ADR AND ODR IN ROMANIA – FUTURE CHALLENGES

Ciprian TANUL

Abstract. *In 2013, new EU legislation came into force in the area of consumer protection by means of alternative dispute resolution and online dispute resolution. The Directive 2013/11/EU (Directive on consumer ADR) and the Regulation (EU) no. 524/2013 (Regulation on consumer ODR) are both legally binding acts. However, if the Directive needs transposition into national law for its applicability – the deadline for adoption of the necessary provisions by laws, regulations or administrative acts being 9th of July 2015, the Regulation is directly applicable in all Member States. Some of its articles are already applicable and binding, others shall apply from 9th of January 2016. This present paper aims to present the evolution of ADR and ODR in the EU law and some of the challenges which the Romanian authorities but also the Romanian enterprises and citizens may encounter in order to make good use of these particular pieces of legislation.*

Keywords: *Directive on consumer ADR, Regulation on consumer ODR, Out-of-court dispute settlement, Directive 2013/11/EU, Regulation (EU) no. 524/2013.*

Ciprian TANUL
Ph.D. candidate at the Faculty of Political, Administrative and Communication Sciences, Babeş-Bolyai University Cluj-Napoca
Email: cipriantanul@gmail.com

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Background

In order to trace back in time the evolution of the European Union`s interest in alternative dispute resolution mechanisms (ADR), both from the political and legal perspective, it is necessary to monitor two tracks: first would be the "area of freedom, security and justice", mainly the "judicial cooperation in civil matters". The other one is the more specific domain of "consumer protection". That is not because the European legislation is overlapping, on the contrary, but because there is a certain degree of parallelism in regulating different domains using the same tools. For example, searching on Google for "ADR" and "EU", one link goes to the page of DG Health and Consumers of the

European Commission. The dedicated subpage "EU action on ADR/ODR" deals only with the documents adopted by the EU in that specific area. The "calendar" tab starts with the 1st Commission Recommendation of 1998 *on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (EC 1998)*. Nevertheless, that was not the first initiative of the EU, not even of the European Commission, dealing with ADR.

According to the *Green paper on alternative dispute resolution in civil and commercial law*, "Many of these [grass-roots initiatives] date back a long time, such as the establishment in 1994 of a European Economic Interest Grouping to network arbitration and mediation centres in France, Italy, Spain, and the United Kingdom. This "**European Network for Dispute Resolution**" (ENDR) enjoyed financial support from the Community, managed by the Commission's Directorate-General XXIII (Small and Medium-sized Enterprises)" (EC 2002, p. 7, footnote 9). Oddly enough for a project financed with public funds, the ENDR does not seem to have a functional website. However, it seems that ENDR was formed at Lille (France), in November 1994. Its registered address is in Bordeaux. The members of ENDR were: Camera Arbitrale del Piemonte (Turin), CAREN (Lille), CARMED (Marseille), CEDR (London), Centre d'Arbitrage de Bordeaux Aquitaine (CABA), Centre d'Arbitrage Rhone-Alpes (Lyon), Chambre Arbitrage de Toulouse, Chambre de Commerce de Trevise, Chartered Institute of Arbitrators (London), Corte de Arbitrajede (Murcia), Tribunal Arbitral de Barcelona, and Tribunal Arbitral de Commercio de Bilabo (and the Centre des Arbitres des Avocats, Bilbao). Its role is "to facilitate the resolution of cross border disputes within the European Union". Its own members have rules and systems for settling large international disputes. ENDR does not see its role to promote these well-established services, nor to attempt "harmonisation" of procedures in this area. Its main area of interest seems to be the "simple, economic and efficacious systems for the resolution of small cross-border disputes. These will typically be between smaller companies (PME's, 'petites et moyennes enterprises')" (EA 1996).

We have to go back in time up to the 1980s to track the **first EC initiatives** in the field of consumer redress using out-of-court mechanisms. The first Commission Communication took into account that "[s]ince traditional legal proceedings prove too cumbersome, too slow and too expensive for dealing with disputes involving small sums, some countries have sought other, less costly, procedures that are more easily accessible to consumers. Of these, the introduction of conciliation and arbitration bodies has often given satisfactory results." (EC 1984, p. 27, annex 3 paragraph 3.01). Among other issues, the Commission emphasized in the same document the **importance of information** as an essential condition of the new mechanisms' efficiency , stating that "[t]he existence of new dispute resolution procedures must, in general, be publicized if consumers are to know and take advantage of them"(EC 1984, p. 11).

