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CONSUMER ADR: THE ALBANIAN EXPERIENCE IN TRANSPOSING EU DIRECTIVE 2013/11

The consumer protection has been of paramount importance for the EU institutions with the final aim of strengthening the EU single market. At present consumer law occupies a considerable part of the EU regulatory framework. After settling the substantial law with regard to consumer rights, a stronger need for guaranteeing and enforcing those rights is observed. The EU has adopted Directive 2013/11 on Consumer ADR aiming to establish fast, efficient, low-cost and qualitative schemes of consumer redress, operative since the second half of 2015. This paper aims to outline the general requirements of Consumer ADR Directive and introduce the Albanian experience on its transposition. A minor comparative overview to the experience of other EU countries is underlined in order to evaluate the better solution.

Key words: *Consumer, Alternative Dispute Resolution, Effective Procedural Remedies*

INTRODUCTION

On 21 May 2013, the European Parliament and the Council adopted two important legal instruments concerning consumer alternative dispute resolution. The first concerns the Directive on Consumer Alternative Dispute Resoluti-

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on¹ (hereinafter: Directive on CADR or Directive), while the second concerns the Regulation on consumer Online Dispute Resolution² (hereinafter: ODR Regulation).

The Alternative Dispute Resolution refers to disputes, which are settled out of the court in extrajudicial proceedings. It typically describes a multitude of techniques such as arbitration, mediation, conciliation, settlement, etc. As the acronym ADR is not well known outside of the world of litigation, some scholars have proposed to use the term Consumer Dispute Resolution (CDR) to avoid confusion.³ Consumer dispute resolution is a whole new system which is being developed alongside national court system that employs numerous approaches and techniques of dispute resolutions aimed mainly at small value complaints about goods and services that would not reach a courtroom.⁴ The CADR Directive aims mainly at the law enforcement rather than informal mechanism in dispute resolution.⁵ The picture of consumer ADR schemes varies considerably in EU Member States,⁶ but to the date the implementing laws are in force.⁷ The CADR Directive follows a functional approach and classifies three types of ADR procedures, i.e.

¹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 63–79.

² 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, OJ L 165, 18.6.2013, p. 1–12.

³ Naomi Creutzfeldt, “Alternative dispute resolution for consumers”, *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Eds. Michael Stürner, Fernando Gascón Inchausti, Remo Caponi), Sellier, Munich, 2015, p. 3–10.

⁴ Naomi Creutzfeldt, “An Introduction to Alternative Dispute Resolution (ADR) for Consumers in Europe”, *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Eds. Caroline Cauffman and Jan Smits), Intersentia, 2016, p. 141–154.

⁵ Gerhard Wagner, “Private law enforcement through ADR: Wonder drug or snake oil?”, *Common Market Law Review*, No. 1, Vol. 51, 2014, p. 165–194. Recently, the European Commission attention is directed towards better enforcement of consumer rights. See, e.g. COM(2018) 183 final. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers. Brussels, 11.4.2018.

⁶ Christopher Hodges, Iris Benöhr, Naomi Creutzfeldt-Banda, “The Hidden World of Consumer ADR – Redress and Behaviour”, Report and analysis of a conference held at Jesus College Ship Street Centre, 28 October 2011, The Foundation for Law, Justice and Society, Oxford, 2011, available at https://www.academia.edu/1328468/The_Hidden_World_of_Consumer_ADR_Redress_and_Behaviour, 22.9.2019.

⁷ Information available at <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32013L0011>, 21.9.2019.

amicable solution; proposed solution; imposed solution, which can be imposed only on traders or on both parties.⁸

The Regulation on consumer ODR provides for the establishment of a platform by the European Commission for so-called “Online Dispute Resolution”. The platform extends to transactions entered into via the Internet by consumers. The platform functions as a “reference entity”. Consumers and entrepreneurs can easily, through the platform, end up to the relevant ADR authority, which is competent to handle the dispute. The platform refers to bodies that meet the requirements of the Consumer ADR Directive. The Directive is therefore a prerequisite for the proper functioning of the platform. Basically, the Regulation is the informatisation of ADR.⁹ The ODR platform has been operative since the beginning of 2016 and the EU Commission has already published two reports on functioning of the ODR.¹⁰ According to the reports, the ODR platform has proved successful due the incentive it gives to traders to settle the consumer dispute bilaterally, out of any ADR or court procedure.

The implementation of the Regulation remains a later step in EU Candidate Countries like Albania; therefore, this paper will not treat the requirements set out by the Regulation.

