The transposition of the Directive on alternative dispute resolution for consumer disputes (Directive 2013/11/EU) in Romania – new challenges for mediators and businesses

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Abstract. *The National Authority for Consumer Protection of Romania has recently completed the public consultation on the draft law on alternative dispute resolution between consumers and professionals. The law is intended to transpose the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR) into the national legal system. The Romanian authorities seem to prefer a centralized approach, completely excluding from the process the private ADR entities that already exist, such as mediators and organizations that provide mediation services. The financial and administrative burden of the procedure is generally attributed to businesses. The total cost of transposition is still unknown and a number of uncertainties arising from the wording of the Directive are perpetuated. The purpose of this article is to present some important aspects of the future law, with an emphasis on the main challenges that mediators and businesses will face in the near future if the law is to be adopted as such by the Romanian Parliament.*

Keywords: *the transposition of the Directive 2013/11/EU in Romania, public consultation, trader – professional, goods – products, further education – post-secondary non-tertiary education, gold-plating, nationalization of ADR procedures.*

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Introduction

On 19 of May 2010,the European Union strategy called "*A Digital Agenda for Europe*" (EC 2010) was released with the objective of drawing a road map for the use of the full potential of the new communication technologies, particularly the Internet, in order to obtain sustainable economic and social benefits by **creating a digital single market**. The Agenda is one of the seven flagship initiatives of the Europe 2020 Strategy (EC

2010a) and it aims to define the role of information and communication technology (ICT) in achieving Europe's objectives for the year 2020 (EC 2010, p. 4).These objectives relate to increasing the percentage of employed population, increasing investment in research and development,reducing carbon dioxide emissions, increasing the percentage of renewable energies and energy efficiency (all of these with 20%), reducing school drop-out rate and increasing the percentage of higher education diplomas, as well as reducing the number of people at risk of poverty (EC 2010a, p. 5).Finally, the strategy should enable the European Union to grow:

- smart, by developing an economy based on knowledge and innovation;
- sustainable, based on a more resource efficient, greener and more competitive economy; and
- inclusive, fostering a high-employment economy delivering social and territorial cohesion (EC 2010a, p. 5).

Among the obstacles identified in the way of creating a digital single market, there is a **low degree of confidence in the online environment**. Citizens continue to be concerned about the security of payments, the protection of personal data, and the lack of certainty that their rights are respected. In order to improve this situation, the European Commission has taken a series of actions, including **the launch of an EU-wide strategy to improve the Alternative Dispute Resolution systems (ADR), the creation of an EU-wide online redress tool for electronic commerce and improve the access to justice online**, as well as the creation of an EU **online trustmark** for retail websites (EC 2010, p. 15).

The public consultation procedure aimed to identify the difficulties related to the use of ADR and the means of improving the use of ADR in the EU took place between 18 of January 2011 and 15 of March 2011. The consultation document submitted to public attention indicated that, although at the EU level there are over 750 such alternative mechanisms, most of them being free for consumers or having a moderate cost (less than 50 euros), and cases are solved in a short period of time (an average of 90 days), only 3% of the European consumers who have not received a satisfactory answer from the trader resorted to such an alternative system. The percentage of traders who have used ADR means was only slightly higher, of 9% respectively (EC 2011, paragraphs 15 and 16). Identified deficiencies relate, *inter alia*, to the **lack of information for consumers and businesses on ADR means**, to gaps in ADR coverage and to issues related to financing, with an impact on their independence. The reactions received by the European Commission (EC 2011a) within the public consultation process highlighted, however, considerable support for ADR means as an efficient alternative to court proceedings, the importance of developing ADR programs for consumers and support for the improvement of online dispute resolution programs for electronic transactions. Consequently, on 29 of November 2011, the European Commission presented a legislative package

consisting of a *Proposal for a Directive on alternative dispute resolution for consumer disputes (Directive on consumer ADR)* (EC 2011b) and a *Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR)* (EC 2011c). The two proposals were adopted on 21 of May 2013 and became the *Directive 2013/11/EU* (EU 2013) and the *Regulation (EU) No. 524/2013* (EU 2013), respectively.

The Directive 2013/11/EU must be implemented by the member states by 9 of July 2015. Its purpose is "to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures" (EU 2013, Article 1). These ADR procedures are regarded as necessary for consolidating consumers' confidence in cross-border and online commerce. Their development should "build on existing ADR procedures in the member states and respect their legal tradition" [EU 2013, recital (15)].

