

Key notes on the regulation of alternative consumption disputes resolutions procedures in the European Union Law

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Abstract

Most consumers, faced with violations of their rights by professionals, are reluctant to address the Court, considering the legal proceedings too complicated and too expensive, at the same time. This context, detrimental to consumers, could be improved by a coherent regulation of alternative procedures for the settling of potential disputes occurring between consumers and professionals, procedures which, in principle, are simpler, faster and less expensive.

In these circumstances, the European legislator considered essential the need to implement in all the Member States some common principles for the operation of consumer disputes alternative settlement by adopting the Directive no. 11/2013 on the alternative consumer dispute resolution for and the Regulation (EU) no. 524/3013 on online consumer dispute resolution.

Keywords: *consumer protection, consumer litigation, internal dispute, cross-border dispute, court procedures, ADR procedure, ADR entity.*

This work was funded by the contract POSDRU/159/1.5/S/141699, strategic project ID 141699, co-funded by the European Social Fund, through the Sectorial Operational Program - Human Resources Development 2007-2013.

1. The premises for the passing of the Directive no. 11/2013/EU on alternative consumer dispute resolution

It is widely known that in the European Union, the consumer protection legislation is characterized by its indissoluble connection with the establishment and proper functioning of the internal market. Generally, the existence of some regulation differences between the Member States, both on substantive grounds, as well as on proceedings grounds, determines obstacles in cross-border exchanges, at the same time undermining the consumer confidence in the internal market. More specifically, in relation to the procedures for dealing with consumer complaints, both on the sectors covered by these procedures and on the quality thereof, these regulatory differences are an important reason for which the consumers do not buy goods and / or services from another Member State as they are not convinced that a possible dispute with a professional can be resolved easily, quickly and inexpensively. Most of consumers, faced with violations of their rights by the professionals, are reluctant to address the

Court, considering the legal proceedings too complicated and too expensive. This context, detrimental to consumers, could be improved by a coherent regulation of the alternative procedures to solve possible disputes occurring between the consumers and the professionals, procedures which in principle are simpler, faster and less expensive. In addition, in some Member States, there is a considerable delay of the cases pending in the Courts, which prevents the EU citizens to exercise their right to a fair lawsuit, within a reasonable period of time.

In these circumstances, the European legislator considered essential the need to implement in all Member States some common principles for the operation of the alternative consumer disputes resolution, meeting thus the requirements of ease, speed and accessibility (low costs) to cover all sectors of activity.

In this regard, on May 21st 2013 the Directive no. 11/2013 on alternative consumer dispute resolution was passed (Directive on consumer ADR) and on the amendment of Regulation (EC) no. 2006/2004 and of Directive 2009/22/EC [1]. Together with the Regulation (EU) no. 524/3013 on online consumer dispute resolution (Regulation on consumer ODR) [2], the Directive is part of the so-called legislative package on the alternative consumer dispute resolution addressing the problem of effective and concrete implementation of the consumer rights in their disputes with the professionals, considered by the doctrine, the Achilles heel of the consumption law [3].

The two legislative acts are designed as two interconnected and complementary legislative instruments. Thus, the regulation provides the establishment of an ODR platform (on line disputes resolution), to provide the consumers and the professionals with a single point of accession for online alternative dispute resolution through ADR entities that are connected to the platform, thus providing a means of alternative consumer dispute resolution with the help of some quality ADR procedures. The concept of ADR procedure includes extremely varied ways. In general, the use of these procedures allows the solving of disputes without the need to go through the legal proceedings, due to the involvement of an entity outside the Parties, such as: an arbitrator, a mediator, an ombudsman or a complaints office, excluding direct negotiations between the parties.

By the time this Directive was passed, the ADR procedures were not sufficiently developed and consistent, despite several initiatives at the EU level; *exempli gratia*, the European Commission passed two recommendations on the procedures for the solving of alternative consumer disputes [4], creating at the same time, two networks responsible for ADR: ECC [5] and FIN-NET [6]. Therefore, in order to strengthen the consumer confidence in the internal market, including in the online trade field, and to exploit the potential of the cross-border trade, the regulations passed provide the development within the European Union of a proper functioning ADR system, based on the ADR procedures existing in the Member States and to observe the legal traditions thereof.

