

Specific aspects regarding the settlement of litigations within the consumers protection field, from the perspective of the new European regulations

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Abstract

The alternative dispute resolution settlement represent a viable alternative for classical justice. In the consumer protection field, the litigation settlement using extrajudicial procedures will enable the consumer accession to the effective and fast services for conflict solution. The unitary legislation in this field will produce the increase of commercial transactions on the internal market as well as concerning the cross-border commerce by institution of some plain and fast mechanisms for litigation settlement.

Keywords: *alternative policies, consuming market, mediation, consumer protection*

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1. Foreword

The alternative dispute resolution within the consumption related field stands for a constant preoccupation of the European Union, whose aim is for the internal market to be able to provide its consumers with some high quality standard products and services, as well as an efficient protection of the latter's rights.

The legislation on consumers' protection has significantly improved within the recent years. However, European consumers have to deal with some particular difficulties in terms of getting damages anytime one breaches upon their rights. Legal procedures tend to be difficult, expensive and time consuming, and most of the times they prove to be either inefficient, or they tend to provide an uncertain outcome.

Given all the aforementioned, at the European Union level, one has required the adoption of some unitary measures in terms of an alternative resolution of disputes, in terms of consumption, which should help European consumers overcome their linguistic barriers, the legislative differences as well as the costs, as involved. Thus, those consumers involved in litigations within the consumption market field and particularly, in

several cross border consumption related transactions, shall have some efficient procedural means at their disposal, so as to efficiently settle their litigations.

The term of such an alternative dispute resolution relates to certain extra – legal procedures regarding an amicable settlement of such litigations, such as mediation, conciliation, arbitrage, the appeal chambers, the adjudicator's institution, etc., with several specific differences in terms of each and every single such method.

The ADR and ODR procedures, as regulated at the European Union level, shall apply in view of settling those litigations between consumers and traders, by means of one ADR entity, both in terms of the e – commerce and in terms of the offline commerce. In order to facilitate consumers' access to such above mentioned procedures, one requires that at the European Union level there shall be applied a number of unitary, coherent and efficient procedures for the alternative resolution of disputes in the consumption market field, within the context that the actions taken at a unilateral level by the member states have had no satisfactory results whatsoever in terms of both consumers and traders alike.

2. The procedure regarding the settlement of litigations by virtue of Directive 2013/11/EU of the European Parliament and Council and the (EU) Regulation no. 524/2013 of the European Parliament and Council.

Directive 2013/11/EU of the European Parliament and Council regarding the alternative resolution of disputes in the consumption related field, and the EU Regulation no. 524/2013 of the European Parliament and Council regarding the online resolution of disputes in the consumption related field, set up a number of efficient and low cost – consuming measures and procedures, in view of getting a fast resolution of litigations occurring in connection with the conclusion, running / performance of any sale or service providing agreement, both in the field of online transactions and in the offline trade field.

The drawing up of the two above mentioned normative deeds has occurred within the context where there were a number of differences between the alternative procedures in terms of the settlement of litigations in the consumption related field in the member states. Thus, one provides for a unitary framework which shall regulate the relationship between traders and consumers within the Union and which shall foster the

conducting of commercial transactions on the Union internal market under some safe conditions in terms of the security and protection of the consumers' rights, by means of establishing a number of efficient control mechanisms.

By the time of the adoption of the legislative pack in the consumption market field, there were no such unitary norms which shall settle the litigations generated by such consumption, and consumers had no efficient means whatsoever to deal with any such litigation. In the event of a cross border litigation between consumers and traders, if the two parties do not have their headquarters within the same member state, consumers may address the European Consumer Center. At the European Union level, one has established the European Consumer Centers Network, with attributions in amicably settling the cross border litigations in the consumption market field. Nowadays in the European Union there are over 750 ADR entities, which are, however, not available in all regions and in all sectors of the common market.

Thus, by such new legislative regulations one aims at guaranteeing all EU consumers the latter's possibility to solve their litigations, without showing up before a given court of law, regardless of the type of product or service making up the subject matter of any such dispute, as well as irrespective of the place of purchase on the European market. One estimates that the global access to quality ADR within the EU shall trigger the saving by the consumers, of around 22,5 billion of Euros / year. [1]

In Romania, in the case of one such litigation between a consumer and a trader, if both parties have their residence within this member state, consumers may address either a public authority holding attributions within the consumers protection field, namely the National Authority for Consumers Protection, or they may address a mediator, by virtue of Law no. 192/2006 on mediation and the organization of a mediator's profession, or they may address the courts of law.

Whereas the existing differences in terms of the national systems for the regulation of litigations in the consumption field, the need has arisen for the establishment of a unitary and coherent legislative framework for all entities managing such alternative procedures for litigations settlement in the consumption market field within the European space, thus one fostering the purchase of assets and services on the European internal market.

