

ALTERNATIVE DISPUTE RESOLUTION

Mihaela Irina IONESCU*

Abstract

Alternative dispute resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, before permitting the parties' cases to be tried.

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (hereinafter „Directive 2013/11/EU”) aims to ensure a high level of consumer protection and the proper functioning of the internal market by ensuring that complaints against traders can be submitted by consumers on a voluntary basis, to entities of alternative disputes which are independent, impartial, transparent, effective, simple, quick and fair.

Directive 2013/11/EU establishes harmonized quality requirements for entities applying alternative dispute resolution procedure (hereinafter "ADR entity") to provide the same protection and the same rights of consumers in all Member States.

Besides this, the present study is trying to present broadly how are all this trasposed in the romanian legislation.

Keywords: *alternative dispute resolution, complaints, consumers, EU regulation, national legislation.*

At present, at **European Union** level, differences between Member States regarding complaints systems both in terms of sectors covered by these and quality procedures are noticed. These differences represent a barrier to the internal market and is one of the reasons why many consumers do not purchase goods and services from another Member State and do not have confidence that potential disputes with traders could be solved in an easy, quick and inexpensive manner. Given these issues, it was considered important to implement common principles in all Member States for solving consumer complaints.

In this regard, in May 2013, *Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) and Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)* were adopted.

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and the proper functioning of the internal market by ensuring that complaints against traders can be submitted by consumers on a voluntary basis, to entities of alternative disputes which are **independent, impartial, transparent, effective, simple, quick and fair.**

Directive 2013/11/EU establishes **harmonized quality requirements** for entities applying alternative dispute resolution procedure (hereinafter "ADR entity") **to provide the same protection and the same rights of consumers in all Member States.**

The Directive requires Member States to facilitate consumer access to procedures for alternative dispute resolution (hereinafter 'ADR procedures') in case of national disputes and cross-border referring to contractual obligations in contracts for sales or contracts for services in all commercial sectors. In this respect the following requirements that the ADR entities must meet are established:

– **expertise, independence and impartiality:** the natural persons in charge of ADR should possess the necessary expertise, including a general understanding of law and be independent and impartial;

– **transparency:** ADR entities should make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, clear and easily

* Lector, PhD, “Nicolae Titulescu” University of Bucharest (e-mail: mihaelairinaionescu@anpc.ro).

understandable information on the entity and the procedure;

- **effectiveness:** ADR procedures should be effective by fulfilling certain requirements such as the procedure to be available and easily accessible online and on paper for both parties irrespective of where they are, to be free of charge or at moderate costs for consumers, the outcome of the ADR procedure to be available to the parties within 90 calendar days of the date on which the ADR entity has received the complaint;

- **fairness:** in this respect criteria that ADR procedure must meet are established, such as: the parties have the possibility of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them; the parties are notified of the outcome of the ADR procedure in writing or on a durable medium, and are given a statement of the grounds on which the outcome is based;

- **liberty:** an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised 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.

In order to provide an effective tool for solving consumer complaints when purchasing goods and services online and that the ADR procedure to be available and easily accessible online to both parties, Regulation no. 524/2013 provides for an online dispute resolution platform (hereinafter 'ODR platform') so that consumers and professionals benefit of a single point of entry for online alternative dispute resolution through ADR entities that are connected to the platform.

From the IT perspective, the ODR platform will be an interactive website, free of charge and available in all official languages of the European Union. This platform: will provide a complaint form to be completed and submitted online by the applicant; will inform the defendant about the complaint; will identify relevant ADR entities, etc. Therefore the Directive 2013/11/EU and Regulation (EU) no. 524/2013 are two interrelated and complementary legislative instruments.

To ensure that ADR entities meet the quality requirements, the Directive provides for the designation of one or more **competent authorities**, and the appointment of a competent authority as a **contact point** for the European Commission.

Currently, in Romania, in disputes between consumers and traders, when both traders and consumers are resident in Romania, consumers may contact:

a) public authorities in charge of consumers protection, such as National Authority for

Consumers' Protection, Ministry of Transport, Ministry of Health, National Authority for Management and Regulation in Communications, National Tourism Authority which solve the complaints free of charge;

b) mediators, according to Law no. 192/2006 regarding mediation and the mediation profession;

c) courts.

