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Chapter 13

Challenges for the Implementation of the Consumer ADR Directive in Spain

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A. Steps Towards the Implementation of the ADR Directive

Even though Spain was the only Member State that did not vote in the European Council (COREPER) in favour of adopting the ADR Directive,¹ the Spanish legislator began to implement the ADR Directive at a very early stage. On the 27 of March Act 3/2014 was passed to modify the Refunded Text of the General Law for the Protection of Consumers and Users and other complementary laws (in advance RTGLPCU).² Among other aims, this Act implemented part of the principle of liberty contained in art. 10 of the ADR Directive.

Later, on the 17th of April 2015 the Draft Bill on Consumer Alternative Dispute Resolution was published. The text includes 39 articles, four additional provisions, six final provisions and an abrogation. In its Titles, the Draft includes the requirements to be fulfilled, respectively, by the consumer ADR procedures (II), the ADR entities (III) and the persons in charge of the ADR proceedings (IV). It also includes the procedure to be followed for applying and obtaining the accreditation as a European ADR entity, the designation of the competent authorities to evaluate the applications received (V) and the new obligations to inform

¹ It appealed to the final wording of art. 13 ADR Directive related to the information obligations of traders about the ADR entities available. The position of Spain is available in <http://tinyurl.com/zlulx9z> (hereinafter, last visited 20 January 2016).

² BOE 76, 28/03/2014.

which fall on the traders (VI).³ As general rule, the Draft Bill employs a similar consumer definition as the one contained in Spanish law, which includes not only natural persons acting for aims different from his or her commercial, professional or business activities, but also legal persons.⁴ The possibility to restrict legal persons' access to submitting claims by way of an ad hoc provision remains open, which reflects the current practice of some ADR entities.⁵

The Draft Bill must be welcomed as it represents the first attempt to create a general legal framework for alternative consumer redress. Even if its title seems to embrace the regime for every ADR entity, the legislation projected only refers to the standards to be fulfilled by certified ADR entities. During the further legislative procedure of the Act it would be needed to make clearer if non certified entities will be able to provide CADR services and, if so, in what extent.⁶

The Spanish implementation of the ADR Directive takes into consideration that some autonomous communities have competences in the area of consumer mediation.⁷ The present constitutional structure of the legislative competence will have to be considered by the respective legislators (both, the Spanish parliament and the autonomous communities' parliaments), during the transposition of the ADR Directive. By transposing the ADR Directive and exercising its legislative competences the autonomous community of Catalonia passed a new regime for consumer mediation.⁸

³ See a commentary of the Draft in José Ignacio Paredes Pérez, "Análisis crítico del anteproyecto de ley de resolución alternativa de conflictos de consumo", in María Isabel Álvarez Vega and Giovanna Cappilli, *Mecanismos alternativos de resolución de conflictos en materia de consumo. Iniciativas para la transposición de la Directiva 2013/11/UE de 21 de mayo*, Granada, Comares, 2016, forthcoming.

⁴ See art. 1.2 RTGLPCU.

⁵ For the telecommunication sector, see art. 55 Act 9/2014. Legal persons and traders were excluded from the proceedings before the Office of the Telecommunication User according to Royal Decree Law 13/2012, of 30th March (BOE 31/03/2012), with effect from the 1st of April 2012. For the electrical sector, see art. 43.5 Act 24/2013.

⁶ See Report to the Draft Bill of the National Commission of Markets and Competition, p. 11.

⁷ The competence to regulate both consumer mediation procedures and entities has been assumed by the following Autonomy Statutes: art. 71.26 Autonomy Statute for Aragón (BOE 97, 23/04/2007); art. 49.2 Autonomy Statute for Cataluña (BOE 172, 20/07/2006); and art. 9.18 Autonomy Statute for Extremadura (BOE 25, 29/01/2011). The competence to regulate only the consumer mediation procedures has been assumed by the following Autonomy Statutes: art. 58.2.4º Autonomy Statute for Andalusia (BOE 68, 20/03/2007); and art 30.47 Autonomy Statute for Balears Islands (BOE 52, 1/03/2007).