2. Scope of the Directive

The scope of alternative procedures covered by the Directive is relatively wide, as the purpose is to support the functioning of the internal market while maintaining a high level of consumer protection by ensuring that the disputes occurring between the consumers and the professionals will be solved by the bodies applying the extrajudicial procedure with impartiality, transparency, effectiveness speed and fairness.

According to art. 2 of the Directive, this applies to the alternative solving procedures of national and cross-border disputes concerning the contractual obligations arising from Sale or Service Agreements concluded between a professional established in the Union and a consumer residing in the Union, through the intervention of an ADR entity which either proposes or imposes a solution or brings the parties together in order to facilitate an amicable settlement.

A first remark, important to be done after reading this text, is that, for a better understanding of its scope, one should consider the definitions that are found in art. 4 of the Directive. If some of them are well known, such as the definition of consumer [7] or of the professional [8], others are designed to clearly delineate the scope of the Directive.

Therefore, both the national and the cross-border disputes are considered which concern the contractual obligations that may arise from Sales or Services Agreements, where the quality of the parties, consumer, respectively the professional, is essential.

Per a contrario, the Directive scope thus excludes the extra-contractual disputes, such as, for example, a dispute that has as object the pre-contractual information obligation.

According to the definition contained in article 4, paragraph f), decisive for the classification of a dispute as being cross-border, is the fact that, when ordering goods or services, the consumer is resident in a Member State other than that in which the professional is established. Also, the ADR entity is any entity, irrespective of the name thereof, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and which is included in a list according to the mechanism provided for by art. 20 of the Directive. The inclusion in this list is decided by each competent authority, evaluating whether the dispute settlement entities that have been notified to it qualify as ADR entities falling within the scope of the Directive and meeting the quality requirements laid down.

The following are excluded from the scope of the directive, according to par. 2 of art. 2: the procedures that are carried out before the dispute resolution entities where the natural persons in charge of dispute resolution are employed or paid exclusively by the professional, unless the Member States choose to allow for such procedures to be considered ADR procedures in accordance with the Directive and the requirements laid down are provided, including the specific requirements of independence and transparency; the procedures subject to the systems for the handling of consumer complaints managed by the professional; non-economic services of general interest; disputes between professionals; direct negotiations between the consumer and the professional. Also, the Directive does not apply to the attempts made by a judge to settle a dispute in the course of the judicial proceedings concerning that dispute, to proceedings initiated by a professional against a consumer, to health services provided to patients by health professionals, including prescribing, dispensing and provision of medicines and medical devices, to public academic or additional education institutions.

3. Requirements Applicable to ADR Entities

The Directive sets forth quality harmonized requirements for the entities applying alternative dispute resolution procedures in order to ensure the same level of protection and the same rights to consumers in all Member States. In this respect, the following

quality requirements are established, that the ADR entities and the ADR procedures must meet:

a) expertise, independence and impartiality (art. 6); therefore, the individuals responsible for ADR should, first of all, have the knowledge and skills necessary in the field of alternative dispute resolution or the judicial settlement of consumer disputes, as well as a good understanding of the legislation. Secondly, these people will be appointed for a period sufficient to ensure the independence of their actions and cannot be dismissed without good reason. Then, in order to ensure a fair character, these people should not receive instructions from either party, and the compensation must be done in a way that is not bound by the outcome of the procedure [9].

b) Transparency (Article 7); the ADR entities must publish on their Internet sites, on durable support, clear and understandable information about the entity and about the ADR procedure, such as: their contact details, the fact that the ADR entities are included in a list in accordance with art. 20 of the Directive, the individuals responsible of ADR, the types of disputes they are competent to deal with etc.

c) Efficiency (Article 8); the Directive deems met the efficiency requirement if the procedure is available and easily accessible online and on paper for both parties irrespective of where they are located, the ADR procedure is free of charge or at a symbolic price for consumers, the parties have access to the procedure without the requirement to use a lawyer or a legal adviser, the result of the ADR procedure is made available to the parties within 90 calendar days of the date on which an ADR entity has received the complete file to the applicant.