Albania transposed the CADR Directive through the amendments of Consumer Protection Acts in 2018.¹¹ The legal amendments came as a result of some policy considerations after a regulatory impact assessment, carried out from the Ministry of Economy.¹² Although the legal act implemented the most important requirements of the Directive, still some provisions, such as the regulation of a residual CADR scheme remains to be settled through some different sub-legal acts which are on the way of adoption.

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⁸ Christof Berlin, “Consumer ADR – Academia and the Field”, *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Eds. Michael Stürner, Fernando Gascon Inchausti, Remo Caponi), Sellier, Munich, 2015, p. 67–75.

⁹ N. Creutzfeldt (2013), p. 6.

¹⁰ Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, Brussels, 13.12.2017, COM(2017) 744 final. For the second report see: https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf, 22.9.2019.

¹¹ Law No. 71/2018, OJ RAL No. 162/2018.

¹² Regulatory Impact Assessment on Consumer Alternative Dispute Resolution, 16 May 2016, carried out under the GIZ project “*Harmonisation of Economic and Trade Legislation with EU acquis*”.

In this paper, firstly the EU CADR Directive will be outlined (Sec. 2) and secondly the Albanian experience on transposing that Directive will be elaborated (Sec. 3). By shedding light on the requirements set by the CADR Directive, one can envisage the role, rules and structure to be followed by the CADR schemes in the national system, aiming the proper implementation of EU *acquis* on way forward.

EU DIRECTIVE ON CONSUMER ADR

The Consumer ADR Directive, as a premise to the ODR Regulation appears as an act of great importance for achieving a high level of consumer protection and the proper functioning of the internal market. Although, Consumer protection legislation at EU and Member States' (MS) level has been significantly strengthened in the past decades, European consumers do not always obtain effective redress, when their rights are violated. Many disputes between consumers and traders ('C2B disputes') involve very small sums of money. They are usually so small that consumers do not bother with them (the rational apathy problem). According to the EU Commission, this is because consumers believe court proceedings to be expensive, time-consuming and burdensome. Cumbersome and ineffective proceedings and their uncertain outcome discourage consumers from even trying to seek redress. In addition, consumers are not always aware of what their rights entail in concrete terms and therefore do not seek compensation when they are entitled to it.¹³

According to the impact assessment studies carried out by the EU Commission, the lack of effective redress poses particular challenges in cross-border transactions. Naturally wary of venturing into an unfamiliar commercial environment, consumers are especially worried about something going wrong with a purchase made in another Member State. They are concerned about differences in legislation between Member States, language barriers, potentially higher costs and unfamiliar procedural rules in dispute resolution in another Member State. Consumers often give up their cases simply because they do not know where to address their dispute in another Member State. Uncertainty about securing re-

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¹³ Commission Staff Working Paper. Executive Summary of the Impact Assessment, *Accompanying the document*, Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR), Brussels, 29.11.2011 SEC(2011) 1409 final, C7-0454/11, available at <https://www.europarl.europa.eu/document/activities/cont/201204/20120425ATT43950/20120425ATT43950EN.pdf>, 22.9.2019, p.1-2.

dress affects consumers' confidence in shopping across borders and dissuades them from taking advantage of the Single Market.¹⁴

Although individuals might seem nonchalant to pursue small problems or losses, the aggregate value of multiple such issues can represent major illicit profits for traders. Such ill-gotten gains constitute serious unacceptable trading behaviour, and lead to significant distortion of competition in the market.¹⁵

The need to improve access to redress for consumers through alternative dispute resolution schemes drove the EU institutions to interfere for the harmonisation of ADR legislation in consumer disputes in all MS, by taking in consideration the different level of development of ADR in the Member States and the various types of existing ADR schemes. The divergent national policies in ADR schemes led to the conclusion that the best solution to the problem could be achieved only in EU level, and not by single Member States.

The Directive requires Member States to provide quality and easily accessible ADR entities to consumers. Promoting such alternative dispute resolution of consumer disputes at the European level reinforces consumer confidence and promotes thus the functioning of the internal market. The objective of the Directive can be explained in the light of three directions. Firstly, in all Member States should be free and easy access to out of court dispute resolution for all types of consumer disputes falling within the scope of the directive (coverage problem). Secondly, the quality of these disputes should be provided in all Member States on the basis of the same principles and guarantees. Thirdly, the consumers should be adequately informed by traders, about the existence of the possibility of an alternative dispute resolution concerning their dispute.¹⁶

The Consumer ADR Directive requires a minimum harmonisation, which means that the MS may maintain or adopt stringent provisions to ensure higher protection of consumer tailored to their national legal system. The Directive establishes harmonised quality requirements for ADR entities and ADR procedures in order to ensure that, after its implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no

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¹⁴ *Ibidem*.