⁸ See Decree 98/2014, of July 8, on the procedure for mediation in consumer relations. Official Journal of the Generalitat de Catalunya, July 10, 2014, number

The Draft was presented by the Ministry of Health, Social Services and Equality, and was sent for consolidation to public Spanish actors in the field of consumer redress such as the General Council of the Judicial Power,⁹ the Economic and Social Council,¹⁰ the National Commission of Markets and Competition,¹¹ many Consumer Associations,¹² or the Council of Consumers and Users,¹³ having been issued at least thirty reports. As the approval of the text as a Royal Decree Law was not considered as a suitable procedure in July 2015, the time limit to transpose the ADR Directive finished before having actually implemented it.¹⁴ The normal legislative procedure, however, was interrupted because of the general elections that took place the 20 December 2015. At the time of writing the political skies of Spain remain cloudy until a new Government is formed. Even if the the Directive is not expected to be transposed before the summer of 2016, on the 10th of February the *Agencia Española de Consumo, Seguridad Alimentaria y Nutrición* (AECOSAN) announced through an email that the ECC in Spain has been designated as ODR contact point according to art. 7 ODR Regulation.

Spain has not fulfilled with its obligations by transposing the ADR Directive in time, situation which contributed, together with the delay in other Member States, in the launch of the EU Platform.¹⁵ Although the CJEU has declared the principle of the State's liability in EU Law,¹⁶ this doctrine does not seem to apply in the present situation.¹⁷ By contrast, from 15 of February 2016 until the Spanish transposition had been passed only traders engaging in online sales or service contracts, and online marketplaces, will be under the obligation to inform consumers about the platform pursuant art. 14 of the ODR Regulation. A different issue will be to find a path to impose penalties by the State to traders violating this obligation (as required by art. 18 ODR Regulation) before

6661. See an analysis of this Decree in Aura Esther Vilalta Nicuesa, "Las reclamaciones de consumo en Cataluña y el Sistema de mediación institucional. Análisis del Decreto 98/2014, de 8 de julio, sobre el procedimiento de mediación en las reclamaciones de consumo a la luz de la normativa comunitaria y estatal, 2014(4) *Indret*, 1-27.

⁹ Available in <http://tinyurl.com/hxywj6a>.

¹⁰ Report 5/2015 available in <http://www.ces.es/dictamenes> (consulted on November the 6th, 2015).

¹¹ Report IPN/CNMC/009/15, available in <http://tinyurl.com/jfzmj8g>.

¹² The one issued by ADICAE is available in <http://tinyurl.com/h6ax35c>. The position of FACUA may be seen in <https://www.facua.org/es/noticia.php?Id=9499>.

¹³ See <http://www.consumo-ccu.es/>.

¹⁴ See art. 25 ADR Directive.

¹⁵ See <http://tinyurl.com/hyfdecd>.

¹⁶ See ECJ Case C-6/90 *Franovich v Italy* (19 November 1991).

¹⁷ *Ibid* para. 39 and 40.

the transposition of this rule to Spanish law. The same situation applies to the obligation that traders have of informing consumers about ADR entities pursuant arts. 13 and 21 ADR Directive.

The aim of this chapter is to analyse the Spain's CADR infrastructure under the criteria established by the new European Law. That will allow verifying to what extent the Spanish system will have to change in order to adapt to the new law. The chapter therefore focuses on the functioning of the existing ADR entities, paying especial attention to the different legislative texts that together form their legal regime while taking into account the criteria proposed by the Draft Bill. This chapter concludes highlighting some of the legislative options that the Spanish legislator should consider when adapting the CADR system to the new European law.

