Let me start by congratulating the European Commission on the drafting of these two important legislative proposals that crystallise the commitment in encouraging the use of ADR and ODR to enhance consumer redress outside the courts. These legislative initiatives have the aim of boosting consumer confidence in the internal market.

As you are well aware, the proposed Directive on consumer ADR requires Member States to ensure the provision and availability of ADR entities that comply with legal standards for the resolution of consumer complaints. It also requires traders to inform consumers of whether or not they are committed to participate in ADR. The Regulation on consumer ODR proposes the establishment of a pan-European ODR Platform that will become a single point of entry for resolving online cross-border consumer complaints arising from e-commerce. I assume that most of you are very familiar with the proposals, so during the next few minutes I would like to make a number of suggestions that in my view would contribute towards a successful implementation of these two proposals:

I. [ADR/ODR] **Sector-specific requirement to participate in “effective” internal complaint processes:** According to best practices in dispute resolution, complainants should be required to participate in the traders’ internal complaint processes when these are available and effective. However, there must be safeguards for the compliance with this requisite; the use of in-house mechanisms should be balanced with imposing additional burdens to consumers that might delay their right to obtain redress. Requiring parties to use “effective” internal complaint handling processes would not only comply with the principle of subsidiarity, settling complaints in the most convenient manner, but it would also remove the conflicts with the sector-specific legislation which frequently require parties to employ these internal mechanisms before using ADR. Currently there are over thirty sector-specific laws which require Member States the provision of ADR schemes, such as in telecoms, energy, insurance, financial services, transport, and postal services. The proposed Directive requires Member States to provide compliant ADR in all sectors, yet most sector-specific ADR entities presently do not comply with the standards set in the ADR Directive (mainly because they are not impartial within the meaning of the Directive). Thus, Member States will need to fulfil this obligation by either (i) changing the existing complaints scheme to make it compliant with the definition of the ADR Directive, or (ii) setting up a residual ADR entity or scheme. In addition, it is worth considering whether the Council or the Parliament should amend the proposed ADR Directive to allow ADR entities and the Platform to first require parties to attempt the resolution of complaints through internal complaints mechanisms when these are efficient, accessible and adequate for resolving the complaint. Hence, in my view, in regulated sectors the ODR Platform or ADR entities should, at least, have the discretion of requiring the consumer to first participate in (effective) sector-specific in-house complaint processes.
services before they can access a fully-fleshed ADR entity that complies with the ADR Directive. However, this new requirement should have built-in safeguards to ensure that it does not create further barriers to consumers’ access to redress—e.g. traders must have complaint process set up in the language of the consumer; there must be a short deadline for the trader to reply complaints, etc.

II. [ODR] **Automated negotiation in the ODR Platform:** These proposals do not require parties to attempt to resolve disputes directly amongst themselves, so there is a risk that traders may find out about the complaint through the Platform, which will automatically offer them to agree on the selection of an ADR entity. It would be preferable if the Platform clearly allows parties the opportunity to negotiate a settlement without the intervention of third neutral parties. This approach would be in line with the model procedural rules that UNCITRAL Working Group III is now developing for ODR. The objective here again is to settle the dispute as early as possible. Indeed, that is how eBay resolves over sixty million disputes annually, without the intervention of neutral parties, employing automated negotiation tools that settle the majority of complaints between eBay buyers and sellers. ODR tools can propose fair computer-generated proposals that are tailored to the complaints. Conversely, if resolution of disputes is not highly automated, parties require sophisticated ad hoc translations, and each dispute is resolved with the intervention of third neutral parties, then we will be replicating traditional ADR processes making the whole system more costly and less effective. It should be noted that the cost of resolving a case through ADR is around 400 euros per unit (e.g. Financial Ombudsmen Services in the UK and the Consumer Arbitration Scheme in Spain).

III. [ODR] **Complaint forms should be coupled with information on consumer rights:** The ODR Platform should provide parties with information on consumer law related to the sale of goods and the provision of services. This information should be coupled with examples of the resolution of similar disputes, and it should be provided in a clear and targeted manner with the aim of filtering unmeritorious claims and promote voluntary settlement. An effective negotiation tool could tailor the information into different types of complaints thus helping the parties to settle the dispute as early as possible and without the intervention of third neutral parties whenever possible. Thus, negotiation could potentially act as a ‘funnel’ that would save the costs of using ADR schemes.

IV. [ADR] **Pre-existing commitment to participate in an ADR process:** According to the ODR Regulation both parties must agree to an ADR process, and if they do not agree, then the complaint will not be sent to the ADR entity. Although, this approach would be correct for many disputes, there will be cases where the consumer would be able to pursue a complaint without agreement from the trader. In other words, there are ADR entities (mainly ombudsmen schemes) that process consumer complaints without the traders’ agreement to
participate. This is for example the case of the legal ombudsman in the UK, which receive complaints about lawyers, or the Financial Ombudsman Services, which settle complaints related to financial services in the UK. Furthermore, there are also EU sector-specific laws that make the participation of the trader in an ADR schemes mandatory. Another exception may occur in the cases where the traders are adhered to the ADR scheme (e.g. arbitration) through a trustmark program before the dispute arises.