¹⁵ C. Hodges, I. Benöhr, N. Creutzfeldt, "Consumer-to-Business ADR Structures: Harnessing the Power of CADR for Dispute Resolution and Regulating Market Behaviour", The Foundation for Law, Justice and Society, Oxford, 2012, available at <http://www.fljs.org/sites/www.fljs.org/files/publications/ConsumerADR-PolicyBrief.pdf>, 20.9.2019.

¹⁶ See Christopher Hodges, Iris Benöhr, Naomi Creutzfeldt, *Consumer ADR in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 20–21; Alexandre Biard, "Towards high-quality consumer ADR: the Belgian experience", *Privatizing Dispute Resolution. Trends and Limits* (Eds. Loïc Cadiet, Burkhard Hess, Marta Requejo Isidro), Nomos, 2019, p. 81.

matter where they reside in the European Union. It leaves wide margin of appreciation for the policy choices of each MS on designation of their Consumer ADR system. Although the Directive sets out the core rules on the operation of out of court dispute resolution, it apparently does not impact the fundamental right of access to court as enshrined in Article 47 of EU Charter of Fundamental Rights, Article 6 of the European Convention of Human Rights and MS Constitutions. However, academic criticism is not absent towards the Directive on this late issue as regards impediment to the right of access to court system, jeopardy to the principle of due process of law,¹⁷ disturbance of harmonized interpretation of consumer law and the enforcement of mandatory consumer law,¹⁸ or even inefficiency.¹⁹ The response to criticism is the argument of balancing the principle of due process against that of proportionality, by considering what the consumer in real life want.²⁰ Consumers who have a simple dispute want it resolved quickly and cheaply. They are reluctant to spend time and money on simple problems and low value claims. Thus, they need user-friendly systems which deliver fast outcomes.²¹ Statistics shows that consumers use the systems of CADR and in this manner the access to justice is *increased*, compared to the situation when consumer do nothing.²²

Types of disputes subject to CADR directive

The Consumer ADR Directive shall apply to all 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 and a consumer within the EU territory. Such disputes should be resolved

¹⁷ Horst Eidenmüller, Martin Engel, "Against false settlement: Designing efficient consumer rights enforcement systems in Europe" *Ohio State Journal on Dispute Resolution*, Vol. 29, 2014, p. 261–296.

¹⁸ See Caroline Cauffman, "Critical Remarks on the ADR Directive", *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Eds. C. Cauffman and J. Smits), Intersentia, 2016, p. 157; Burkhard Hess, "Privatizing Dispute Resolution and its Limits", *Privatizing Dispute Resolution. Trends and Limits* (Eds. Loïc Cadiet, Burkhard Hess, Marta Requejo Isidro), Nomos, 2019, p. 33.

¹⁹ G. Wagner, p.194.

²⁰ Christopher Hodges, "Consumer redress: Implementing the Vision", *The new regulatory framework for consumer dispute resolution* (Ed. Pablo Cortés), Oxford University Press, 2016, p. 359–360.

²¹ *Ibidem*, p. 360.

²² *Ibidem*.

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. From such broad formulation it comes out that it is up to the MS to design the architecture of the CADR schemes, which fulfil the criteria set out by the Directive. The organisation of CADR entities may be public or private funding, based on binding or voluntary participation.

There are certain situations, procedures and disputes to which the Consumer ADR Directive shall not apply. The Directive's purpose is to regulate only the ADR procedures initiated by consumers against traders in sale and service contracts, thus the following disputes falls outside the scope of application of CADR Directive: disputes between traders; procedures initiated by a trader against a consumer; procedures before consumer complaint-handling systems operated by the trader; direct negotiation between the consumer and the trader; attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute; procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader. Likewise, the disputes resulting from the following services need not to apply the requirements of CADR Directive: disputes, which arise out of non-economic services of general interest; or health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices; disputes concerning public providers of further or higher education.²³

*Obligations of Member States to facilitate
and control the ADR delivery*

Chapter II of the Directive requires MS to facilitate access by consumers to ADR procedures.²⁴ The ADR entities available to the consumers shall comply with the requirements set out in the Directive. The ADR entities, in order to comply with the Directive's requirements, shall maintain: an up-to date website with easy access to all necessary information on the ADR procedure, which enables consumers to submit a complaint online or offline; upon request provide the parties with information on a durable medium; enable the exchange of information between the parties via electronic means or by post; accept both domestic and cross-border disputes; respect the data protection legislation. In order to facilitate

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²³ Art. 2(2) of the CADR Directive.