We have already analysed the main provisions of the Directive in the article "ADR and ODR in Romania – future challenges" (Tanul 2014), therefore we will not discuss them again here. We will treat only the significant aspects in terms of transposition in Romania, as the draft law proposed by the National Authority for Consumer Protection (ANPC) has been recently published on this institution's website. In brief, the project in question provides that:

1. **Any central public authority** responsible for consumer protection **can be an ADR entity**;
2. **ADR procedures may be carried out only by central public authorities**;
3. **A professional is obliged to resort to the use of an ADR procedure** when there is a dispute with a consumer;
4. **An ADR entity proposes a solution which will become binding for the parties** (to be read "for the professional"– because only the professional is exposed to a fine for non-compliance) if it is accepted by the consumer;
5. A body responsible for conducting ADR procedures is established within the ANPC, in direct coordination of the President of ANPC, which may have the role of residual entity;
6. Organization, financing and execution of ADR procedures will be established by means of government decision.

In the first part of the article we will critically examine the conduct of the public consultation procedure. Next, we will analyse a number of terminological differences between the Directive and the draft law, which could produce unintended legal effects, focusing on the pairs of terms "**trader**"**–"professional", "goods"–"products", "further education"–"post-secondary non-tertiary education"**. The last part of the article will be dedicated to an analysis of the *sui-generis* ADR system designed by ANPC, insisting on its effects on the development of mediation in Romania. We will also present some

solutions adopted by other EU Member States, such as Belgium – which has already completed the transposition of the Directive by adopting the Law of 4 of April 2014 on inserting Book XVI "Extra-judicial settlement of consumer disputes" into the Economic Law Code, Luxembourg –where the Bill is currently subject to parliamentary debate, and the United Kingdom– a country where the public consultation has ended and the government has published its regulatory intentions.

Comments on the public consultation procedure

In Romania, the participation of citizens in the process of adopting normative acts is regulated by Law no. 52/2003 concerning transparency in public administration, republished[1]. According to this law, the public consultation procedure is based on the publication of a notice by the central or local authorities, on the internet or in the media, on the future act. This notice shall include, *inter alia*, a background note, a statement of reasons, a paper on the need for regulatory action, an impact study and/or a feasibility study, as appropriate, the full text of the draft instrument and the deadline, place and manner in which those interested may submit written proposals. If the draft legislation is relevant to the business environment, the notice shall be sent by the initiator to the business associations and to other legally constituted associations, on specific areas of activity. The deadline for the receipt of proposals is 10 calendar days. If a legally constituted association or another public authority requests a public debate, such a debate may be organized and the public may have access to its minutes, to the written recommendations, to the improved versions of the draft legislation in various stages of its development, to the advising reports and to the final adopted version of the normative act. In any case, **the public authority is obliged to maintain the above mentioned documents on its website**, in a special section. Also, the requirements of Law no. 52/2003 are minimal, the authority being able to take other measures in order to improve transparency of the decision-making process.

Currently, **neither the notice published by ANPC, nor any of the documents referred to above may be consulted on its website**[2], except the hyperlink to the draft law, which is still valid[3]. Information on the public consultation procedure is available on third-party sites, such as "Legestart"[4] or the site of The National Association of Romanian

1 Monitorul Oficial al României, Part I, No. 679 of 5 November 2013.

2 http://www.anpc.gov.ro/index.php?option=com_content&view=category&layout=blog&id=34&Itemid=41.

3 http://www.anpc.gov.ro/anpcftp/legislatie/140827/proiect_lege_solutionare_alternativa_litigii_140827.pdf.

4 http://legestart.ro/solutionarea-alternativa-litigiilor-dintre-consumatori-si-profesionisti-ce-reguli-propune-anpc-ul/.

Bars (NARB)[5]. According to "Legestart", the period for submission of comments and proposals was 4-15 September 2014. That period is not mentioned in the ANPC's document and there is no indication of an address where the proposals could be sent. On ANPC's web site there is no official information at this time on the results of the public consultation, whether a public debate was organized or not,whether recommendations were submitted by organizations and what the results of the public consultation are. There are no such observations published on the websites of other bodies concerned, such as NARB or The Mediation Council[6].

This situation, together with the reading of the statement of reasons, leads to the conclusion that the public consultation was purely formal and the transparency of the decision-making process – in this case – practically does not exist. The only legal requirement fulfilled by ANPC is the publication on its website of the statement of reasons and draft regulations for an unknown period of time. Moreover, in section 6 of the statement of reasons, entitled "*Consultations carried out for developing draft legislation*", under paragraphs "*1. Information on the consultation process with non-governmental organizations, research institutes and other bodies concerned*" and "*2. Justification of the choice of organizations consulted and of the way the work of these organizations is related to the subject of draft legislation*" it is provided that "**The draft law does not address this issue**", therefore **the public authority did not deem it necessary to consult any other organization concerned**.