B. The Consumer ADR Structure in Spain

1. The Arbitration Boards

Spain counts with a large tradition in the field of CADR where public institutions are in charge of most of the CADR entities, either by directly creating the ADR entities or by financing them. The public finance of the Spanish system has the positive effect of granting the degree of independency required by art. 6 of the ADR Directive. The public leadership role also assumed by State officials in the dispute system resolution may also have a positive effect in fulfilling the impartiality principle.

The public system takes as its cornerstones the Spanish Consumer Arbitration System, which was put in place in 1993 and it has been continuously modified, modernized and adapted to the needs of the users.¹⁸ This public ADR body is enacted by law and only is opened for consumer complaints against traders. The general competence of this system may suppose that Spanish system will not need the complementary ADR entity envisaged by art. 5 ADR Directive.¹⁹ The public arbitration scheme is free of cost for both, consumers and trader. AECOSAN, which resulted in 2013 from the merger of the *Agencia Española de Seguridad Alimentaria y Nutrición* and the *Instituto Nacional*

¹⁸ The rules governing the Spanish consumer arbitration system are nowadays contained in articles 57 and 58 of the RTGLPCU. The organization and procedure of the system find its development in the Royal Decree 231/2008, of February the 15th, regulating the Consumer Arbitral system (BOE 48, 25/02/2008).

¹⁹ See Immaculada Barral Viñals, "Si no queda satisfecho... ¡reclame!: el futuro de la resolución de conflictos de consumo", CESCO, 19 mayo 2015.

de Consumo, is responsible for the implementation, development and dissemination of the consumer arbitration system. However, AECOSAN is not directly responsible of organizing the dispute resolution system. This task belongs to the national and the territorial Consumer Arbitration Boards created by means of a cooperation agreement between the territorial public administrations (at regional, provincial, community and local level) and AECOSAN. Today there are seventy one Consumer Arbitration Boards which correspond with the national (1), regional (18), provincial (10), community (2) and local levels (40).²⁰ Therefore, the Spanish Consumer Arbitration System operates as a decentralized System, composed by many different actors. In the Center of the System, AECOSAN supports the regional arbitration boards, however not everyone,²¹ with funding and, more theoretically that in practice, provides the legal and technical help. The regional arbitration boards periodically report back to AECOSAN. But the information provided, because of its dispersion and lack of systematic in many cases, seems to be far away from the possibility of allow its aggregation. That maybe explains why the last annual report belong only to 2007²²

Every Consumer Arbitration Board applies the rules, passed at national level, related to the functions of the Consumer Arbitration Boards, the designation of the arbitral bodies and the procedure to be followed. Every Consumer Arbitration Board has, notwithstanding, autonomy to organize the material and human resources needed by the arbitration board to fulfil its functions inside the territorial administration. As a consequence, not every Consumer Arbitration Board is currently in a position to grant the finalization of the arbitral procedures in a specific term.²³ Furthermore, every Consumer Arbitration Board organizes by themselves the mediation services offered to consumers before the arbitration hearing –some of them have even tried to pass their own regulations for consumer mediation.

²⁰ The information may be seen in the following website: <http://www.aecosan.msssi.gob.es/AECOSAN/web/consumo/detalle/organos.shtml>

²¹ Some of them do not receive it as they are not eligible because not fulfilling the requirement needed. See for instance the Resolution of 10 July 2015, of AECOSAN summon aids for the activities of Consumer Arbitration Boards for 2015. BOE 176, 24/07/2015.

²² The available data from 2003 to 2007 are available in <http://consumo-inc.gob.es/arbitraje/memoria.htm>.

²³ For instance, while the Consumer Arbitration Board for the Province of Cordoba nowadays reaches to finalize the procedures in three months, the Andalusian Regional Consumer Arbitration Board moves to six months.