²⁴ Art. 5 of the CADR Directive.

access to an ADR entity, the MS shall introduce a residual ADR, which cover all economic sectors uncovered by sector specific ADR entities. However, MS may also fulfil that obligation by relying on ADR entities established in another Member State or regional, transnational or pan-European dispute resolution entities, where traders from different Member States are covered by the same ADR entity.

The ADR entities may also establish procedural rules, which allows them to refuse to handle a certain dispute, on the grounds that: the consumer did not attempt to resolve the matter directly with the trader; the dispute is frivolous or vexatious; the dispute is being or has previously been considered by another ADR entity or by a court; the value of the claim falls below or above a pre-specified monetary threshold; the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit. However, such procedural rules shall not significantly impair consumers' access to ADR procedures, including in the case of cross-border disputes.

The Six basic principles applicable to ADR entities

The Directive requires that the ADR entities shall comply with six basic principles such as, expertise, independence and impartiality; transparency; effectiveness; fairness; liberty; and legality.

Expertise, Independence and Impartiality (Article 6 of the Directive). – The natural persons in charge of ADR shall possess the necessary expertise and should be independent and impartial. Certain guarantees are required to ensure that purpose, such as the possession of the necessary knowledge and skills, as well as a general understanding of law; duration of the office term; remuneration not depended on the outcome of the procedure; disclosure of any conflict of interests, etc. In order to enhance the expertise and professionalism of the natural persons in charge of ADR, the ADR entities shall provide trainings on the matter. The competent state authority shall monitor the training schemes established by ADR entities.

Transparency (Article 7 of the Directive). – The transparency principle lies both with regard to consumer information and to Annual Activity Report that ADR entities shall submit to the state authority designed as competent authority for monitoring purposes. On the one hand, the ADR entities shall give the consumers every bit of information in order to make the system user-friendly and trustworthy. On the other hand, the ADR entities shall submit a detailed report to the public competent authority with regard to the disputes they have handled, re-

solved, refused, suspended, broken by the parties, etc.²⁵ Such information is useful not only for the statistics, but also enables public authorities to design further measures for improving consumer ADR schemes.

Effectiveness (Article 8 of the Directive). – The principle of effectiveness requires the availability of, as well as easy and costless access to an ADR procedure. The length of procedures shall not exceed 90 days from the receiving of the complete complaint file. In order to comply with the principle of effectiveness, the parties shall not be required to be represented by a lawyer, although independent advice must be available at any stage of the procedure. According to the Directive, the ADR procedures are considered effective when they are easily accessible online and offline; the parties are not obliged to retain a lawyer; the ADR is free of charge; the ADR entity serves the parties without delay.

Fairness (Article 9 of the Directive). – The Directive does not impact the fundamental right of access to court. The fairness principle mirrors some basic rules applied on the right of the fair trial. Consequently, the fairness principles comprise the adversarial nature of the proceedings; the right of representation at any stage; and the written reasoned outcome or decision. In non-binding ADR the parties are informed about the choice they have not to conform to the proposed solution; the right of seeking redress at court; the differences in outcome between the ADR and a court proceeding. The CJEU has discussed the question whether the national legislation making access to court conditional upon exhaustion of ADR remedies violates the principles of the Directive. In *Rampanelli* case²⁶ the CJEU following the line of reasoning in *Alassini*²⁷ stated that the national legal condition to use mediation remedies before reaching a court does not violate the principles of CADR Directive, given that the ADR procedures do not prevent the parties from exercising their right of access to the judicial system. However, the requirement to retain a lawyer and requirement to submit valid reasons for withdrawal from ADR proceeding are precluded under the CADR Directive.²⁸

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²⁵ Art. 19 of the Directive on Consumer ADR.

²⁶ CJEU Judgment of 14 June 2017, C-75/16-Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa-, ECLI:EU:C:2017:457.

²⁷ CJEU Judgment of 18 March 2010, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 -Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)- [2010] ECR I-02213, ECLI:EU:C:2010:146.

²⁸ For a thorough analysis on this regard see Nicola Scannicchio, “Consumer ADR and the effectiveness of the European Directive”, *Legal Integration in Europe and America – International Contract Law and ADR* (Eds. Stefan Lieble, Rosa Miquel Sala), JWV 2018, p. 159–168.

Liberty (Article 10 of the Directive). – The Directive requires respect for the party autonomy to the ADR agreement, especially to the agreements with regard to an ADR that imposes a solution, i.e. arbitration. In such cases, 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. According to the Directive 93/13 on unfair terms²⁹ and CJEU case law, arbitration clauses, contained in the standard consumer contracts pre formulated by traders to the detriment of consumers, may be considered unfair, thus invalid. In such cases the Directive 93/13 allows also for the annulment of the arbitration award if the arbitration clause is considered an unfair term.³⁰ Furthermore the Consumer ADR Directive requires that in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this, thus only a *post factum* agreement is valid.