Another curious aspect is the absence of any information on the social, economic and financial implications of the bill, even though, as we will see, they exist and affect both public and private sector. Thus, all paragraphs in section 4 of the statement of reasons, entitled "*The financial impact on the consolidated general budget, both on short term, for the current year and on long-term (5 years)*", whether they relate to budgetary income or expenses, to the financial impact on the state budget or on the local budgets, are accompanied by the phrase "**not applicable**". The situation is similar for Section 3 –"*The socio-economic impact of draft legislation*". The sections on the macroeconomic impact, the impact on the competition environment and the social impact are followed by the sentence "**The draft law does not address the topic**", while under the heading "*The impact on the business environment*" it is mentioned that "harmonisation at European level of the requirements relating to alternative dispute resolution systems increases consumer confidence in the internal market and encourages cross-border trade. Besides, professionals will be able to settle in quickly and at low costs any dispute with a consumer, without an administrative penalty being applied to them" (ANPC 2014, p. 5).

5 http://unbr.ro/ro/proiect-de-act-normativ-cu-incidenta-asupra-profesiei-de-avocat-solutionarea-alternativa-a-litigiilor-dintre-consumatori-si-profesionisti/.

6 http://www.cmediere.ro/.

An impact document or another policy document to accompany the legislative proposal was not published. ANPC borders itself to a presentation of the current situation of ADR for consumers in Romania, in Section 2,entitled "*The reason for issuing the normative act*", emphasising the tradition and efficiency of the current mechanism for resolving consumers complaints by administrative means, along with a summary of the Directive 2013/11/EU and of the draft law.

A completely different example is the British public consultation. *Department for Business, Innovation & Skills* (BIS) has performed this procedure from 11 of March until 3 of June 2014, in a 1st phase making public two documents: a document of the "Green Paper" type, which presents in detail the main issues of transposition and the questions asked by the government to the interested parties (BIS 2014) and an impact assessment study (BIS 2014). In addition to their publication on the internet, the documents were sent directly to a wide range of organizations – 156 in total. Also, versions of those documents in other languages than English, in Braille or on audio cassette were available upon request (BIS 2014, p. 13). Later, on 18 November 2014,a summary of the 85 responses received, together with the government's position on each issue subject to public debate was published (BIS 2014b). To remain in the area of the socio-economic impact resulted from the application of the Directive, it would be of interest, for example, the cost-benefit analysis for all three target groups: businesses, government, and consumers. Thus, **on the costs that would be incurred by businesses**, the UK authorities anticipated that:

- providing information to consumers about ADR/ODR would cost, in a first stage, between £ 25.3 million and £ 38 million [one initial expense which includes the cost of familiarisation with the new system estimated at £ 17 million, taking into account one hour of training for one employee, costs for updating the websites of £ 6.6 million, while an IT programmer would do the operation in one hour, and costs of changing terms and conditions between £ 85 for a microbusiness and £ 2,578 for a large company (BIS 2014, p. 46)], the expenditures decreasing after that at £ 500,000 to £ 700,000 per year (BIS 2014, p. 6);
- establishing a competent authority to monitor the compliance with the Directive would cost businesses approximately £ 100,000 per year;
- fees paid by businesses to the ADR residual body, as an effect of the increased number of complaints, would amount to £ 900,000 – £ 9.6 million per year;
- administrative business expenditure generated by additional complaints would amount to £ 400,000 – £ 2 million per year.

The British government, in turn, should spend approximately £ 6 million with:

- the establishment and funding of a residual ADR entity (£ 5 million);
- the establishment of an ODR contact point (£ 100,000 per year);

- the establishment of a competent authority to monitor compliance with the Directive (a one-time cost of £ 200,000); and
- the operation of the Helpdesk (£ 100,000 per annum while the set-up costs are not yet estimated).

Consumers would themselves pay additional costs ranging between £ 100,000 and £ 300,000 due to the increase of complaints' number.

In terms of **benefits**, they were approximated as follows: due to the decrease of the number of disputes litigated, businesses would save between £ 300,000 – £ 1.6 million; any savings that would be made by the government and consumers have not yet been established. For consumers, it was approximated that the compensation they might receive from businesses would amount to £ 400,000 – £ 2 million per year.