Traders can officially adhere to the Spanish arbitration system by making a 'public offer' in different forms. Traders can restrict their adherence for certain types of cases and to specific arbitration boards. It is also possible to adhere to arbitrations based in law or equity. The arbitration agreement may also be concluded *ad hoc* between the parties by the consumer's submission of a complaint and request for the arbitration. A list of the adhering traders to the SCAS through the National Consumer Arbitration Board can be found online.²⁴ It is however still difficult to gain access to the information related to traders adhering the SCAS through other territorial Consumer Arbitration Board and there is not even the intention of creating a unique list containing every trader adhered through all the Boards. The adhesion of the traders to the consumer arbitration system gives them the right of showing the Trustmark in all their communications and advertisement. They are however not obliged to do so, and indeed many traders do not show it. At this respect, the obligations of information arising by art. 13 ADR Directive will suppose an important change on the Spanish Consumer Arbitration System.

The procedure before the Consumer Arbitration Boards is open to most types of consumer disputes including also those concerning contractual obligations stemming from sales contracts or service contracts as envisaged in art. 1 ADR Directive. Consumer Arbitration, however, is not permitted in cases of intoxication, injury, death, or when a reasonable suspicion of a crime exists,²⁵ so arguably not covering the whole scope of application of the ADR Directive.

The Consumer Arbitration Board plays a key role in the administration of the procedure and in the designation of an arbitration body. While the consumer arbitration boards have the task of designating the arbitrators and resolving on the admissibility of the claims, the arbitration body assesses the claim and issues the awards. In addition, the Committee on Consumer Arbitration Boards has the task of resolving appeals against the resolutions made by the presidents of the consumer arbitration boards related to the admissibility of arbitration, and in doing so it establishes the criteria for similar cases. Lastly, at least theoretically, there is a General Board whose functions are *inter alia*, to publish annual reports, the arbitral awards and to provide training to arbitrators. This General Board met once many years ago and not anymore.

²⁴ See <http://tinyurl.com/jkgqvzi>.

²⁵ See art. 57.1 RTGLPCU and art. 2 Royal Decree 231/2008.

There are also public ADR entities with competence to resolve consumer disputes but on a specialized basis. Within the transport sector there are arbitration boards, which are independent from the general consumer arbitration system, though as these are public bodies, they also fall within the structure of the State.²⁶ *Transport Arbitration Boards* have competence to resolve dispute related to transport contracts, including not only consumer contracts but also contracts between traders. The Arbitration Boards for Transport have been created inside the administration, and there exists one in every region and in the autonomous towns of Ceuta and Melilla.²⁷

2. Other Public ADR entities

There are also specialized public ADR entities for financial services disputes, the Spanish system counts nowadays with the Claims Service of the Spanish Central Bank, the Investors Department of the National Stock Exchange Commission and the Directorate General of Insurance and Pension Funds.²⁸ The three institutions offer public information on their activities and provide guidelines on recurrent problems.²⁹

The ADR Directive does not ignore the existing European Acts which has already provided rules to the consumer alternative redress. According to the European Law,³⁰ for telecoms disputes there is the Office for the Telecommunication User, depending on the Secretary of

²⁶ The regulation of the Transport Arbitral Boards is contained in arts. 37 and 38 of Act 16/1987, of 30th July, of Land Transport Management Act (BOE 182, 31/07/1987), modified by Act 29/2003, of 8th October. The structure and procedure followed by the Transport Arbitration Boards have been developed by arts. 6-12 of Royal Decree 1211/1990, of 28 September, approving the Land Transport Management Act (BOE 241, 08/10/1990).

²⁷ The public information related to the functioning of the Transport Arbitration Boards for the years 1999-2009 is available in <http://tinyurl.com/gq7voa3>.

²⁸ See art. 30 of the Act 44/2002, of November the 22nd, of Measures to reform the financial system (BOE 281, 23/11/2002), modified by Act 2/2011, of March the 4th, of sustainable economy, (BOE 55, 05/03/2011) and the Order ECC/2502/2012, of 16th November, establishing the procedure to file claims before the claims service of the Central Bank, the National Stock Exchange Commission and the Directorate General of Insurance and Pension Funds. BOE 281, 22/11/2012.