Directive 2013/11/EU of the European Parliament and Council, regarding the alternative settlement of litigations in the consumption field, has been drawn up so as to enable consumers to take advantage and fully benefit from the internal market potential, as well as to provide the consumer with the access to ADR mechanisms, as available for all types of national and cross border litigations, as regulated by virtue of the present Directive; ADR procedures should comply with the coherent quality requirements, which should apply within the entire Union and consumers and traders should become aware of the existence of this type of procedures. [2] As a consequence, the normative deed aims at creating the European legislative framework for the implementation of the ADR mechanism, as an alternative method for litigations settlement, within the context of enhancing consumers' trust in the European internal market.

There are also other European normative deeds which include several dispositions relating to such alternative settlement of litigations / conflicts, which legal dispositions are meant to adjust the legislative framework having been established by virtue of the Directive 2013/11/EU of the European Parliament and Council regarding the alternative settlement of litigations in the consumption related field. Thus, the European law enforcement agent, stipulates the fact that the Directive 2013/11/EU is aimed to be horizontally applied to all types of SAL procedures, including those ADR procedures regulated by virtue of Directive 2008/52/EC on mediation in the case of cross border civil and commercial litigations. [3]

As a consequence, Directive 2013/11/EU does not impede the enforcement of the other normative deeds that include dispositions relating to such an alternative settlement of litigations. The ADR procedures which are to be managed in compliance with the dispositions of the Directive 2013/11/EU of the European Parliament and Council, regarding the alternative settlement of litigations in the consumption related field, may vary from one member state to the other. The type of such ADR procedure shall be chosen by the interested member state subject to its national regulations and the legislation specificity. We hereby consider the fact that we may talk about one ADR entity behaving in a similar manner with the mediation institution, where the solution belongs to the parties, or that we may be speaking about one ADR entity that proposes or imposes such a solution on the parties.

The field of application in terms of the Directive 2013/11/EU of the European Parliament and Council, regarding the alternative settlement of litigations in the consumption related field, limits itself to the management of alternative procedures for the extra – legal settlement of national or cross border litigations that relate to contractual obligations deriving out of the conclusion or performance of sale or service providing agreements, as concluded between a trader established within the Union and a consumer having his residency within the same Union. The extra – legal procedure shall be managed by a ADR entity, namely a structure within the central public administration holding responsibilities within the consumers protection field, which shall either propose a certain solution, or which shall get the parties together in order to facilitate the process of reaching an amicable solution to the problem.

The Directive 2013/11/EU of the European Parliament and Council, regarding the alternative settlement of litigations in the consumption related field shall not apply to those activities/contracts that are run by the higher education or complementary education institutions, the health services provided to patients and the services relating to the provision of medicines and medical devices, the procedures being initiated by a trader against a consumer, the direct negotiations between a consumer and a trader, the litigations between traders, or in the case of general interest services without any economic character whatsoever.

The provisions of the normative deed shall only be applicable in the case of consumer's filing complaints against the trader. To this end, one stipulates the fact that member states shall be under the obligation to establish by virtue of some national norms, a number of ADR entities which shall enable consumers' access to such alternative procedures for the settlement of litigations within its regulatory scope. The latter member states shall be under the obligation to facilitate consumers' access to ADR procedures, as well as to ensure that ADR entities conduct their business activity in an efficient and productive manner. At the same time, by virtue of several internal procedural norms, the member states may allow ADR entities to deny the management of a certain type of litigation anytime one meets the conditions that are restrictively and expressly stipulated within the Directive. [4]. However, neither the procedural norms established by the member states, in view of such a denial in terms of managing ADR

procedures in certain cases, nor the establishment of the financial threshold that may be introduced in order to limit access to such ADR procedure, shall have any negative impact and nor shall the latter directly influence the consumer's right to address such ADR entities.

Once a consumer has invested such ADR entity with the settlement of his complaint, as filed against a certain given trader, the public authority shall appoint the natural person who is to be responsible with the management of such ADR procedure, in compliance with the Directive provisions. One establishes the obligation that the member states shall make sure that natural persons responsible with ADR procedure shall possess the necessary expertise and shall be independent and unbiased. [5]

According to the legal dispositions, such a natural person responsible with the SAL procedure shall bring proof to its professional background in the field of procedures regarding the alternative settlement of litigations, or in the field of the legal settlement of litigations in the consumption related field, as well as to the fact that he possesses a good knowledge of the legislation in the field. Although the law does not stipulate the obligation of such a natural persons responsible with ADR procedure to be a qualified specialist within the legal field, yet in order to be able to meet the legal requirement, that the ADR responsible natural person shall possess general knowledge of the legislation in the field, shall hold sufficient knowledge of law so as to fully understand the legal implications of such litigations, one requires for such a natural person responsible with the ADR procedure to bring proof to this end (either by means of holding a diploma certifying his graduation of the Faculty of Law, or a certificate certifying his having graduated a post – academic course or a Master Degree in the general legal field). Also, the ADR procedure responsible natural person shall be specialized either in the field of the alternative settlement of litigations, such as the mediator, the arbitrator or he shall be specialized in the legal settlement of litigations in the consumption related field, such as the Lawyer, the Expert, etc.