Legality in binding ADR (Article 11 of the Directive). – The legality principles require that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, the mandatory norms for the protection of consumers shall prevail. The solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident. The same rule applies in cross border consumer disputes; the mandatory norms of the consumer country of habitual residence, designed for the consumer protection shall not be derogated by the application of the consumer ADR procedures. Such obligation arises out of Rome I Regulation on the law applicable to contractual obligations.³¹ The principle of legality is observed only in binding ADR procedures, considering that in non-binding ADR, the consumer has the choice to withdraw from the proceedings or anyway take the case to the court. That solution provided by the Direc-

²⁹ Council Directive 93/13/EEC of 5. April 1993 on unfair terms in consumer contracts, OJ L 095, 21/04/1993, p. 0029 – 0034. See also Annex 1(q).

³⁰ CJEU Judgement of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*- [2006] ECR I-10421 ECLI:EU:C:2006:675; See also CJEU Judgment of 6 October 2009, C-40/08 – *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*- [2009] ECR I-09579 ECLI:EU:C:2009:615.

³¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16; Art 6.

tive is criticised as threatening the efficiency and uniform enforcement of consumer rights within EU.³²

Other requirements for a well-functioning CADR system

Limitation periods/Prescription (Article 12 of the Directive). – With regard to the limitation period the Directive requires that the time spent during the consumer non-binding ADR proceedings, shall not count for the expiry of limitation or prescription periods for the relevant consumer claims. The ADR procedures shall be considered as a suspension cause of prescription. Thus, the right to initiate judicial proceedings is preserved.

Consumer Information. – Chapter III of the Directive sets forth the obligation of traders to inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entity or ADR entities. Such information shall be provided in a clear, comprehensible and easily accessible way on the traders' website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer. If this obligation is not fulfilled, the MS shall impose effective, proportionate and dissuasive penalties on traders. In this chapter of the Directive are also envisaged the obligation for assistance of the consumers to access ADR procedures, dissemination of information through Consumer Organisations and Business Associations, cooperation between ADR entities both domestic and cross border, etc.

Role of competent authorities. – Chapter IV of the Directive provides for the role of the competent authorities, which on the one hand shall receive information and monitor the activity of the ADR entities; and on the other shall pass such information and be a contact point to the European Commission. The competent authorities shall list on own website all ADR entities which comply with the requirements of the Directive. Such website shall be updated without delay if new information is received. The Competent authorities starting from 2018 shall submit quadrennial reports to the European Commission in order to help the improvement of the Consumer ADR functioning.

To conclude, the framework for effective ADR comprises: the six basic principles applicable to ADR entities; consumer information; the role of Competent Authorities to monitor the activity of ADR entities; and the cooperation

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³² B. Hess, p. 42-43.

in multilevel plans. Cooperation is crucial for achieving the goals of the Directive. It includes, but not limited to, cooperation between ADR entities among themselves and cross border cooperation; cooperation among ADR entities and competent authorities; cooperation among competent authorities and European Commission.

THE ALBANIAN EXPERIENCE IN TRASPOSING CADR DIRECTIVE

The grounds for transposition

First of all, Albania as a Candidate Country for accession to EU is bound by the Stabilisation and Association Agreement³³ to transpose the EU *acquis* into national legislations.

Secondly, the Albanian Consumer Protection Act (CPA),³⁴ adopted since 2008, prior to the amendments of 2018, stipulated that the consumer complaints shall be submitted, *inter alia*, before the special structures created to deal with out of court consumer dispute resolution. The regulatory framework for the establishment of special structures on consumer ADR had to be approved by the Council of Ministers Decision.³⁵ Until the amendments of 2018, no action was initiated, neither any sub-legal act adopted by the government.

Thirdly, the National Strategy on Consumer Protection 2014-2020 had provided for actions necessary to be taken for setting up consumer ADR entities aiming at offering an increased protection of consumers and strengthening consumer power.³⁶

Prior to the amendments of CPA, only mediation as an alternative to judicial proceedings was regulated by the Mediation Act,³⁷ which still is in an infant

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³³ See Art 70 and 76 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declarations, *OJ L 107*, 28.4.2009, p. 166–502.

³⁴ Law “On Consumers Protection”, no. 9902 dated 17.04.2008, *OG RAL* no. 61/2008; amended by law no. 10444, dated. 14.7.2011, *OG RAL* no. 103/2011; law no. 15/2013, dated 14.02.2013, *OG RAL* no. 29/2013; law no. 71/2018, *OG RAL* no. 162/2018.