The first Communication on consumer redress was followed by a supplementary Communication dated 7 May 1987 (EC 1987). On that occasion, the Commission mentioned that the Economic and Social Committee suggested, in its report on the "Producer-Consumer Dialogue" of 1984 that the Commission should examine setting up [extra-judicial schemes for conciliation and arbitration] in connection with codes of conduct negotiated between business and consumer organizations at Community level, since "such codes, where they exist at the national level, often provide for such schemes in order to settle consumer disputes". The Commission`s conclusion, however, was that "there remain substantial difficulties in the way of establishing such a dialogue [...]" (EC 1987, p. 13).

The European Parliament, in its Resolution of 11 March 1992 on consumer protection, called on the Commission "to urge the Member States *to develop in cooperation with trade and industry nationwide networks of mediation centres*, using existing national institutions (such as ombudsmen and mediation bodies), which could be brought in to settle disputes before involving the courts, without curtailing in any way the consumer's right to turn the matter over to the proper courts" (EP 1992, point 11).

In the Green Paper "*Access of consumers to justice and the settlement of consumer disputes in the single market*", the Commission took note of the situation in a series of Member States concerning, among other themes, "out-of-court procedures especially devoted to these disputes [...], including mediators and ombudsmen (and similar structures) which have recently been created in various economic sectors" (EC 1993, p.15).The main objective of the Green Paper was to "trigger a discussion between all the interested parties on the basis of the approaches outlined [in the document]". Two of six themes for discussion were related to "promotion of *codes of conduct* at Community level, whose minimal criteria might be the subject of a Commission recommendation with a view to improving the functioning and transparency of the private "Ombudsman" systems" (point 4 of the Conclusions) and "closer contacts between different consumer arbitration bodies with a view to exchanging experiences on this subject" (point 5 of the Conclusions). In this context, the Commission recommended "exploring ingreater detail the role of certain bodies (such as chambers of commerce and industry)in the creation of voluntary arbitration systems, either at sectorial or regional level" (EC 1993, p.86).

Following the Green Paper, the Commission presented an *Action plan on consumer access to justice and the settlement of consumer disputes in the internal market*. The importance of out-of-court procedures is outlined in this document for multiple reasons, such as (i) the rapid evolution of markets which happens more swiftly than legal codes or negotiations between Member States; (ii) the spectacular growth of such procedures which may be interpreted as a response to challenges in adaptation of legislation or as a "filter" to overcome the court backlog and (iii) the experience gained by several Member States which has proved that the "selective encouragement of out-of-court procedures for set-

tling disputes – providing certain essential criteria arc respected – has been welcomed both by consumers and firms (by reducing the cost and duration of consumer disputes) and is currently supported by all sides concerned" (EC 1996, p. 14).

Regarding **the minimum criteria** necessary for the creation of out-of court procedures applicable for consumer disputes, the Commission identified six such criteria, presenting them in the annex II of the Action Plan as a working outline for a future recommendation: (1) "The **impartiality** of the body responsible for handling the disputes", which has to be guaranteed "by all appropriate means" and especially by guarantees of professional independence of mediators; (2) the **effectiveness** of the procedure; (3) the **transparency** of the existence and scope of the procedure, of the maximum time limit and of the possible cost of the procedure for the consumer, as well as of the criteria governing the "decision" of the body responsible for handling the dispute and the legal "status" (binding or non-binding) of such a decision – in the first case, also of the sanctions for non-compliance; (4) in case of cross-border disputes, the **information of each party,** in writing and in an official language of the Community about the decision of the dispute and its grounds; (5) and (6) ensuring in any case **free access to justice** of the consumer according to the law of his/her country of residence and **the protection** afforded to the consumer by the mandatory rules of law (EC 1996, p. 22).

In its Resolution on this Communication, the European Parliament expressed its support to the objectives set out in the action plan and called, among others, on the Member States "to make every effort to promote the creation of out-of-court procedures to settle disputes in consumer matters and to simplify further the formalities for access to them" (EP 1996, point 10).