In case of cross-border disputes between consumers and traders, consumers may contact the European Consumer Centre. European Consumer Centres Network is a network established at EU level in order to strengthen consumer confidence, advising Europeans on consumer rights and facilitating the resolution of the problems in an amiable way.

Transposition and implementation in Romania

The Directive 2013/11/EU was transposed into national legislation by *Government Ordinance no 38/2015 regarding alternative dispute resolution between consumers and traders* (hereinafter "GO no 38/2015").

GO no 38/2015 establishes the legal framework in order to allow consumers to submit voluntarily complaints against traders to ADR entities that solve them in an independent, impartial, transparent, effective, fast and fair manner. GO no 38/2015 takes over all the quality requirements imposed by the Directive 2013/11/EU.

According to the national legislation, an ADR entity may propose a solution that will become binding on the parties if it is accepted by both parties and/or impose a solution which is binding on the parties. If the ADR entity offers both solutions, it is the consumer who chooses if the entity proposes or imposes a solution. GO no 38/2015 stipulates that ADR entities designate natural persons who meet the conditions of expertise, independence and impartiality to conduct ADR procedures.

Considering the provisions of point 24 of the recital of the Directive according to which ADR entities can function "within the framework of national consumer protection authorities of Member States where State officials are in charge of dispute resolution. State officials should be regarded as representatives of both consumers' and traders' interests.", GO no 38/2015 provides that ADR entity may be any central government authority or autonomous administrative authority with responsibilities in consumer protection field. Therefore, excepting the financial area, ADR procedures can be performed only by central authorities or autonomous administrative authorities. In this way it was meant to ensure that principles of independence and impartiality are respected, given that point 41 of the recital of the Directive provides: "ADR procedures should preferably be free of charge for the consumer. In the event that costs are applied, the ADR procedure should be accessible,

attractive and inexpensive for consumers. To that end, costs should not exceed a nominal fee.”

Thus, any other entity, except public institutions, would have to obtain funds, most likely from traders to operate and impartiality and independence would be very difficult to guarantee.

Setting up ADR entities

An ADR entity will be set up within the National Authority for Consumers Protection. This entity will be impartial and independent of the market surveillance and control activities. The entity will be run by a Director and 25 employees will be implied in the procedures. The procedures carried out by this entity will ensure coverage of all the country and will also cover all the fields of activity, except if other specialised ADR entities are set up.

For the financial field, given its complexity and the impact of banking services on consumer, a Centre for Alternative Dispute Resolution in the banking system was set up. The work of this centre is coordinated by a Steering College. The Steering College is composed by a representative of National Bank of Romania, of National Authority for Consumers' Protection, of Romanian Banking Association, of a consumer association and an independent person.

Centre for Alternative Dispute Resolution in the Banking system (CSALB) is an autonomous legal entity, governmental, apolitical, non-profit, public interest legal person with a mission to organize, manage and monitor settlement through ADR procedures, disputes between consumers and traders whose activity is regulated, authorized and supervised / monitored by National Bank of Romania, as well as subsidiaries of traders carrying out activities in Romania in banking.

ADR Center main duty consists in organizing, managing and monitoring resolve disputes through ADR procedures or internationally, arising from contracts for provision of services between consumers and traders mention in Article 1. (3).

Disputes have an international character when the consumer is domiciled or habitually resident in another state in the European Union or the European Economic Area, as well as the territory of the Swiss Confederation, when concluding the contract service for the merchant of Romanian nationality, or performing activities on Romania's territory.

Consumers may submit the dispute for ADR ADR procedures administered by the Center if they prove that, previously, have tried to settle the dispute directly with the trader in question.

ADR procedures organized by CSALB runs out of court intervention and consist of a conciliator who, depending on the procedure chosen by the consumer, may propose or impose a solution on the parties. ADR procedures organized by CSALB are voluntary, independent, impartial, transparent, effective, fast and fair.

Organization and Alternative Dispute Resolution Rules are governed by the ADR procedure completed with the suggested solution on the ADR procedure and rules finalized by imposing a solution.