The ADR procedure shall be managed based upon the principles of independence, expertise and impartiality in terms of the ADR responsible natural person within the context of ensuring and guaranteeing by the member state of the transparency of such a procedure (which shall not prejudice either the principle of

confidentiality or the compliance with privacy during the entire length of running the said procedure), the efficiency, correctness and legality as well as the freedom of choice in terms of the alternative method for the settlement of the said litigation. The non disclosure principle shall be complied with both during the process of running the procedure relating to the litigation settlement and on a subsequent basis, following the initiation of a civil or commercial legal procedure, or of the arbitration procedure.

Within 90 days as of the ADR entity's having received the full file of the said complaint, the outcome of the procedure shall be made available for the parties. In several well justified cases, the ADR entity may extend such aforementioned term, by informing the parties to this end.

The consumer may not be compelled to complain about a certain non – compliance or non – accomplishment of contractual clauses to one ADR entity and be deprived of his right to address the court of law. Such ADR procedure is facultative and not compulsory for the parties. In the event when, within the ADR procedures one stipulates the litigation settlement by imposing a certain solution, this shall become binding for the parties only to the extent the said parties have been informed ab initio on the binding character of the said solution and have agreed upon it. One shall not require the specific agreement on the trader's part if the national norms stipulate that the solutions shall be binding for traders. [6] Unless the outcome of such ADR procedure is binding, the parties may subsequently initiate a legal procedure (arbitrage – based or before a court of common law), in terms of the said litigation. The running of such ADR procedure in compliance with the Community related provisions may not be achieved in parallel with the legal or arbitration procedures.

The directive 2013/11/EU regarding ADR procedures in the consumption related field, alongside the Regulation no. 524/2013 on ODR in the consumption related field, stand for two complementary and interrelated legislative instruments. Regulation no. 524/2013 has been adopted within the context where the online commerce has reached an unprecedented expansion, there being a necessity for the appropriate operation of a platform for the alternative settlement of litigations which shall provide the consumers with an unique entry point in view of an extra – legal settlement of the litigations by means of such ADR procedures. The ODR platform provides a simple, efficient, fast

and inexpensive extra – legal solution in the case of those litigations deriving out of online transactions . [7]

The European regulations cover the alternative procedures regarding the settlement of litigations both in terms of the physical commerce and in terms of the trade from the virtual space. If by the time of the appearance of the Regulation no. 524/2013 the online commerce development has been impeded mainly due to the lack of several coherent and valid mechanism for the litigations e - settlement, upon adopting the said Regulation, one enables the creation of a ADR platform at the European Union level, which shall act as an interactive site for the online settlement of the litigations deriving as a consequence of those transactions from the virtual space.

Regulation no. 524/2013 shall apply in terms of the extra – legal settlement of the litigations initiated by the consumers having their residency within the Union, against certain traders established within the Union, which relate to the contractual obligations deriving out of the agreements of sale or providing services within the virtual space, with the introduction of new mechanisms that shall enable both consumers and traders to achieve an e – settlement of the said litigations.

The extra – legal settlement of these litigations within this sector shall be accomplished by using the ODR platform and only to the extent the legislation of the member state where the consumer has the latter's regular residency allows for the settlement of such litigations through a SAL entity .[8]

In view of a good management of the alternative procedures for the settlement of litigations, the Regulation stipulates the creation of an ODR platform, namely of an interactive site which shall provide both the consumers and the traders with an unique entry point. The platform shall allow access to general information regarding the method for such litigations settlement. The consumer / trader shall be able to fill in the e / form for complaints, by attaching all the documents he may find to be pertinent and conclusive within the case. The said complaint shall be subsequently forwarded to the ADR entity with competence in settling the litigation by applying its own procedural norm principles.