The minimum criteria presented above have become **principles** in the *Commission Recommendation 98/257/EC*. The recommendation is limited to procedures "which, no matter what they are called, lead to the settling of a dispute through **the active intervention of a third party who proposes or imposes a solution**" (mainly arbitration). It does not concern procedures that "merely involve an attempt to bring the parties together to convince them to find a solution by common consent" (EC 1998). **Therefore**, **direct negotiation, conciliation, and mediation fall outside the scope of the Recommendation**.

The principles of the Recommendation, which must be respected by all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes, are the following: (1) **independence** – guaranteed by guaranteed by four measures, including (i) the abilities, experience and competence, particularly in the field of law, required to the person appointed in order to carry out his function and (ii) a period of office of sufficient duration to ensure the independence of the person appointed his action and shall not be liable to be relieved of his duties without just cause, (2) **transparency** – ensured by two sets of measures, namely provision of

specific information, in writing or any other suitable form, to any persons requesting it and publication by the competent body of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified, (3) **adversarial principle**; (4) **effectiveness** – "ensured through measures guaranteeing that the consumer has access to the procedure without being obliged to use a legal representative, that the procedure is free of charges or of moderate costs, that only short periods elapse between the referral of a matter and the decision and that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute" (EC 1998, principle IV), (5) **legality**, (6) **liberty** – "the decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this" (EC 1998, principle VI), and (7) **representation** – the procedure must not deprive the parties of the right to be represented or assisted by a third party at all stages.

In its *Resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes*, the Council of the European Union noted, among other things, the rapid development of electronic commerce and the existence in Member States of out-of-court bodies which fall outside the scope of Recommendation 98/257/EC, but which also play a useful role for the consumer. Therefore, the Council invited the Member States to encourage the activities and the setting-up of such bodies, on the basis of Recommendation 98/257/EC. The Council also invited the Commission to "assist Member States […] in the promotion of activities of existing out-of-court bodies and in the establishment of new bodies" and, more importantly, to "develop in close cooperation with Member States common criteria for the assessment of out-of-court bodies falling outside the scope of Recommendation 98/257/EC". The mentioned criteria must ensure the quality, fairness, and effectiveness of such bodies (Council 2000, point 11).

Directive 2000/31/EC ("Directive on electronic commerce") provides that each Member State "should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders" (19). Its article 17 (Out-of-court dispute settlement) additionally stipulates that "Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned" (EPC 2000).

Taking into account the *Council Resolution of 25 May 2000,* the evolution of electronic commerce and, notably, the evolution of electronic dispute settlement systems, as well as the necessity to apply the principles formulated in *Recommendation 98/257/EC* to **mediation, but also to Ombudsmen and Consumer Complaint Boards** (described

as "any other third party procedures, no matter what they are called, which facilitate the resolution of a consumer dispute by bringing the parties together and assisting them, for example by making informal suggestions on settlement options, in reaching a solution by common consent"), the Commission has adopted a 2nd *Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes*. The principles set out in this new Recommendation are more or less the same, namely: **impartiality**, **transparency**, **effectiveness,** and **fairness** (EC 2001).

The evolution of ADR and ODR (the latter as a "form of web-based cross-border dispute resolution") as instruments for improving the access to justice persuaded the Commission to respond to the specific request of Council by drafting in 2002 a *Green paper on alternative dispute resolution in civil and commercial law*. After an inventory of political and legal evolution of out-of-court settlement of disputes, both at the European Union and at Member States level, the Commission used the opportunity to raise 21 questions in order to establish the future approach of field development. The inquiries in question dealt with the political and legal implications of the initiatives that might be undertaken (Q.1-4), ADR and access to justice and, more specifically, the scope of contractual clauses regarding the recourse to ADR (Q.5-8), the limitation periods (Q.9), minimum quality standards, especially confidentiality (Q.10-16), the validity of consent and the effectiveness of ADR (Q.17-18) and, finally, the status, the training, the accreditation and the liability of third parties (Q.19-21) (see EC 2002).

For the purpose of the present article, we will mention only the question concerning ODR, namely Q.3: "**Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation**?"