³⁵ Art. 56 of Albanian CPA, *ibidem*.

³⁶ National Strategy for consumer protection and market surveillance 2014–2020, adopted by Council of Ministers Decision no. 753, dated 16.9.2015, available at <http://kmk.ekonomia.gov.al/wp-content/uploads/2015/11/Strategjia-e-Mbrojtjes-se-Konsumatoreve-dhe-Mbikëqyrjes-se-Tregut.pdf>, 24.9.2019, p. 45.

³⁷ Law “On mediation on dispute resolution”, no. 10 385, dated 24.2.2011, *OG RAL* no. 25/2011; amended by law no. 81/2013, *OG RAL* no. 31/2013; amended by law no. 26/2018, *OG RAL* no. 85/2018; approximated with Directive 2008/52/EC of the European Parliament and of the Co-

phase of development. In practice, mediation in Albania is applied mainly in family matters and small claims. The field of consumers claims is not yet grasped by the licenced mediators. However, the complaints of consumers in sector specific industries, i.e. energy, water supply, telecommunications, postal services, financial services, insurance, transport etc., are continuously handled by Regulatory Bodies in respective sectors.

The procedure followed

The Albanian Ministry of Economy urged by the obligations set out in the National Strategy on Consumer Protection³⁸ and National Action Plan for European Integration³⁹ with the support of GIZ,⁴⁰ started the initiative for further harmonisation of the consumer law by drafting the necessary legislation on establishment and functioning of Alternative Dispute Resolutions schemes. The new draft piece of legislation was preceded by a Regulatory Impact Assessment (RIA). The task to carry out studies and research was assigned to a working group composed of several experts in law and in economics. The RIA report⁴¹ followed the mainstream guidelines⁴² and adopted the methodology employed by the European Commission on the impact assessment of the Proposal for a Directive on consumer ADR.⁴³ Several documents were prepared with regard to the identification

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uncil of 21 May 2008 on certain aspects of mediation in civil and commercial matters *OJ L 136*, 24.5.2008, p. 3–8.

³⁸ CMD 753/2015.

³⁹ CMD no. 74, dated 27.1.2016, OG RAL no. 17/2016, p. 1926.

⁴⁰ The German government has provided continuous support to Albanian Institutions on the way of European integration, through GIZ projects. GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) has been a continuous partner of Albanian Ministry of Economy in assisting the process of harmonisation in economic and trade law. See the latest Annual Report 2017–2018 of the Consumer Protection Commission at <http://kmk.ekonomia.gov.al/wp-content/uploads/2019/04/Raporti-vjetor-KMK-2018.pdf>, 25.9.2019, p. 12.

⁴¹ Regulatory Impact Assessment on Consumer Alternative Dispute Resolution, 16 May 2016, carried out under the GIZ project “*Harmonisation of Economic and Trade Legislation with EU acquis*”.

⁴² Regulatory Impact Assessment Guidelines: A Guide to undertaking Regulatory Impact Assessment and completing the Explanatory Memorandum, Albania; prepared by the Ministry of Economy, Ministry of Integration, World Bank and Pohl Consulting & Associates, published under BERIS – Business Environment and Institutional Strengthening project, October 2010.

⁴³ Commission Staff Working Paper - Impact Assessment, *Accompanying the document* Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the

of the problem and objective; the analyse of existing legislation; the legislative gap concerning consumer ADR; etc. Discussions in regard to the development of policy options were conducted with all identified stakeholders on several occasions during the research/assessment. The policy options were presented to Ministry of Economy which assigned the experts to draft the amendments of the CPA, by bringing it into alignment with the CADR Directive.

The result

The amendments on the CPA were adopted in October 2018 and the new act provides for the establishment of five sector specific CADR schemes and one residual CADR structure. The consumer ADR on the economic sectors of general interests will be carried out by special structures established under the Regulatory Bodies on those field, respectively: the Energy Regulatory Authority shall be responsible for consumer dispute resolutions in the field of energy and gas; the Electronic and Postal Communication Authority shall settle the consumer disputes in communication and postal services; the Financial Supervisory Authority shall deal with consumer disputes in the field of insurance and other financial services, other than banking services;⁴⁴ the consumer disputes resolution in air transport are assigned to the Civil Aviation Authority; and finally the consumer dispute resolutions in water supply sector are assigned to the Regulatory Authority of the Water Supply. Each of these institutions has to establish a special unit (entity) within own structure that should deal with consumer dispute resolution by respecting all other requirements set by CPA, i.e. respecting the basic principles of consumer ADR. Those structures have the authority to impose a decision on traders and in accordance with their specific laws and the kind of ADR they choose to apply, they may impose a decision on consumers, too by respecting all guaranties settled by law. All legal acts on regulatory markets are approximated with the respective EU directives, which also requires the establishments of CADR schemes on the sector, such as energy and gas; communications and postal services; insurance; air transport, etc.⁴⁵

European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR), Brussels, 29.11.2011, SEC (2011) 1408 final.