V. **[ADR] The traders’ information obligation should clarify whether ADR is offered in the language of the transaction:** The Regulation provides for the creation of standard complaint and response forms in all the languages of the EU. However, once the disputes escalate to an ADR entity the Platform will simply inform the consumer about the language in which the available ADR procedure will be conducted. This could potentially be an insurmountable limitation if parties do not agree on the language. Parties may be expected to agree to a process conducted in the language of the transaction. This in itself may be challenging to consumers, who may be prepared to participate in e-commerce using a foreign language, but their language levels may not be sufficiently nuanced to engage meaningfully in an ADR system. Traders, on the other hand, as repeat players, will be more capable of participating in the ODR process. Although, the Regulation designates ODR facilitators as the intermediaries to assist parties with language barriers, the man power of this resource will obviously be quite limited. Hence, when traders inform consumers about their adherence to ADR entities, they should clarify whether the ADR process is offered in the language of the transaction.

VI. **[ODR] The ODR Platform should be optional for domestic complaints and offer a case management tool:** The ODR Platform should also be available for domestic disputes, offering consumer a real single point of entry to resolve all complaints arising from e-commerce. While imposing the ODR Platform as a hub to deal with all domestic consumer complaints will fall outside the competence of the EU, nothing impedes the EU from offering the technological tools that the ODR Platform will develop to consumers, traders and ADR entities that wish to use it. The use of the ODR Platform for both, domestic and cross-border disputes will significantly increase the awareness amongst the parties who could benefit from it. Furthermore, the ODR Platform should be something more than a website that allows the consumer to submit a complaint which, when the other party agrees, is then redirected to an ADR entity. The ODR Platform should offer an automated negotiation tool to the parties and additional case management tools to the approved ADR entities. It would be preferable if the ODR Platform becomes a one-stop shop for resolving consumer complaints rather than just forwarding complaints to ADR entities which use their own interface systems. Thus, in my view the ODR Platform should provide an optional case management tool for the ADR entities that would allow them to provide their ADR processes through the ODR Platform. In due course the ODR Platform would also help national ADR entities to develop common and interoperable standards in an organic manner.
VII. [ADR] Distinction between binding and non-binding processes, and clarifying the validity of pre-dispute arbitration clauses: In binding processes, in particular arbitration, the Directive should clarify under which circumstances a pre-dispute agreement is valid. As traders are allowed to bring complaints against consumers in binding ODR there may be a risk of having a high number of default cases, where the consumer national laws may be disregarded, particularly as the principle of legality is not explicitly included in the proposed legal instruments. It is proposed that the competent authorities should be able to grant the validity of these pre-dispute agreements on an ad hoc basis when arbitration providers could assure an adequate protection of consumer rights and/or they are covered by the legal provisions that implement the proposed ADR Directive. This approach would be in accordance with Annex I[q] of the Unfair Contract Terms Directive and Article 84(d) of the European Common Sales Law.

VIII. [ADR] Decisions in binding processes should be published: This is not necessary in non-binding processes where parties freely agree to an amicable settlement. Indeed the Directive has included important safeguards on this front – e.g. cooling-off period. Moreover, transparency in outcomes will assist in the amicable settlement of disputes. The resolution of consumer disputes should follow that of a pyramid, where at the majority of disputes should be settled voluntarily between the parties with the assistance of the technology (the fourth party) and only a small proportion of these should escalate to adjudicative processes where a third neutral party will resolve the disputes. These adjudicated decisions should be public in order to ensure transparency in the process.

IX. [ODR/ADR] Incentives to participate and to settle: Another key for the success of this initiative is to ensure that parties, particularly traders as the most likely respondents, have incentives for participating in ADR. The proposals only require the traders’ information obligations, but this requirement will be more effective if it is coupled with for e.g. trustmarks and blacklists. Incentives should not only be used for traders to participate but also for parties to settle early their complaints. A combination of rewards and punishment in the form of incentives and swift enforcement are essential for promoting voluntary settlement between the parties. Also, allowing national courts the power of not awarding legal costs to a litigant where an ADR option existed and where it was reasonable to use, as well as case fees and a swift connection to enforcement agencies will be a means of offering the carrot and the stick to traders. Yet, above all, it is important to emphasise that parties should be encouraged to settle without the intervention of third neutral parties, which is more likely to happen when the ODR process ends in an effective and foreseeable adjudicative outcome; however, given the choice, traders may be more inclined to keep control over their own settlements or agree to an arbitration system that it is tailored to their own preferences.
X. **[ODR] Close collaboration between the ODR Platform and consumer enforcement agencies:** Enforcement agencies should have access to the information submitted in the Platform to indentify rogue traders at an earlier stage. Consumers will not be aware when filing a complaint if the trader is acting in good faith or not; however the ODR Platform could easily build technology that would allow identification of bad practices –e.g. a trader that never responds to complaints, or where there are indications of fraud. A close cooperation between the ODR Platform and enforcement agencies is essential to ensure a quick response to fraudulent activity.

**Conclusion:**

If successful these initiatives will transform the provision of ADR into a guarantee that will enhance consumer confidence, especially in the digital market, helping to boost e-commerce through the encouragement of trust-worthy business models that would be favoured in an increasingly competitive internal market. However, since in practice it will be mostly traders who will choose and pay for ADR entities, there will be a risk for forum shopping. This begs the question would consumer ADR ensure a higher level of consumer protection or push consumers to reach settlements that disregard their legal rights? Only the effective monitoring of ADR entities by the competent national public authorities could ensure the former. Therefore, in these times of public cuts it is hoped that governments will allocate sufficient resources to avoid traders from tailoring ADR entities to their needs so that an adequate level of consumer protection could be guaranteed.