d) Accuracy (art. 9); In this respect, the criteria that ADR procedure should meet are established, as for instance, the parties have the opportunity to express their point of view, to receive from the ADR entity, the arguments, the evidence, the documents and the facts presented by the other party, any statements and expert opinions and to comment on them; the parties are informed that they may seek independent consultancy or they can be represented or assisted by a third party at any stage of the proceedings; the parties are informed about the outcome of the ADR procedure, stating the arguments on which it relies. Similarly, in the case of ADR procedures, which aim at solving the dispute by suggesting a solution, the parties should be informed of their right

to withdraw from the proceedings at any time, if not satisfied with the conduct of the proceedings; before accepting the solution proposed, the parties must be informed on the following elements: they can choose whether or not to accept / follow the solution proposed, that the solution proposed may be different from the one established by a Court, that before giving the consent to a proposed solution or amicable agreement, are allowed a reasonable period of time to reflect.

e) Freedom (Article 10): This requirement is reflected, on the one hand, by ensuring the non-binding nature of a possible agreement between the consumer and the professional to submit complaints to an ADR entity, if it was concluded before the occurrence of the dispute and if it has, as effect, the consumer depriving of his/her right to bring an action in Court to resolve the dispute. In relation to this requirement, are evocative the specifications on the conditions under which the right to bring an action in Court could be compromised under some alternative procedures for disputes settling brought by the Court of Justice of the European Union [10]. On the other hand, within the proceedings aimed at resolving the dispute by imposing a solution, it can become binding on the parties only if they were informed in advance about the binding nature of the solution and if they formally agreed.

f) Legality (Article 11); This requirement takes into account the consumer remedies imposed by the ADR entity, distinguishing between the internal character disputes, in which case there is no a conflict of laws and the cross-border disputes. Thus, in the first case, the consumer is protected by the fact that the solution imposed cannot lead to depriving the consumer of the protection provided by the mandatory legal provisions of the country in which the consumer and the professional normally reside [11]. A similar rule is also applicable in the other situation; thus, if the applicable law is determined according to the rules of private international law, or in accordance with the Regulation (EC) no. 523/2008 (Rome I Regulation) or in accordance with the Rome Convention of June 19th 1980 on the law applicable to contractual obligations, the consumer cannot be deprived of the protection guaranteed by the mandatory provisions contained in the legislation of the Member State in which he/she normally resides.

3. Conclusions

As conceived, the Directive no. 11/2013 on the alternative consumer dispute resolution, can become a viable alternative of the traditional Court proceedings, which can be used by the consumers harmed in the wake of their rights breach by professionals, in the matter of contractual obligations. It is premature to talk about the real impact of the directive, given that it has not yet been transposed in all Member States and it is unlikely that this will happen, although the transposition should be carried out by 9 July 2015. In the specialized literature, it is deemed with good reason, that the correct and in term transposition of the Directive will be crucial not only to strengthen the consumer protection and to ensure their access to quality ADR procedures, but also because it equally, is a prerequisite for the proper implementing of the Regulation (EU) no. 524/3013 on online consumer dispute resolution. [12].

At the same time, we should stress that the European legislator uses in this case, the technique of minimum harmonization, leaving Member States a significant margin, therefore, the application thereof will depend greatly on the national political choices. According to Article 2 para. 3, the Member States may maintain or introduce rules that exceed those laid down by this Directive, in order to ensure a higher level of consumer protection. Also, according to par. 4 of art. 2, this Directive acknowledges the competence of the Member States to determine whether the ADR entities established on their territory should be able to impose a solution.

It is to be noted, once again, the European legislator preference for the minimum harmonization technique, mainly used in the field of consumer protection, based on the argument that although favoring the legal regime differences, it creates the conditions to provide a high level of protection for consumers.

References:

[1] Published in the Official Gazette, the Law no. 165 of 18 June 2013. The transposition of this Directive should be carried out by 9 July 2015. In Romania, the Directive has not been transposed yet; the National Authority for Consumers Protection (ANPC) proposed for public consultation a presentation of a bill on the alternative resolution of the disputes between consumers and professionals. In Belgium, for example, the Directive was already transposed by the Law from 4 April 2014 on inserting the Book XVI Extrajudicial Regulation of the Consumption Disputes in the Code of Economic Law.