What kind of ADR procedure?

In general, the draft proposed by ANPC copies the text of the Directive, therefore copying the terminological ambiguities, too. Thus, it is not sufficiently clear what kind of ADR procedures will apply, who will fall under the law, what kind of goods and services will be affected by this law and to what extent the laws already in force have to be modified, starting with The Mediation Law.

In our opinion, the most important omission (taken as such from the Directive) affects the very definition of the ADR procedure provided at Article 3(1)(g):"*procedure as referred to in Article 2, which complies with the requirements set out in this law and is carried out by an alternative dispute resolution entity*". It does not result, either from this definition, or from the wording of Article 2 or other articles of the project, what kind of procedure is involved: **conciliation, mediation, arbitration, med-arb, neutral fact-finding, ombudsman**, etc. However, from the combination of several articles, it results that in case the consumers choose to make use of the ADR procedure, this procedure becomes **mandatory for professionals** [Article 13(1)], **which may not withdraw** [according to Article 7(1)(j) and Article 9(2)(a) only consumers may withdraw from the procedure]. The proposed ADR procedure is an adversarial one, parties being able to express their views, to present evidence, to take notice of the arguments and evidence submitted by the opposing party and to comment on them, and to be represented or assisted by lawyers, legal advisors, independent advisors or third parties, although the representation or assistance is not mandatory. In case it accepts to settle the complaint [grounds for refusal are set out in Article 5(5)], the ADR entity –that can only be an administrative body –"**proposes a solution**" [Article 2(1)] **which becomes binding for the parties as soon as the consumer accepts it**[Article 5(9)]. **The outcome of the procedure shall be motivated and notified to the parties** [art. 9(1)]. If the professionals do not wish to participate in the proceedings or if they do not implement the solution agreed upon by consumers, they risk fines up to 6,000 RON [Article 20(3)].

From this description it follows that we are dealing with a *sui generis* procedure for resolving a dispute through the intervention of a third party, with the following characteristics:

a. **The third party is a civil servant and it is imposed to the parties by law. Neither the consumer, nor the professional can choose him/her. Private ADR entities, like mediators or arbitrators, are not allowed to perform such a procedure.** The establishment of administrative structures and the appointment of persons who will actually perform the procedure, their mandate etc. will be regulated later by means of secondary legislation.
b. **The third party has the option to refuse, under certain conditions, the conduct of the procedure.** The means for challenging the refusal, which will probably be subject of secondary legislation,are not yet established.
c. **The value of the dispute is irrelevant for the procedure.** The draft law does not provide minimum or maximum limits for acceptance or rejection of dealing with the case by means of this procedure.
d. **The procedure is free for the consumer.** The fees that will be charged to the professional are not specified and they shall be established later.
e. **The procedure is adversarial,** with the possibility of representation and/or assistance by a lawyer/another person.
f. **The procedure is mandatory for the professional.** There is no possibility of giving up the procedure, except by the consumer.
g. If the third party agrees to handle the case, **it is obliged to propose a solution.** If the solution is accepted by the consumer, it becomes **mandatory for the professional**, under the sanction of a fine.
h. **Only a consumer may initiate an ADR procedure** against a professional.
i. Finally, the settlement of consumer disputes through ADR, whether online or offline, will be available **only through the public ADR entities**, with the exclusion of mediators, arbitrators or other forms of private ADR. **These will no longer have access to the European Commission's ODR platform, established by Regulation (EU) no. 524/2013. Consequently, the online dispute resolution for consumers in Romania will be a state monopoly in the next period**.

"Trader" or "professional"?

According to Article 2(1) of the Directive 2013/11, "[t]his Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts ***between a trader*** *established in the Union and a consumer resident in the Union* through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution". According to Article 4(1)(b) of the same Directive, "'**trader**' means any natural person, or any legal person

irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession". The ANPC, probably intending to adapt the terminology to the provisions of the new Civil Code, has replaced the term "**trader**" with "**professional**", ignoring the difference between genus and species (for a more extensive discussion on this distinction, see Popa and Frangeti, 2011).

Therefore, in the draft law, the two articles mentioned above read as follows:

Article 2(1) –"This law shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a ***professional*** established in the European Union and a consumer resident in the European Union through the intervention of an ADR entity which proposes a solution."

Article 3(1)(b) –"'***professional***' –any natural or legal person, public or private, acting within the framework of his commercial, industrial or production, artisanal or liberal activity, or any person acting in his name or on his behalf, for the same purpose."