A *Summary of responses to the Green Paper on alternative dispute resolution* was published by the Commission on the 31st of January 2003. The Commission received more than 160 responses from governments of Member States and third countries, providers of ADR, providers of training and information in ADR, academia, judges, bar associations and solicitors' firms, chambers of commerce, professional federations, commercial companies, and consumers' associations. The diversity of responses demonstrated the complexity of the subject and the variety of approaches: technical, social, legal, and political. Summarizing the answers for Q.3, the Commission stated that **"[w]hile some consider that it is too soon to judge, given the slow development of ODR, most take the view that ODR and other types of ADR should be dealt with in exactly the same way, with only the technical requirements of ODR being considered separately**" (EC 2003, p. 3).

On the 27th of January 2003, the Council of the European Union adopted the *Directive 2002/8/EC* on legal aid for cross-border disputes. The Directive provides, both in its recital (21) and in the article 13, that "legal aid is to be granted [...] for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court" (Council 2002, recital 21).

The *European Code of Conduct for Mediators* was launched at a conference in Brussels on 2 July 2004. It has been developed with the assistance of the European Commission and "sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters"(EC 2004). The Code of Conduct contains a series of provisions regarding **competence, appointment and fees of mediators and promotion of their services** (chapter I), **independence and impartiality of mediators** (chapter II), **the mediation agreement, process and settlement** (chapter III) and **confidentiality.**

As a direct result of the consultation conducted through the *Green Paper on alternative dispute resolution,* the Commission submitted for approval to the Council and the European Parliament, on 22nd of October 2004, the *Proposal for a directive on certain aspects of mediation in civil and commercial matters* (EC 2004a). The proposal was adopted four years later, with a series of amendments, and become*Directive 2008/52/EC* (EPC, 2008).

The objective of the directive is facilitation of access to ADR and promotion of such methods by "encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings" (EPC 2008, article 1). Its scope is limited to cross-border disputes of civil and commercial matters with the exception of the rights and obligations which are not at the parties' disposal. The directive is not also applicable to the revenue, customs or administrative matters or "to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)" (idem). The term for transposition of the directive into the legal system of the Member States was 21st of May 2011. According to its article 11, until the 21st of May 2016, the Commission have to submit to the European Parliament, to the Council, and to the European Economic and Social Committee, a report on the implementation of the directive. The report must present the development of mediation throughout the European Union and the impact of the directive in the Member States plus a series of proposals to adapt the directive, if necessary.

For the purpose of the present article it is worth mentioning that at the point (9) of the preamble, the directive clearly states that "[it] **should not in any way prevent the use of modern communication technologies in the mediation process**" (EPC 2008, recital 9).

The *Directive 2004/39/EC on markets in financial instruments* provides that "Member States shall **encourage the setting-up** of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes […], using existing bodies where appropriate" (EPC 2004, article 53).

The *Directive 2006/123/EC on services in the internal market* imposes an obligation of information of the recipient by the provider if the latter is "subject to a code of conduct, or memberof a trade association or professional body which provides for recourse to a non-judicial means of dispute settlement" (EPC 2006, article 22). The provider must also "specify how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement" (idem).

The article 83 (Out-of-court redress) of the *Directive 2007/64/EC on payment services in the internal market* provides an obligation for the Member States to **put in place** "adequate and effective out-of-court complaint and redress procedures for the settlement of disputes between payment service users and their payment service providers […] using existing bodies where appropriate" (EPC, 2007).

Article 19 of *Directive 2008/6/EC (Postal Services Directive)* stipulates an obligation for the Member States to "encourage the development of independent out-of-court schemes for the resolution of disputes between postal service providers and users" (EPC 2008a).

The *Directive 2008/48/EC on credit agreements for consumers* provides, in its article 24 ("Out-of-court dispute resolution"), the same obligation for the Member States as Directive 2007/64/EC, namely to **put in place** "adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements […] using existing bodies where appropriate" (EPC 2008b).

The *Directives 2009/72/EC concerning common rules for the internal market in electricity* and *2009/73/EC concerning common rules for the internal market in natural gas* provide the same obligation for the Member States, namely that an independent mechanism such as an energy ombudsman or a consumer body be put in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements (EPC 2009 art. 3 p. 13, respectively EPC 2009a art. 3 p. 9).