²⁹ An exhaustive information related to the disputes resolved by the Spanish Central Bank, for the years 1999-2013, is available in <http://tinyurl.com/jgu3pvp>.

³⁰ See art. 34 Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services OJ L108.

State for Telecommunications and the Information Society (SETSI).³¹ Related to the structure and functioning of this Office, it is important to consider art. 3.1 ADR Directive, which, in cases of conflict, declares that the provisions of the ADR Directive shall prevail. However, the standards established by the ADR Directive are only applicable to accredited ADR entities, and not to all the ADR bodies. It is therefore possible that the Office for the Telecommunication User may not be accredited as an ADR entity. Indeed, the present Draft does not make any references neither to that Office nor to other public ADR entities to become a European ADR entity.

The existing public ADR system for disputes coming from the electrical and gas sectors also derives from the obligations required by sectorial European Union Law.³² According to the Spanish System, the Minister of Industry, Energy and Tourism has the competence to resolve the disputes derived from the electrical and gas sectors.³³ However, this activity takes place in coordination with the autonomous communities' administrations, being foreseen by the law the existence of a management protocol. Accordingly, consumers must file their claims before the competent authorities in every Autonomous Community.³⁴

For the postal services disputes, the adaptation of Spanish Law to the obligations derived from the European law³⁵ has taken place by giving competences to the Minister of Infrastructures to resolve those disputes.³⁶ In the field of the air passenger redress, the State Agency for Air Security, depending on the Ministry of Infrastructures, is the Spanish entity responsible for the fulfilling of the European regulation

³¹ The main characteristics of the procedure are envisaged in the art. 55 of Act 9/2014, of May the 9th, General of Telecommunications. BOE 114, 10/05/2014.

³² See art. 3.13 of the Directive 2009/72/EC of 13rd July, concerning common rules for the internal market in electricity, and art. 3.9.2 of the Directive 2009/73/EC of 13rd July, concerning common rules for the internal market in natural gas, both in OJ L211,.

³³ See Additional Provision number 8th of the Act 3/2013, of 4th June, creating the National Commission related to Markets and Competence. BOE 134, 05/06/2013. See also art. 43.5 Act 24/2013, of 26th December, for electrical sector. BOE 310, 27/12/2013. See also the Royal Decree Law 13/2012, of 30th March, transposing the Directives related to the Internal Market of electricity and gaz. BOE 78, 31/03/2012.

³⁴ See art. 98 Royal Decree 1955/2000, of December the first, regulating the transport, distribution, commercialization and supply of electrical energy. BOE 310, 27/12/2000. The competent authorities in every Autonomous Community may be found under this link: <http://tinyurl.com/gS3ku5f>.

³⁵ See new art. 19 of the Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, as amended by Directive 2008/6/EC of 20 February 2008.

³⁶ See Additional Provision number 11th of the Act 3/2013, of June the 4th, creating the National Commission related to Markets and Competence.

related to the rights recognized to the air passengers, which know of the disputes filed by the passengers.³⁷

At a local level the activity of the so called OMICs is to be noted, the OMICs being local offices providing information to consumers, who play an important role in the Spanish system of consumer protection.³⁸ OMICs usually extend their functions beyond providing consumers with the required information, as they also provide consumer with successful mediation services. Depending on the local administration, the OMICs may count with a special regulation for the mediation procedures.³⁹ If it is the case, they also inform of other ADR entities available (e.g. consumer arbitration, specialized ADR entities), to be used by the consumer.