The question is whether the **liberal professions** (lawyer, notary, auditor, tax consultant, expert accountant, chartered accountant, securities investment consultant, architect and others, such as mediator or sworn translator) that would enter within the scope of the law – as they fall within the definition of 'professional' [the Romanian word is „profesionist"] – would be in the same situation if the term "trader" [the Romanian word is „comerciant"] was kept(incidentally, the same terminological difference exists between the different language versions of the Directive. Thus, in the English version the term used was 'trader', in Spanish "*comerciante*", in French "*professionnel*" and in Italian "*professionista*"). Analysing the definition of the Directive, namely "person [...] acting [...] for purposes relating to his trade, business, craft or profession", we may say the situation would be the same, but we anticipate that during the legislative procedure the discussions concerning whether or not to exempt some professions, invoking, *inter alia*, this terminological difference, will continue. We will not dwell here either on the impact of the law on the profession of lawyer, or on the reconciliation of professional secrecy with solving disputes between clients and lawyers in an administrative way.

"Goods" or "products"?

Another substitution of genus with species, in the reverse sense, was operated in relation with the sales contract. At Article 4(1)(c) of the Directive, it is defined as "*any contract under which the trader* ***transfers or undertakes to transfer the ownership of goods*** [RO – "bunuri"] *to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services*". Conversely, the similar provision in the draft law, namely Article 3(1)(c), uses the term "***products***"

[RO – "produse"]– this time narrowing the scope of the law. According to that article, "sales contract" means "any contract under which the professional transfers or undertakes to transfer ***the ownership of products*** to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both products and services". There placement has no justification at least for two reasons: a) it is not motivated, as the inversion discussed above, by the terminology of the new Civil Code, which provides, *inter alia*, in Article 3(3) that "it constitutes an exploitation of an undertaking the systematic exploitation, by one or more persons, of an organized activity consisting in the production, the administration or the alienation of **goods** or in the provision of services, whether for profit or not" and b) all language versions consulted use the equivalent word (EN – „goods", FR – „biens", IT – „beni", ES – „bienes"). To make the situation even more difficult, in the current Romanian legislation on consumer protection, **"products" means only movable property**. Thus, the Law no. 449 of 12 November 2003 on the sale of products and their associated guarantees provide in Article 2(b) that „product means the movable tangible property whose final destination is individual or collective consumption or use", while Government emergency ordinance (OUG) no. 34 of 4 June 2014 on consumer rights in contracts concluded with professionals, under Article 2 para 3 states that **product means any „movable tangible property**, with the exception of goods sold by way of execution or valued as a result of the application of legal provisions; water, gas, electricity and thermal energy are considered "products" when they are put up for sale in limited volume or in fixed quantity". It can be easily observed that **real estate** cannot be included in these definitions and, therefore, contracts for the sale of real estate do not fall within the scope of the law, although they fit the requirements of the Directive.

"Further education" or "Post-secondary non-tertiary education"?

Finally, the third terminological difference concerns services in the area of education not covered by the new regulations. Thus, according to Article 2(2)(i) of the Directive, it **shall not apply** to"public providers of **further** or higher **education**" [in Romanian version: "entităților publice de învățământ superior sau **complementar**"], while according to Article 2(3)(g) of the draft law, it shall not apply to „public entities of **post-secondary non-tertiary** or higher **education**" [in Romanian version: "entităților publice de învățământ postliceal sau superior"]. A first observation would be that the concept of "**educational entity**" does not exist in the Romanian educational system. The National Education Law no. 1/2011, revised, uses only the terms "**educational units and institutions**". Next, the Romanian equivalent used in the Directive for "further education", i.e. "învățământ complementar" (the term was used to describe apprentice education) is not a part of the national education system anymore (see Article 23 of Law no. 1/2011), this notion having been completely eliminated. Therefore,the problem of

clarifying the will of the European legislator arises. What kind of education services are exempt from the provisions of the Directive? Services provided by former apprenticeship schools, as stated by the Romanian version of the Directive, those provided by post-secondary non-tertiary public schools, as the draft law provides, other services, such as those offered by technical and vocational education schools or even continuing education courses offered by universities? Other language versions of the Directive are sufficiently different to maintain the confusion. Thus, the Spanish version, which is the most similar to the Romanian one, uses the phrase "a los prestadores públicos de **enseñanza complementaria** o superior". On the contrary, the French version is more like the draft law, since it provides that the Directive does not apply to "prestataires publics de **l'enseignement postsecondaire** ou de l'enseignement supérieur", but there are differences between the Romanian "învățământ postliceal"and the French "enseignement postsecondaire". Unlike post-secondary non-tertiary education in Romania, which is part of the technical and vocational education, the post-secondary education in France can be also theoretical, seeking, for example, to prepare students for higher education by offering them additional courses designed to help them pass the exam for obtaining the diploma giving access to higher education[7]. To make things even more complicated, the Italian version uses the expression "agli organismi pubblici di istruzione superiore o di **formazione continua**", and the English version uses the expression "public providers of **further** or higher education". We believe it is superfluous to insist on the difference between the concept of "post-secondary non-tertiary education"and "further education"). The problem seems to be, by far, a translation-related one and it will be difficult to solve it, given the diversity of the educational systems in Europe.