The member states shall be under the obligation to appoint ODR contact points whose main obligation shall be the facilitation of communication between the parties

and the ADR entity that is competent in settling the said litigation by providing specialized assistance and support upon the registration of the said complaint, through its advisors, by providing the applicant with the general information regarding the consumers' rights that apply in the member state of the ODR contact point, with information on the way how the ODR platform works and on the procedural norms enforceable within the said litigation, as well as on the means of appeal that are pertinent within the case. These obligations shall be incumbent on the ODR contact point only to the extent the parties involved within the said litigation shall not have their regular residency within the same member state, unless otherwise determined by the concerned member state, given the specificity of the legislation at the national level.[9]

From a procedural perspective, the said complaint having been filled in as per the legal dispositions in force, shall be registered by the plaintiff on the ODR platform, which shall forward the same to the respondent. The parties shall be under the obligation to agree upon the ADR entity where the plaintiff shall be submitted for settlement purposes. Unless the parties shall agree upon the competent ADR entity and unless one identifies any such entity, the complaint shall be closed.

Once the ADR the said complaint to this SAL entity that the parties have agreed upon, and the latter entity shall be under the obligation, after having been notified, to issue a ruling if it is to manage the case or if it is to deny the said litigation. To the extent the ADR entity shall accept managing the litigation settlement, it shall immediately communicate its applicable procedural norms and the costs, as involved, to the interested parties.

The ADR entity having accepted to manage the litigation settlement shall be under the obligation that within 90 days as of its having received the full case file, it shall conclude the procedure in compliance with the dispositions of art. 8, letter e of the Directive.

The use of the ODR platform in view of the litigation settlement shall not require the physical presence of the parties or of the latter's representatives before the ADR entity competent in this case, and in the event of managing the alternative online settlement of litigations, the competent SAL entity shall not be under the obligation to run the ADR procedure through the ODR platform.

Regulation no. 524/2011 aims at the extra – legal settlement of litigations in compliance with the stipulations of the normative deed. This does not mean that the plaintiff no longer has any access to a legal procedure for the settlement of the latter's litigation. Whereas the dispositions of art. 47 of the European Union Book on Fundamental Rights, the ODR / ADR procedures may not substitute the legal procedures and they may not impede the parties to exercise the latter's right to have access to a court of common law, to an efficient means of appeal and to a fair trial.[10]

3. Conclusions.

The ADR and ODR procedures that are operating at the European Union level shall guarantee to the consumers the fact that the internal market alongside the latter's digital size provide efficient mechanisms for the settlement of the various litigious matters and shall foster the running of the cross – border trade given the fact that there are several efficient and unitary extra – legal alternative procedures at the Union level.

The regulated procedure shall facilitate to the consumers the latter's access to an amicable settlement of their litigations regarding the purchase of certain types of services and products, shall enhance consumers' trust in the European internal market and shall terminate the linguistic and legislation related barriers within the regulatory field, by introducing one standard procedure at the Community level. The regulations in this field are all the more required since in compliance with the dispositions of the Treaty regarding the European Union Operation, the European Union is under the obligation to bring its contribution to the protection of consumers' economic interests. The ODR / ADR procedures, as established by virtue of the normative deeds under analysis shall enhance the potential of the alternative means for the litigations settlement and shall generate a certain balance in terms of the efficacy and efficiency of managing disputes within the consumption market field, particularly in the case of cross – border litigations.

Member states shall provide for the coming into force of the deeds with the power of the law and of the administrative deeds, as required for the implementation of the dispositions of both the Directive and the Regulation by the 9th of July 2015.

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- [1] European Commission press release, Brussels, 29 November 2011;
- [2] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, Whereas, (7) „In order for consumers to exploit fully the potential of the internal market, ADR should be available for all types of domestic and cross-border disputes covered by this Directive, ADR procedures should comply with consistent quality requirements that apply throughout the Union, and consumers and traders should be aware of the existence of such procedures. Due to increased cross-border trade and movement of persons, it is also important that ADR entities handle cross-border disputes effectively.”;
- [3] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC, Whereas, (19): „Some existing Union legal acts already contain provisions concerning ADR. In order to ensure legal certainty, it should be provided that, in the event of conflict, this Directive is to prevail, except where it explicitly provides otherwise. In particular, this Directive should be without prejudice to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (7), which already sets out a framework for systems of mediation at Union level for cross-border disputes, without preventing the application of that Directive to internal mediation systems. This Directive is intended to apply horizontally to all types of ADR procedures, including to ADR procedures covered by Directive 2008/52/EC.”;
- [4] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC, Article 5 (4);
- [5] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC, Article 6 (1);
- [6] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC, Article 10 (2);
- [7] Regulation (EU) no. 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer;
- [8] Regulation (EU) no. 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer Article 2 (2);
- [9] Regulation (EU) no. 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer Article 7 (3) and (4);
- [10] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC, Whereas, (45) „The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising their right of access to the judicial system. In cases where a dispute could not be resolved through a given ADR procedure whose outcome is not binding, the parties should subsequently not be prevented from initiating judicial proceedings in relation to that dispute. Member States should be free to choose the appropriate means to achieve this objective. They should have the possibility to provide, inter alia, that limitation or prescription periods do not expire during an ADR procedure.”