3. The Role of Private ADR Entities in the Spanish System

The requirements contained in the ADR Directive arisen from the independence principle may be more difficult to meet by private ADR entities. Less problems under this perspective may be associated with the ADR services offered by not for profit consumer associations. They can receive petitions or enquiries for information, ask for collective redress before a court, and they may also contact the trader to ask for a dispute resolution, by negotiating directly. These mediation activities are developed, by the following organisations: AUC (Asociación de Usuarios de la Comunicación),⁴⁰ ASGECO (Asociación General de Consumidores),⁴¹ ADICAE (Asociación para la Defensa de Impositores de la Banca, Cajas y Seguros),⁴² CECU (Confederación de Consumidores y Usuarios),⁴³ HISPACOOOP (Confederación Española de Cooperativas de Consumidores y Usuarios),⁴⁴ CEACCU (Confederación Española de Organizaciones de Amas de Casa, Consumidores y Usuarios),⁴⁵ FACUA

³⁷ Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. See the following website: <http://tinyurl.com/j6jn693>.

³⁸ The map of the existing OMICs may be consulted under this website: <http://tinyurl.com/zetyaol>.

³⁹ See for instance art. 11 of the local Ordinance for the Protection of consumers and users of the village of Albolote, *Province of Granada Bulletin*, 6th of August 2010.

⁴⁰ The information is available in the following link <http://www.auc.es/>

⁴¹ See <http://asgeco.org/index/>.

⁴² The information is available in the following link <http://tinyurl.com/zzzt5wf>.

⁴³ See <http://cecu.es/>.

⁴⁴ See <http://www.hispacooop.com/home/>.

⁴⁵ See <http://www.ceaccu.org/>.

(Consumidores en Acción),⁴⁶ FUCI (Federación de Usuarios y Consumidores Independientes),⁴⁷ UNAE (Federación Unión Nacional de Consumidores y Amas de Hogar de España) y OCU (Organización de Consumidores y Usuarios).⁴⁸ Among these, ADICAE (29% of the total amount of inquiries and complaints received by consumer associations in 2014) and OCU (26%)⁴⁹ are especially noteworthy. These consumer associations can apply for grants to the government (AECOSAN), but for the mediation activities they rely only on the annual fees of their affiliates.⁵⁰

Currently, some traders offer consumers their own ADR services by way of a separate department from the consumer complaint-handling systems, which are excluded from the scope of the ADR Directive. These departments cooperate tightly with the other departments of the trader. In most cases these departments have been created on a voluntary basis, with the aim of allowing both consumer disputes resolution and identifying recurring disputes. To this configuration responds a number of ombudsman schemes in Spain, such as the *Defensor del cliente de Endesa*,⁵¹ the Customer Counsel of Water in Barcelona (AGBAR)⁵² and the *Servicio de Defensa del cliente* of Telefonica.⁵³ Art. 2.2 ADR Directive gives the Member States the possibility of considering the above mentioned entities as ADR entities, and Art. 17.4 of the Spanish Draft Bill seems open to this possibility in exceptional cases where there exists a high level of disputes and a lower level of adhesion of traders to ADR entities. The current wording of the Draft leaves however unclear who is going to evaluate such circumstances, and if it will require a new regulation or simply a decision from the competent authority.

In relation to this, the legislator will have to decide which may be the role to be assigned to such kind of departments, as they are being considered by the stakeholders both either as a complement to the public system or as a first step towards its privatisation. In any case, only if they were considered as accredited ADR entities consumers

⁴⁶ See <http://www.facua.org/>. Reports related to its activities may be found in <http://facua.org/memoria2013>. For 2014 see <http://facua.org/memoria2014>.

⁴⁷ See <http://www.fuci.es/>.

⁴⁸ See <http://www.ocu.org/quienes-somos>.

⁴⁹ See the annual report of the Council of Consumers and Users for 2014 in <http://www.consumo-ccu.es/dictamenes/recla14.pdf>.

⁵⁰ The annual fee amounts to 57 Euros for FACUA and to 42 Euros for ADICAE.

⁵¹ See <https://www.endesaclientes.com/defensor-cliente.html>.

⁵² See <http://www.customercounsel.aiguesdebarcelona.cat/es>.