Can we speak about a case of excessive-regulation?

By excessive regulation or "over-regulation" (in English the established term is "gold-plating") we mean the phenomenon by which the states impose obligations that go beyond what is necessary to transpose an EU directive into the national legal systems, but without infringing the provisions of that Directive. The excess of regulation results in an increase of bureaucracy, of administrative costs for businesses and therefore in a decrease in their competitiveness. The European Commission states that Member States should avoid such situations and confirms that it is ready to assist them in this regard (EC 2011d, p. 7).

Beyond the terminological ambiguities outlined above, the big problem of the ANPC's draft law consists precisely in the very way it intends to transpose the Directive 2013/11. We will not resume here the obligations under the Directive, as we have

7 http://www.insee.fr/fr/methodes/default.asp?page=nomenclatures/naf2008/n5_85.41z.htm.

already done that (Tanul 2014). However, we will point out that Member States must ensure, *inter alia*:

a. **that consumers have access to quality ADR procedures** in order to solve any contractual dispute originated in a sale of goods or in a supply of services between a trader and a consumer;
b. **that ADR entities meet certain standards**, including independence, transparency, expertise, efficiency and fairness, and the ADR procedures are conducted under certain conditions;
c. **that traders inform the consumers** about the availability of ADR entities or programs and if they do or do not intend to use them;
d. **that an authority competent to monitor the functioning of ADR entities exists**.

On the one hand, we must recognize that the draft law prepared by ANPC is not contrary to the text of the Directive 2013/11, all the proposed solutions being"covered"by its provisions. On the other hand, nevertheless, we must emphasize that the project establishes a *so-called ADR* system (which is neither conciliation,nor mediation or arbitration), bureaucratic, centralized and cumbersome, mainly for traders, but which will eventually produce negative effects on consumers, too, first by transfer of additional costs in the price of products and services and, subsequently, by the quality of ADR procedures offered. It is hard to believe that a small number – by the nature of things –of civil servants will be able to resolve, at the standard level imposed by the Directive, the consumers' complaints **in all fields – from the sale of toys, books and DVDs to the sale of cars and solar panels or from the provision of international transport services to legal assistance services, to name just a few**. Inevitably, given the budgetary constraints that will prevent employment of qualified staff, consumers will actually **have NO access to the ADR services** required by the Directive and its violation will occur *de facto*, as it happens with many other public services in Romania.

The mechanism proposed by ANPC moves away significantly both from the spirit of the Directive and from the way in which it was already implemented in other countries (Belgium) or from the way in which the authorities of other countries intend to implement it (UK, Ireland or Luxembourg). The main arguments are:

- **none of the above mentioned countries has nationalized ADR procedures for consumer protection,** as Romania is preparing to do. By "nationalization of ADR procedures" we mean their exclusive entrusting to the central public authorities and the removal of any private entity (whether they are individuals – mediators, or legal entities – companies or NGOs that deal with alternative disputes in different areas). Thus, in the explanatory memorandum to the draft law, it is explicitly provided that "the draft states that ***any central public authority*** responsible for consumer protection ***shall be an alternative dispute resolution entity***. In this sense, the project ***establishes that alternative dispute resolution procedures may be performed***