Finally, the *Directive 2009/136/EC on electronic communications networks and services* stipulates that Member States have **to ensure that** "transparent, non-discriminatory, simple and inexpensive **out-of-court procedures are available** for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services" and they have to adopt measures to ensure that "such procedures enable disputes to be settled fairly and promptly" (EPC 2009b), while *Directive 2009/140/EC* provides, regarding the cross-border disputes, that Member States **may make provision** "for the competent national regulatory authorities jointly

to decline to resolve a dispute where other mechanisms, **including mediation**, exist and would better contribute to resolving of the dispute […]" (EPC 2009c).

In 2007 and 2009, two separate studies were conducted on the usage of ADR throughout the European Union, at the request of the European Commission. The first study, actually a research project conducted by the University of Leuven, was dedicated to the "analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings". The research was conducted in the 25 (then) Member States of the European Union, as well as in Australia, Canada, and the United States of America and it was published on the 17th of January 2007 (Leuven 2007). The second study was published on 16 October 2009 by the Civic Consulting of the Consumer Policy Evaluation Consortium. It was commissioned by the DG SANCO and it provided an overview of existing ADR schemes in the EU, their work, identifies the main challenges, while it also evaluated the conformity of ADR schemes with the Commission Recommendations of 1998 and 2001 (Civic Consulting 2009).

In May 2010, the European Union`s strategy *Digital Agenda for Europe*(EC 2010) was launched aiming to contribute to sustainable economic growth by making use of the new digital technologies. Its action 14, called "Explore the possibilities for Alternative Dispute Resolution", provided a legislative proposal for consumer ADR in the EU by the end of 2011 and an EU-wide ODR system for cross-border electronic transactions by 2012. The main problem identified being the difficulty to resolve online cross-border shopping disputes due the involvement of different legal systems and procedures, EU action was considered necessary in order to make the most of the current ADR schemes.

In November 2011, after the consultation procedure conducted in the same year, the European Commission launched the proposals for a *Directive on alternative dispute resolution for consumer disputes* (Directive on consumer ADR) and for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR). The proposals were approved after two years by the European Council and the Parliament, becoming the *Directive 2013/11/EU on alternative dispute resolution for consumer disputes* (ECP 2013) and the *Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes* (ECP 2013a).

The legal framework – a brief presentation

On 29 November 2011, the European Commission submitted to the European Parliament and the Council two legislative proposals aimed primarily at ensuring that all the EU consumers would be able to settle their disputes with the traders out of court, regardless of the type of product or service purchased and no matter if the purchase took place in their country or abroad, directly or via the Internet. Thus, the Commission aims to eliminate the main obstacles to the effectiveness of alternative dispute resolution (ADR): insufficient geographical coverage, insufficient knowledge of ADR and improv-

ing the quality of ADR procedures. Also, it is estimated that this possibility of resolving consumer disputes will help consumers to save about 22 billion Euros/year (EC 2011).

According to article 288 of the Treaty on the Functioning of the European Union, a regulation has general application, it is binding in its entirety and directly applicable in all Member States, while the directive is mandatory for each Member State only concerning the result to be achieved, leaving at the discretion of national authorities the choice of form and methods.

As time frame, the Commission expects that Member States will implement the ADR/ODR rules by July 2015 and that the ODR platform will be operational in January 2016 (see the Commission web page at the address http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm).

The general objectives of both acts are the proper functioning of the internal market and a high level of consumer protection by recourse to high quality ADR procedures (the Directive) and by providing a European ODR platform facilitating high quality out-of-court resolution of disputes between consumers and traders online (the Regulation).

The specific objectives of the Directive and the Regulation, as formulated in the impact assessment document (EC 2011a) are the insurance of access to ADR procedures, a better information of consumers and businesses about the existence of these procedures, the insurance of quality ADR services, and the existence of a reliable ODR mechanism for cross-border disputes arising from the electronic commerce.

In order to achieve these objectives, the Directive imposes three major types of obligations on the Member States: a) obligations to access to ADR entities according to a series of requirements and principles regulating such entities and procedures (art. 5-12); b) obligations related to information and cooperation (art. 13-17) and c) obligations for monitoring the ADR entities and notification (art. 18 to 20). The Regulation provides the establishment of a European ODR platform (art. 5-14).

