules regarding alternative dispute resolution mechanisms.

It must be acknowledged that access to justice is framed in the ECHR and the EU Charter as access to a court. This fundamental right encompasses elements ranging from fair trial guarantees to independence and impartiality of the judge to the right to be heard, to the right to be advised, defended and represented, and equality of arms.[69] However, access to court also includes very practical issues, such as the easiness of finding the court premises and specific offices or courtrooms, the availability of information on opening hours, the presence of physical and language barriers, the attention of the personnel to the court users' needs, and availability of procedural forms that need to be filled with the court.[70] Yet, this interpretation should be extended to adapt the justice system to the needs of informal, accessible, fast, and cost-effective procedures: effective access to justice is not limited to the existence of

[68] See CJEU, Volksbank Romania (fn 439) par. 98.

[69] For a detailed analysis of the CJEU jurisprudence on art. 47 EU Charter on the right to an effective remedy see ACTIONES project, Handbook on the Techniques of Judicial Interactions in the application of the EU Charter, Module 3 – The Right of an effective remedy, 2017, <https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.c-Module-3.pdf> accessed 30 November 2023.

[70] Marco Velicogna, 'Electronic Access to Justice: From Theory to Practice and Back' [2011] Droit et cultures. Revue internationale interdisciplinaire <https://journals.openedition.org/droitcultures/2447> accessed 29 November 2023.

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a competent court and a formal entitlement to instituting proceedings. It also relates to the possibility of the parties claiming their rights in court and receiving a fair and good-quality decision within a reasonable time and cost. In this sense, the ADR mechanisms have proven to be a viable option to avoid some issues emerging from judicial proceedings. This does not imply that the ADRs are problem-free: academic literature has on several occasions criticised ADRs as second-class justice or providing opportunities for 'justice behind closed doors'.[71] Still, the ADR can achieve a 'co-existential justice' that aims to reach a solution that may ensure effective enforcement of rights.

The first set of criteria that should apply to ADR is found in the CJEU case law. Although the Court has rarely addressed the issue of ADR, a few cases show a definite change of approach toward these mechanisms triggered by the Court's responsiveness towards the needs of the Member States. If, in the case of *Fritsch, Chiari & Partner* and *Grossmann Air Service,* the Court denied any added value to conciliation being able to hamper the swift and effective application of EU law, in *Alassini* case, the Court considered and supported the positions of the Member States as regards the possibility to include mandatory alternative dispute resolution mechanisms. Although the Court does not delve into the specific rules regarding the relationship between the ADR mechanisms and the subsequent judicial proceeding, it acknowledged that such a relationship may not, in principle, hamper the application of the principle of access to justice, enshrined in Article 47 of the EU Charter.[72] In particular, the Court justified this different approach on the fact that the introduction of ADR mechanisms at the

[71] See Horst Eidenmüller, Engel M (2014) Against false settlement: designing efficient consumer rights enforcement systems in Europe. Ohio St J Disp Resol 29:261 – 297; Gerhard Wagner, 'Private Law Enforcement through ADR: Wonder Drug or Snake Oil?' (2014) 51 Common Market Law Review 165; Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive' (2015) 38 Journal of Consumer Policy 265; Joasia Luzak, 'The New ADR Directive: Designed to Fail? A Short But Hole-Ridden Stairway to Consumer Justice' [2015] SSRN Electronic Journal <http://www.ssrn.com/abstract=2685655> accessed 25 August 2023; Pietro Sirena, Tutela dei diritti fondamentali e sistemi di risoluzione alternativa delle controversie, Rivista di Diritti Comparati, 2022, 1, 95.

[72] For instance, the Court does not address the problems that may emerge when the ADR is a condition to the admissibility of the subsequent judicial proceeding, such as in the Italian legal system. In this case, it is possible that the ADR procedure does not exactly converge with the judicial claim presented to the court. Thus, it will be the task of the judge to verify that the procedure has been correctly carried out, but without the possibility to rely on the traditional objective elements of the *res in iudicium deducta*. See on this point, Tedoldi, (fn 17).

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national level was aimed at enhancing the speed and limiting the costs of dispute resolution for the parties, as well as at improving the effectiveness of the administration of the justice systems. However, the Court identified six general criteria to assess the compliance of the ADR with the principle of access to justice. Such a test was then used in the subsequent decisions of the Court, showing that it applies to any ADR mechanism regardless of its qualification at the national level.

When looking at the potential adaptation of the principles defined by the CJEU to online disputes, it is interesting to note that the Court includes this option, affirming that different means should be available for the parties. This is relevant as the Court recognised that the exercise of rights (conferred in the case by the Universal Service Directive) might be rendered impossible or excessively difficult for individuals without access to the Internet if the settlement procedure could be accessed only by electronic means.[73] However, the Court does not require any additional aspects regarding the accessibility of the online procedure for consumers, as the mere availability of the offline option may have been supported by other requirements, taking into account the different levels of vulnerability that users may have.[74] Given the push towards an increasing role of ADR in several areas, and predominantly in resolving disputes on online platforms, it is probable that cases will emerge regarding a more detailed analysis of the criteria applicable to how ADR should be framed in the online context.

[73] See CJEU, Alassini (fn 37) para 58.

[74] For an analysis of the concept of average consumer vs vulnerable one, see Hanna Schebesta and Kai Purnhagen, 'Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD' (2020) 28 European Review of Private Law 293. For an evaluation of the additional effort to be adopted by online dispute resolution providers as regards vulnerable consumers and users, see Federica Casarosa, 'Access to (Digital) Justice: Is There a Place for Vulnerable People in Online Dispute Resolution Mechanisms?', (2024) EuCML 126.