⁴⁴ The consumer disputes resolution schemes in the banking system shall be regulated separately by the Bank of Albania.

⁴⁵ For a schematic and well-organized map of EU sectoral legislation that requires the establishment of CADR entities see Caroline Daniels, "Alternative Dispute Resolution for European Consumers", *Privatizing Dispute Resolution. Trends and Limits* (Eds. Loïc Cadiet, Burkhard Hess, Marta Requejo Isidro), Nomos, 2019, p. 267–270.

The residual CADR scheme shall be regulated by sub-legal act. Its establishment is delegated by law to the Council of Minister which by the end of 2019 shall establish an independent entity under the Ministry of Economy to carry out the duties of consumer dispute resolution in all other economic sectors on supply of goods and services, outside the regulated markets mentioned above.

To the date the Albanian picture on consumer ADR coverage is almost empty, with the exception of administrative consumer complaints units within regulated sectors, culminating at the Consumer Protection Commission. In other EU countries the ADR models differ considerably, some are more developed than others depending on the legal structures and national cultures of disputing.⁴⁶ For example, in Sweden the ADR system is comprehensive and widely developed. There is one main body called National Board for Consumer Disputes (ARN), which is a public authority that function like a court, well-known, widely used and effective. In France there is a general culture of in-house mediators, which create some confusion to the consumers as several bodies deals with consumer disputes in a given sector. The Netherlands shows a high adherence to its ADR model because of its unique structure, in which trade associations and consumer associations reach an agreement for the functioning of related sectorial ADR boards, which are then funded by trade associations.

However, this model does not guarantee the resolution of disputes with traders not belonging to any trade association. The United Kingdom has a wide ADR coverage, but there is no comprehensive sector coverage. There are some developed models like Financial Ombudsman Service or Ombudsman Services (covering energy, part of the communication and property sectors). Such model is funded by the sector in which they operate. They are usually free for consumers, but not for traders, who should pay an annual fee. A helpdesk is also created by the Consumer Advice Bureau, which help consumers and companies in identification of certified ADR entities.⁴⁷ In Germany the ADR model is in a relatively early stage, but it is developing into a confused state of diversity, albeit the Insurance Ombudsman model has been notably successful.⁴⁸ In Italy there are two main methods for resolving consumer claims: mediation, which is a condition to file civil claims before the court and representative negotiations (*conciliazione*

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⁴⁶ See N. Creutzfeldt (2016), p. 147–149. For a comprehensive view on various ADR schemes and models in Europe see C. Hodges, I. Benöhr, N. Creutzfeldt, p. 25 ff.

⁴⁷ See N. Creutzfeldt *ibidem*, p. 148, and Pablo Cortés, “A Comparative Analysis on Consumer Dispute Resolution”, *Legal Integration in Europe and America – International Contract Law and ADR* (Eds. S. Lieble, R. Miquel Sala), JWV 2018, p. 280.

⁴⁸ See N. Creutzfeldt *ibidem*, p. 149.

paritetica), which serve for settling consumer complains. The representative negotiations system is decentralised, and the negotiation procedures are carried out by a representative of the consumer taking place at the trader's premises. The solution is proposed to the consumer, who is free to accept it or file civil claim at court. However, those services do not cover each sector, so the residual economic sectors are left to the Chambers of Commerce, which offer ADR services with general competences in civil and commercial matters.⁴⁹

Looking at this comprehensive short comparative view, and considering academic recommendations in the legal literature, in order to avoid consumer confusion, the best solution is to have one ADR entity per sector, which will enable greater efficiency through economic of scales and facilitate collection of information.⁵⁰