It should be noted that the Directive is applicable only to the out-of-court proceedings for resolution of contractual disputes by a third entity (a natural or a legal person such as a conciliator, a mediator, an arbitrator, an ombudsman, or a Board of Appeal) who proposes or imposes a solution orbrings the parties together in order to facilitate an amicable solution. Such procedures exclude the resolution of disputes through the departments of complaint settlement of companies, the settlement of disputes by persons employed exclusively by traders, the direct negotiations between consumers and traders, whether or not they are represented and the judges attempts to resolve the dispute in legal proceedings. Moreover, the Directive shall not apply to: non-economic services of general interest; disputes between traders; procedures initiated by a trader against a consumer; health services and public providers of further or higher education.

Next, we will summarize the main provisions of the Directive having in mind the obligations imposed on Member States.

a) **Obligations of Member States on access to ADR** involve that they have to ensure the possibility that disputes may be submitted to ADR entities that meet a series of conditions. ADR entities may be, as noted above, both legal entities – private or public persons, since Member States have the possibility to create them if they do not exist yet – as well as individuals.

The principles on which the fulfilment of these obligations relies are the following: expertise, independence and impartiality (art. 6), transparency (art. 7), effectiveness (art. 8), fairness (art. 9), liberty (art. 10) and legality (art. 11).

Thus, individuals must have an expertise in the field of ADR or judicial resolution of consumer complaints, and a general understanding of law. Member States must ensure that such persons possess the necessary knowledge and skills plus an adequate experience in ADR procedures and that they are impartial (they cannot be dismissed without good reason and they are not in a situation of conflict of interest with either party to the dispute).

Regardless of their form, ADR entities should have a web site allowing online submission of complaints and exchange of information by electronic means. Also, the site should contain, among others, information on the financing sources, the rules of procedure used, the working languages, the costs incurred by the parties (if applicable), the approximate duration of the procedure and the legal effect of the outcome of the ADR procedure. Annual activity reports must be published, in both electronic and printed form, encompassing a range of information on the number and types of complaints handled, recurring problems arising between traders and consumers, the success rate of the procedure, the average necessary to resolve disputes etc.

Furthermore, Member States shall ensure that ADR procedures are effective, easily accessible to both parties wherever they are located, free or available at moderate costs for consumers, and the dispute is settled within 90 days of the date on which an ADR entity has received the complaint. The 90 days term may be extended for more complex cases.

Regarding the fairness of the ADR proceedings, Member States must ensure the existence of the possibility of expressing the views of the parties, the knowledge of the evidence, of the arguments and of the outcome of these proceedings. In particular, consumers should be informed before accepting the proposed solution about the option they have to accept it or not, the legal consequences of a possible agreement and the fact that the proposed solution may be less advantageous than a judgment based on applicable law.

The principles of **liberty** and **legality** (art. 10 and 11) were added during the lawmaking process. They were not part of the initial proposal of the Commission. According

to article 10, an agreement to submit complaints to an ADR entity "is not binding on the consumer if it was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute". On the other hand, according to the same article, in the ADR procedures concluded with an imposed solution, such a solution is binding on the parties only if they were informed in advance about its compulsory nature and if the parties expressed their agreement. According to the legality principle stipulated in article 11 of the Directive, an imposed solution on the consumer cannot result in its deprivation of the protection afforded to him by the law of its Member State of residence (in a situation of conflict of laws) or by the law of the Member State where the consumer and the trader have their residence (in a situation where there is no conflict of laws).

b) Obligations of Member States on information and cooperation are probably the most sensitive point of the Directive, since for their fulfilment all traders have to inform consumers about the competent ADR entities to settle eventual disputes, by posting the relevant information on their website, and to include such information in the contracts and general terms and conditions. ADR entities are encouraged to associate in European networks in order to better approach the cross-border litigation in a particular field and to cooperate with national entities responsible for the implementation of EU legislation on consumer protection. The cooperation includes mutual exchange of information on trade practices of traders about which consumers have lodged complaints, with the compliance of applicable rules on protection of personal data under Directive 95/46/EC.