only by central public authorities" [emphasis added]. Next, article 3(1)(h) provides that "in the sense of the present law [...]alternative dispute resolution entity (ADR entity) [means] ***any structure within a central public authority*** responsible for consumer protection, offering the resolution of dispute through an ADR procedure [...]" [emphasis added]. For comparison, the Belgian Law provides: "Article 2: In Book I, Title 2 of the Code of economic law, a Chapter 11 is introduced, as follows:"Chapter 11: Definitions specific to Book XVI. Article I. 19. The following definitions apply to the Book XVI: 3° alternative dispute resolution for consuming [means]: any intervention of an entity created by authorities ***or of an independent entity of a private nature*** which proposes or imposes a solution or brings together the parties in order to resolve a consumer dispute; 4° qualified entity [means]: **any private entity** or an entity set-up by a public authority which provides consumer alternative dispute resolution [...]" [emphasis added]. Similarly, the Luxembourgish draft law, currently under parliamentary debate (Luxembourg 2014) defines the extrajudicial settlement of consumer disputes as "any intervention of an entity which proposes a solution or brings the parties together in order to facilitate the identification of an amicable settlement in case of a consumer dispute", and "qualified entity" as "any entity, regardless of how it is called or cited, which is established in a sustainable way and proposes the settlement of a consumer dispute by an out-of-court means of consumer disputes resolution" [...] [Luxembourg 2014, Article L. 311-1, 6) and 7)]. Furthermore, the authors of the bill show further, in the relevant section dedicated to the explanation of each article, that "the legal form is free: the entity may be constituted **by a natural person**, a legal person or an association of natural or legal persons. The entity may be **a private entity** or an authority or other public body" [emphasis added] (Luxembourg 2014, p. 25). As for the implementation in the UK, the situation is even more clear: the British government does not plan to set-up a new residual ADR entity, not even for interventions in the sectors currently not covered by the existing offer (over 70 ADR programs, both public and private, some voluntary, others mandatory), but it will entrust that role to an institution designated by means of a call for tenders (BIS 2014b, pt. 30).

- none **of the above mentioned countries established a new form of ADR** (neither conciliation, nor mediation or arbitration) **compulsory for only one party** (i.e. for the professional), as the Romanian authority intends to do. Thus, Article 13 of the ANPC's draft law provides that "the professionals established in Romania **are obliged to use ADR procedures** in order to solve disputes with consumers when the latter choose to make use of such procedures". It is important to point out that the **Directive 2013/11 does not impose this obligation**, but only states that it is without prejudice to national rules that already provide it. In this respect, recital (49) of the Directive is clear: "This Directive ***should not require the participation of traders in ADR procedures to be mandatory*** or the outcome of such procedures to be binding on traders,

when a consumer has lodged a complaint against them. […] Therefore, this Directive should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders […]"[emphasis added]. The reason why other countries have avoided establishing a general obligation to make use of ADR is precisely related to insuring a balance between the need for consumer protection and the need to reduce administrative costs of business. For example, the British government stated that "Use of the residual scheme will not be compulsory – it will be available should businesses choose to use it. **We believe a blanket obligation on businesses to use ADR is not appropriate at this time**. The fees that businesses are charged to use ADR would impose a high annual cost to business. We do not believe that there is currently sufficient evidence that the benefits of making ADR mandatory justify this cost" [emphasis added] (BIS 2014b, p. 15, pt. 32), estimating that these additional costs could amount to £ 18 million – £ 38, 5 million.

- **the mediation as an ADR means and the mediators as ADR entities are completely eliminated** from the ANPC's draft law. According to The Mediation Council, there are almost 7,000 mediators registered in Romania (RCM 2014), as well as 123 professional associations in the field of mediation (RCM 2014), 11 organizations providing mediation services (RCM 2014b) and 122 authorized trainers (RCM 2014c). In addition, Article 2(2) of the Law no. 192/2006 on mediation and organization of the profession of mediator, revised, provides that "**[t]he provisions of this Law shall also be applicable to conflicts in the field of consumers' protection**, in case the consumer invokes the existence of injury as a result of having purchased defective products or services, of failure to comply with the contract clauses or with the securities provided, of existence of certain abusive clauses included in the contracts concluded between the consumers and the economic operators or of infringement of other rights provided by the national law or the European Union law in the field of consumers' protection"[emphasis added]. Therefore, both the legal framework and human resources necessary to provide traders and consumers with **a private alternative** to the public ADR services are already in place in Romania. Moreover, the Directive itself states in recital (15) that "**[s]uch development should build on existing ADR procedures** in the Member States and respect their legal traditions. Both **existing** and newly established properly functioning **dispute resolution entities** that comply with the quality requirements set out in this Directive **should be considered as 'ADR entities' within the meaning of this Directive**". This does not happen according to the proposed regulations, the existing procedures and ADR entities being completely ignored in favor of newly created state-owned entities. In addition, **the ANPC's project is also contradictory** since, on one hand, in Article 4(2) it provides that "this law is without prejudice to Law no. 192/2006 on mediation and organization of the profession of mediator [...]", but on the other hand, in article

4(1) it provides that "save as otherwise set out in this Law, if any provision of this law conflicts with a provision laid down in another piece of legislation transposing a legal act of the European Union and relating to out-of-court redress procedures initiated by a consumer against a professional, the provision of this Law shall prevail". In other words, Article 2(2) of Law no. 192/2006 remains without object, without thereby being brought "any prejudice"to that law, which is obviously false. Moreover, in Section 5 of the explanatory memorandum entitled "*Effects of draft law on legislation in force*" it is written in black and white that "the emergence of this law entails the modification of the following acts: [...] Law no. 192/2006 on mediation organization of the profession of mediator".