Apart from ADR entities, the full picture shall contain also the Competent Authorities, whose duty is to certify and monitor those entities that offer CADR services. In Albanian CPC, the role of Competent Authority is vested on Consumer Protection Commission under the Ministry of Economy. It shall certify and supervise all the CADR structures, by listing them on the webpage. The same body is supposed to serve later as a contact point for the EU Commission. Albania has followed the horizontal model of Competent Authority. There are basically two models of Competent Authorities: a *horizontal* one where one single Competent Authority is designated to certify and monitor all CADR schemes regardless of the economic sector, or a *vertical* one, where several Competent Authorities are in charge of monitoring CADR entities, usually one per sector and a separate one is designated as residual in charge for other CADR entities operating in non-regulated sectors. Usually this residual Competent Authority is also the contact point for the EU Commission.⁵¹ Several states like France through an *ad hoc* commission on evaluation and control of consumer mediation, Luxembourg through the Ministry of Economy, Ireland through its Competition and Consumer Protection Commission, Finland through its Ministry of Justice, or Romania through its Ministry of Economy have adopted the horizontal model of a single Competent Authority. In a different manner, Italy and England have adopted the vertical model with respectively six and eight Competent Authorities.⁵²

⁴⁹ See P. Cortés, p. 273-276.

⁵⁰ P. Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*, New York: Cambridge University Press, 2018 p. 176; C. Hodges, p. 365-367; N. Creutzfeldt (2016), p. 150-151.

⁵¹ A. Biard, p. 86. See also P. Cortés, p. 267 ff.

⁵² *Ibidem*.

Albania, being a small country with little private offer on alternative dispute resolution and lack of culture on out of court proceedings in contrast to Italy, has assigned the regulatory bodies on specific sectors the duties of the CADR entity itself, and not the competences of the Competent Authorities.

The future expectations

To the date, none of the Regulatory Bodies has issued any report on the measures necessary to be taken to comply with the new amendments of CPA. The amendments were to be effective six month after the entry into force of the law,⁵³ therefore the Regulatory Bodies designed by law had six months to prepare the infrastructure for compliance.

The residual CADR entity is on the way of establishment. The Ministry of Economy has appointed a working group responsible for drafting the Council of Minister Decision, which shall provide the conditions and requirements for the new establishment of the general CADR entity, which shall deal with disputes falling outside the scope of specific sectors of general economic interests. The questions raised so far have been with regard to whether to maintain one central residual entity or to decentralise the structure and recognise some competences to municipal units dealing with consumer protection. Most likely, considering the policy choice of the Albanian legislator, to keep as clear as possible and as centralised as possible the scheme on CADR entities, again the choice will incline towards one centralised entity, probably by delegating only few ancillary functions to local structures. The prognosis for successful implementation of CADR Directive looks positive, considering the experience of regulatory bodies to handle consumer disputes and a general public trust on public funded entities.

CONCLUSION

The Directive on Consumer ADR adopted on 21 May 2013 aims at harmonising the quality requirements for ADR entities and ADR procedures in order to ensure that consumers can access high quality, independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. With the adoption of consumer ADR directive, the real work that needs to be done over the coming years is to develop national consumer ADR schemes so that they operate well and can deliver the regulatory/behavioural benefits of which they are capable. Although, some consumer ADR schemes might already exist, almost eve-

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⁵³ Art. 25 (2) Albanian CPA, law no 71/2018, OG RAL no. 162/2018.

ry scheme and national system would benefit from review. The objective should be to conform to a simple model that can be easily recognizable to consumers and operate transparently. Overall, a holistic approach towards consumer dispute resolution contributes on two directions: on the one hand, discouraging traders from misbehaviour, and on the other hand encouraging consumer to seek remedy when affected. From a practical point of view, the Albanian legislator has adopted the most efficient model given the circumstances in context. From a theoretical legal view, the development must be observed on the way of concrete application of new legal rules.

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ADR U PRAVU POTROŠAČA: ISKUSTVO ALBANIJE
U PRENOŠENJU EU DIREKTIVE 2013/11
U NACIONALNO ZAKONODAVSTVO

Rezime

Zaštita potrošača je od presudnog značaja za institucije EU radi ostvarivanja krajnjeg cilja – jačanja jedinstvenog tržišta EU. Potrošačko pravo zauzima značajan deo regulatornog okvira EU. Nakon što su doneti pravni propisi u oblasti potrošačkog prava, javlja se potreba za garantovanjem i sprovođenjem tih prava. EU je usvojila Direktivu 2013/11 o ADR u potrošačkom pravu u cilju uspostavljanja bržeg, efikasnijeg i jeftinijeg obezbeđivanja obeštećenja potrošača, koja je primenjiva od druge polovine 2015. godine. Rad izlaže opšte principe EU Direktive i predstavlja iskustvo Albanije u njenom prenošenju u nacionalno zakonodavstvo. Prikazan je i uporednopravni pregled analizom iskustava zemalja EU, u cilju utvrđenja optimalnog rešenja.

Ključne reči: potrošač, alternativno rešavanje sporova, efikasna pravna zaštita

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