In our view, the fulfilment of such obligations, as they are regulated by the Directive, has a double impact: on one hand, it definitely provide an advantage for ADR entities that traders will choose and propose to consumers, on the other hand the Directive, unlike the Commission's proposals, stipulates the compliance of ADR entities with the principle of confidentiality. This is one of the pillars on which the recourse to out-of-court settlement of disputes lays. One of the main reasons for choosing mediation or arbitration over court is precisely the certainty that what is discussed in mediation or arbitration room "remains in that room", including the identity of the parties, data concerning the dispute or documents which the parties use in order to support their cause. This is a major improvement of the Directive in the law-making process and it will certainly have a positive effect on its effectiveness.

c) Obligations of Member States concerning the monitoring of ADR entities involve the appointment of a competent authority to verify that such entities comply with the scope of the Directive. In this respect, it is necessary that ADR entities communicate to the competent authorities a series of information concerning their identification and contact data, including those of the individuals responsible for the settlement of disputes, the structure and sources of funds, the procedural rules, the fees charged, the average length of procedures, the language of procedure and other information neces-

sary in order to establish the competence, as well as a statement on whether the entity qualifies as and ADR entity falling within the scope of the directive. Also, every two years, ADR entities must submit to the competent authorities statistics on the number of disputes submitted and types of complaints on which they were related, the success rate, the average time for the settlement, the rate of compliance with the outcomes of ADR procedures, an assessment of effectiveness of cooperation within networks of ADR entities and an assessment of the effectiveness of ADR procedures offered by the entity.

Based on information received, the competent authorities shall assess whether ADR entities fall within the scope of the Directive and make-up a list with which they further notify to the European Commission.

Although the Directive does not expressly provides so, from the structure of the text results that only those ADR entities included on the list will be proposed by traders to consumers for settling any disputes. Moreover, only such entities will be able to operate within the framework of Regulation no. 524/2013 (Regulation on consumer ODR) (ECP 2013a, article 5).

Concerning the Regulation on consumer ODR, the obligations of Member States are the following: they have to inform the Commission about whether or not their legislation allows for some disputes (namely, the disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union, which are initiated by a trader against a consumer) to be resolved through the intervention of an ADR entity and which ADR entities deal with such disputes (ECP 2013a, article 2), they must designate ODR contact points and communicate their name and contact details to the Commission (ECP 2013a, article 7), they must ensure that ADR entities, the centres of the European Consumer Centres Network, the competent authorities defined in the Directive 2013/11/EU, and, where appropriate, the bodies designated in accordance with the same directive provide an electronic link to the ODR platform (ECP 2013a, article14) and they have to encourage consumer associations and business associations to provide an electronic link to the ODR platform and, finally, the competent authority of each Member State must assess whether the ADR entities comply with the obligations provided by the Regulation (ECP 2013a, article 15).

The impact on Romanian legislation – future challenges

The *Study on the use of Alternative Dispute Resolution in the European Union* of 2009 pointed to a number of problems, such as gaps in the coverage of ADR (both geographically and by sector), lack of awareness by consumers and businesses, failure to respect the core principles laid down by the two Recommendations and incomplete offers of ADR schemes to solve consumer disputes related to e-commerce transactions.

According to the Romanian Council of Mediation, in Romania there are almost 10,000 registered mediators in the roster of authorized mediators (the exact figure is 9,150, both active and inactive mediators) (RCM 2014), 118 professional associations in the field of mediation (RCM 2014a), 11 organizations which provide mediation services (RCM 2014b), and 110 certified training providers (RCM 2014c). However, both the study of 2009 and the Impact Assessment accompanying the proposals for the Directive on consumer ADR and for the Regulation on consumer ODR indicates that **few ADR schemes exist – namelytwo:** The National Authority for Consumer Protection (ANPC) and The National Authority for Management and Regulation in Communications of Romania (ANCOM) (Civic Consulting 2009, p. 88), the latter being "to date the only scheme notified to the European Commission". They are both public ADR schemes and no private ADR provider is notified to the Commission.

The same study shows that "according to the European Consumer Centre (the only responding stakeholder organisation), there are gaps in most sectors of industry, i.e. banking, insurance, investment/securities, transport, postal services, package travel/ tourism, energy, water supply and heating, food services/products, non-food consumer goods, construction, games of chance, as well as scams and pyramid schemes. No data concerning geographical coverage is available" (Civic Consulting 2009, p. 89).