As for the other countries in question, both Belgium and Luxembourg intend to set up a residual ADR service based on mediation. In Belgium, it will be called „Service de médiation pour le consommateur" (The Mediation Service for Consumers) and in Luxembourg „Le Médiateur de la consommation" (The Consumer Mediator). None of the two countries intends to eliminate existing forms of organization of mediation in favour of a public service;

- **setting up an unfavourable regime for traders that goes beyond what is necessary to achieve the objectives of the Directive**. Thus, traders will be "subordinated" by the government to an ADR entity, without being able to influence this assignation in any way. The draft law does not give them the possibility to choose another ADR program. The "neutral and impartial" third party will be imposed on the parties, as it is the case of adjudication and it will be a representative of the public authority. The difference is that he/she will not be a judge, but a civil servant. He/she will not impose a solution, but will propose one, after analysing the file, the evidences and after hearing the parties or their representatives. We do not know whether and to what extent that civil servant will endeavour to determine the parties to identify a solution themselves, or, given the limited time, the lack of financial motivation and the large number of cases, he/she will rather tend to come with a prefabricated solution of a "one size fits all" type. If a consumer files a complaint, the trader will be obliged to make use of the ADR procedure if the administrative ADR entity considers it is competent to address it. The procedure is free of charge only for the consumers, but not for traders, who will be forced to pay some taxes. Since no fee is stipulated for submitting a complaint and no minimum amount is required for such a claim to be considered, the likelihood of abuse increases. Nothing is specified about incurring the costs in case of unfounded complaints. Only consumers can withdraw from the procedure, the traders are not allowed to. Only consumers have the possibility to accept or reject the proposal made by the ADR entity, not the traders. On the contrary, the latter are obliged to implement it if it is supported by the consumers, under the penalty of a fine.

Conclusion

In our previous paper, dedicated to the transposition of Directive 2013/11 in Romania, we have anticipated that the authorities' first option will be a centralized approach, a "one ADR scheme covering all consumer disputes in all areas" type, showing that ANPC is already prepared in the sense, but the perspective that ANPC will be the only ADR entity that settles consumer disputes will not be welcomed by mediators. We have shown that the effectiveness of such approach, given the lack of qualified personnel, is debatable. In addition, we have anticipated that endless talks between professionals (especially between mediators and lawyers) on better regulation of the sector, but also the permanent disputes between different interest groups will mark the future legislation (Tanul 2014, p. 68).

Some of the above are included in the current legislative proposal, namely the preference for the centralized approach of settling consumer disputes by ADR under the auspices of ANPC, which is obvious. Whether this centralized approach will produce the results pursued by the Directive, namely increasing consumers' confidence in ADR, boosting their confidence in e-commerce and, consequently, the growth of cross-border sales, we will see in time. In our opinion, these results will fail to appear. What we believe will happen if the law is approved as such by the Romanian Parliament, is the introduction of a new way to collect various taxes from businesses under the guise of "we are asked to do so by the European Union", without quality public services in the field of consumer dispute resolution being provided in return.

We did not anticipate last year the absence of any serious public debate on the legislative proposal, especially given the passion the Romanian mediators understood to criticise the 2006 Law on mediation with, regardless of any changes, and to place the blame for non-performance (usually synthesized in the phrase "mediation does not work") on the legal framework. We expected a vigorous institutional response from the directly interested mediators' organizations and we expected that such a project, which brutally brings the consumer disputes out of their sphere of activity, would be the subject of intense debates. To our surprise, it passed almost unnoticed, especially during the election campaign for the establishment of the new Mediation Council.

We hope that at least some of the issues raised in this article will be the subject of changes in the parliamentary procedure, particularly those relating to the clarification of the terminology used and to the introduction of the free choice of established ADR means by the interested parties. The development of new bureaucratic mechanisms, as an opportunity to collect additional taxes, is not healthy, either for businesses or consumers, or,ultimately, for the state.

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