ADR procedure completed with suggested solution, further called conciliation procedure is optional for parties and reliance on it is established at the initiative of consumer merchant agreement formulated during trying binding settlement of the case together with the merchant directly.

The procedure does not involve its continuation through a judicial or arbitral procedure, if the parties' agreement does not register on the solution proposed by the conciliator, or achieved only a partial understanding in this regard.

Either party may at any time withdraw from the procedure.

When the parties agree to resort to conciliation organized and managed by ADR Center, by that very fact they accept the rules.

Parties must personally participate in the proceedings.

The consumer may be assisted or represented, if necessary, by a representative of the association of consumers who belongs or a lawyer whose fees support it.

The trader participate through a legal representative by a legal adviser or lawyer whose fees support it.

The procedure is free only for the consumer.

ADR procedure completed with imposing a solution is described as arbitration, organized and managed by ADR Center

ADR Center as permanent arbitration institution, operates in compliance with Government Ordinance no.38 / 2015 on alternative disputes between consumers and traders, Directive 2013/11 / EU on Alternative Dispute Resolution in consumer and amending Regulation (EC) nr.2006 / 2004 and Directive 2009/22 / EC of the civil procedure Code in force and the Regulation for the organization of the Centre for alternative Dispute Resolution in Banking and functioning of the Steering College.

The person in the list of conciliators established by ADR Center, appointed or chosen in a dispute in which the parties have opted for the ADR procedure completed with an imposed solution acquires in that dispute, an arbitrator.

ADR Center organizes dispute settlement arbitration proceedings if the parties have concluded this compromise.

If by compromise, the parties have entrusted the Centre ADR settlement of the dispute through an ADR procedure finalized by imposing a solution by itself this fact the parties have accepted the application of these Rules of Procedure.

The arbitration may be entrusted by the compromise concluded, one or more people invested

sides to hear the case and deliver a final and binding on them.

The sole arbitrator or, where appropriate, the three referees invest constitute, in the present rules, the arbitral tribunal.

Settlement of the dispute lies with the arbitral tribunal that hears in full independence and impartiality and pronounces a final and binding on the parties. The decision is enforceable under the provisions of the Civil Procedure Code.

Under the nullity of the arbitral decision, the entire arbitration procedure must ensure equal treatment of the parties, the right to defense and contradictory debates.

ADR Center, the arbitral tribunal, the Secretariat of the Center ADR procedure and its entire staff are obliged to ensure the confidentiality of arbitration. The case file is confidential and no foreign person does not have access to it without the consent of the parties and the arbitral tribunal prior approval.

Arbitral awards may be used for statistical purposes or information in cooperation work of the competent authorities under the Regulation of organization the Centre for Alternative Dispute Resolution in Banking and functioning of the Steering College and other entities ADR on legal issues arising in litigation without mention of the name / designation of the parties or data that might harm their interests.

The parties have a duty to exercise their procedural rights in good faith to cooperate with the arbitral tribunal for the development of corresponding arbitral process and its completion within the deadline.

At any stage of the dispute, the arbitral tribunal will try its solution based on agreement of the parties.

Nevertheless, any public authority or autonomous administrative authority may set up ADR entities in their field of activity.

As competent authority and contact point with the European Commission the Ministry of Economy, Trade and Businesses was designated.

Currently, measures are being taken in order to ensure that ADR entities are set up and function at the beginning of 2016.

Conclusions

Romanian legislation transposing Directive 2013/11/EU is recent, the implementation process is not completed yet, so until the effective functioning of the system of alternative dispute resolution involved are still steps to go.

In this respect it is necessary, besides the actual existence of the legal framework, to take place and a more ample information, more extensive, on this new activity, especially in the legal professions.

References:

- Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004;
- Directive 2009/22/EC (Directive on consumer ADR);
- Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004;
- GO (Governmental Ordinance) 38/2015 regarding alternative dispute resolution between consumers and traders;
- CSALB (Centre for Alternative Dispute Resolution in the Banking system) - Regulation for the organization of the Centre for Alternative Dispute Resolution in Banking and functioning of the Steering College.