The EU studiesalso show that there is a strong correlation between the development of ADR in a specific country and the level of consumer trust in the ADR methods, that is in the countries where ADR is already well developed (Denmark, Sweden, Finland, Germany, Luxemburg, the Netherlands, and Czech Republic) an average of 56% of consumers report having obtained a satisfactory redress from traders, while in the countries with the least developed ADR (Bulgaria, Cyprus, Lithuania, Slovenia, Romania, and Latvia) satisfactory redress was obtained only by 23% consumers (EB 342, p.75)". (EC 2011a, p. 31)

The confidence of the Romanian public in ADR methods was not measured yet, and the continuously changing legislation in the field has a rather confusing effect. For example, the Law no. 192 on mediation and organisation of the profession of mediator, issued 16 May 2006, was amended 9 times – by Law no. 370/2009, Government Ordinance no. 13/2010, Law no. 202/2010, Law no. 76/2012, Law no. 115/2012, Government Emergency Ordinance no 90/2012, the Government Emergency Ordinance no 4/2013, Law no. 214/2013, and last time by the Government Emergency Ordinance No 80/2013. Recently, the Constitutional Court ruled that the norm making compulsory the information session on mediation in certain civil and commercial disputes infringes the Romanian Constitution (CCR 2014). Making the attendance at an information session on mediation a preliminary condition for having access to a trial by a judge was regarded as a measure to boost the usage of mediation by the litigants. However, mediation is not a free of charge procedure and there are no public funds available to cover the

administrative costs of such a procedure, therefore the access to justice was somehow hampered by imposing an additional fee to the litigant.

Nevertheless, concerning ODR, there are no provisions in the Romanian legislation insofar. It is not expressly forbidden, nor is it encouraged or even mentioned.

In order to implement the provisions of the Directive and the Regulation, Romanian authorities will have to change the recently adopted legislation again. Apart from the Law on mediation already mentioned, some other provisions need revision, such as the **arbitration law** (Law no. 335/2007 on Chambers of Commerce in Romania), **specific legislation on consumer protection, in particular in the field of electronic commerce** (Government Ordinance no. 21/1992 on consumer protection, republished, Law no. 365/2002 on electronic commerce, republished, Government Ordinance no. 130/2000 on the regime of distance contracts, republished and amended, Law no. 363/2007 on combating unfair practices of traders andLaw no. 193/2000 on unfair terms in contracts concluded between traders and consumers, to mention only a few.

There is a multitude of possible choices for the Romanian authorities in order to give an impetus to ADR schemes, since "the obligation of ensuring that all consumer disputes can be referred to ADR (i.e. full coverage), does not imply that Member States have to set up separate ADR schemes for each market sector" (EC 2011a, p. 47). One is the possibility to establish **one public ADR scheme covering all consumer disputes in all sectors** – the centralized approach (see also EC 2011a, p. 48). The National Authority for Consumer Protection is already in place, **but the perspective that it would be the only ADR and ODR scheme to settle the consumer-trader disputes is not a very appealing one for the Romanian mediators**. In our view, that would be the first option, considering the financial aspect. The efficiency of such an approach, having in mind the lack of qualified personnel, is strongly debatable.

Another option would be **to create separate ADR schemes for the sectors that are not already covered**, or **to encourage private ADR schemes already in place to organize in umbrella entities for the exposed sectors** (idem). As I mentioned before, there is already a series of organizations active in the field of mediation and a large number of individuals trained and active in the field of mediation. Probably, the never ending debates among the professionals (namely the rivalry between mediators and lawyers, public notaries,other law-relatedprofessions) about better regulation of the field and the continuous clash among different interest groups will continue and will influence future legislation.

Finally, **the notification of existing – but not notified – ADR schemes** (idem) should be taken into account for the obligation ofensuring full coverage of ADR. The general public, the private actors, and the public authorities are still poorly informed on the notification procedure, its steps and requirements.

The costs incurred by Romania will depend on the way the authorities choose to meet the obligation of full coverage. Time, however, is running short, since the deadline for adoption of the necessary provisions by laws, regulations, or administrative acts in order to comply with the Directive is 9th of July 2015. The Regulation is already in force and directly applicable in all Member States. Some of its articles shall apply from the 9th of January 2016, after the set-up of the ODR platform.

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