(http://www.ejustice.just.fgov.be/cgi/article.pl?language=fr&caller=summary&pub_date=2014-05-12&numac=2014011245).

[2] The Regulation no. 524/2013 on the online dispute resolution for consumer issues and amending the Regulation (EC) no. 2006/2004 and the Directive 2009/22/EC was published in JO L 165 from 18 June

2013. The Regulation constitutes a European regulatory instrument, mandatory on all its elements and directly applicable in the national legal systems, therefore, an instrument that may be used to adopt an uniform regulation on the matter.

[3] M. Owsiany-Hornung, *La directive de l'Union européenne relative au règlement extrajudiciaire des litiges de consommation, une panacée ou plutôt un placebo contre la maladie chronique du non-respect des droits des consommateurs européens ?*, in *Revue du Droit de l'Union Européenne* 1/2014, p.88.

[4] The recommendation 98/257/EC of 30 March 1998 on the principles applicable to the responsible bodies for the extrajudicial resolution of the consumer disputes (JO L 115/17.04.1998) and the Recommendation 2001/310/EC from 4 April 2001 on the principles applicable to the extrajudicial bodies involved in the consensual resolution of the consumer disputes (JO L 109/19.04.2001).

[5] ECC-NET - is a network of European consumer centers which directs the consumers to a ADR entity competent in another European state in the case of cross-border disputes. The European Consumer Center in Romania, as part of this network, has jurisdiction only in the amicable settlement of the cross-border disputes, respectively those disputes that arose following the acquisition by a resident consumer in Romania of faulty products/services from an economic operator established in a EU Member State, other than Romania, as well as those disputes arose following the acquisition by a consumer resident in another EU member state of faulty products/services from an economic operator with the headquarters in Romania.

[6] FIN-NET is a network of national extrajudicial settlement systems concerning the complaints (appeal chambers, ombudsmen and mediators), which handle the complaints of the cross-border consumers within the financial services.

[7] For a summary of the doctrine on the concept of consumer, see M. Iliescu, *Consumer - between legislative provisions and doctrinal views*, in the magazine *Curierul Judiciar* nr. 8/2014, Ed. C.H.Beck, p.435.

[8] For an analysis of the concept of professional in consumption law, see M. Iliescu, *The Notion of Professional in Consumer Law*, in the magazine *Analele Universității Titu Maiorescu*, Ed. Hamangiu, Bucharest, 2015, p.115.

[9] According to the letter c) of the Article 6, paragraph 1, the SAL responsible individuals have the continuous obligation, throughout the SAL procedure, to immediately notify to the SAL entity any element which may affect their independence and impartiality or which could give rise to a conflict of interests with any of the parties of the dispute to be settled. This does not apply if the SAL entity consists of only one person.

[10] C.J.U.E., The Decision from 18 March 2010 on the joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini against Telecom Italia SpA (C-317/08) and Filomena Califano against Wind SpA (C-318/08) and Lucia Anna Giorgia Lacono against Telecom Italia SpA (C-319/08) and Multiservice Srl against Telecom Italia SpA (C-320/08)* (...). Neither the principles of equivalence and effectiveness, or the principle of effective judicial protection do not oppose to a national regulation which requires, for such disputes, the prior implementation of an extrajudicial conciliation procedure, when this procedure does not lead to a mandatory decision regarding the Parties, does not cause a substantial delay for bringing an action in the court, suspends the prescription of the concerned rights and does not generate costs or generates reduced costs for the parties, to the extent that, however, the electronic means is not the only means of access to that conciliation procedure and interim measures are possible in exceptional cases, where the urgency of the situation requires them.

[11] According to Article 11, paragraph 2 of the Directive, the regular residence will be determined in accordance with Regulation (EC) no. 593/2008.

[12] M. Owsiany-Hornung, *La directive de l'Union européenne relative au règlement extrajudiciaire des litiges de consommation, une panacée ou plutôt un placebo contre la maladie chronique du non-respect des droits des consommateurs européens ?*, in *Revue du Droit de l'Union Européenne* 1/2014, p.112.