⁵³ See http://info.telefonica.es/es/servicio_defensa_cliente/html/

using them will benefit from the suspension of the prescription period according to the ADR Directive.

The Spanish legislator will also have to decide about the treatment to be given to the existing financial ombudsmen for banks and insurance companies, having nowadays an optional character.⁵⁴ Ombudsman services are usually provided by a person or company independent from the trader but obtaining its remuneration directly from the latter, being generally a law firm. The degree of independence of this institution varies depending on whether its tasks are developed for one bank or insurance company,⁵⁵ for a group,⁵⁶ or even for some banks that independent from each other.⁵⁷ The Spanish Draft for the implementation of the ADR Directive seems not to have thought about the bank ombudsmen to become certified ADR entities.⁵⁸ Just in case, it would be necessary to provide them with a different treatment depending on whether the natural persons in charge of dispute resolution are remunerated either by the individual trader, or by a professional organization or a business association of which the trader is a member.⁵⁹ While art. 2.2 ADR Directive will be applicable in the first case, for the second the legislation should provide the requirements to be fulfilled according to art. 6.4 ADR Directive, which requires a separate and dedicated budget at their disposal. The exception to this requirement, that occurs when the natural persons form part of a collegial body composed of an equal number of representatives of the professional organization and of consumer organizations, seems not to be applicable.

Mediation services between the adhered traders and consumers are also developed by Confianza Online⁶⁰. This is a not for profit association that has obtained the public trustmark of *Confianza en línea*.⁶¹ Confianza

⁵⁴ See art. 29 of the Act 44/2002, of November the 22nd, of Measures to reform the financial system (BOE 281, 23/11/2002). See also Order ECO/0734/2004, of March the 11th, on departments and services for customers and customer ombudsman of financial institutions (BOE 72, of March the 24th, 2004).

⁵⁵ For instance the ombudsman for Catalana Occidente. For more information see <http://tinyurl.com/hkltt4>.

⁵⁶ For instance, the ombudsman for the Santander group of Banks. See <http://tinyurl.com/zpy4s54>. Or for the BBVA group of Banks, see https://www.bbva.es/sistema/meta/organismos_atencioncliente.jsp.

⁵⁷ See, for instance, the ombudsman for CECA. For more information see <http://www.ceca.es/de-interes-sectorial/defensor-del-cliente/>.

⁵⁸ See the fourth additional provision of the Draft.

⁵⁹ This different treatment, however, is not taken into consideration by the Draft. See art. 17.4.

⁶⁰ See <https://www.confianzaonline.es>.

⁶¹ See Royal Decree 1163/2005, of 30th September, creating the public trustmark of confidence on the electronic commerce and regulating the requirements and procedure

online allows the adhesion of traders directing their commercial activities online. This association has two main aims, to create ethic rules for traders operating in Internet and to establish a dispute resolution system. In this second profile, two different ADR entities have been created by Confianza online: one for the advertisement complaints (AUTOCONTROL), which fall outside the scope of the ADR Directive, and the Adigital Mediation Committee, for online contractual disputes between traders and consumers. Traders adhered to Confianza online are obliged to follow the mediation procedure before the Adigital Mediation Committee. When the dispute is not resolved in the mediation process, traders are submitted to some specific consumer arbitration boards. As Confianza online may be seen as included in the special cases envisaged by art. 6.4 ADR Directive, it will also be needed to count with a further development of the Spanish legislation in order to allow this entity to become accredited ADR entity.

4. General and Specialized Competence For Consumer Disputes

The Spanish Consumer Arbitration system gives every Consumer Arbitration Board (either at local, provincial, regional or the State level) the competence to resolve every consumer dispute.⁶² In addition to specialised ADR bodies, Consumer Associations and OMICs also have an important role in resolving consumer disputes. Interestingly, specialized ADR entities have a residual competence admitting claims only when the arbitration boards are not knowing about the claims.⁶³ It is also important to note two additional issues. First, there is a very high number of claims in some sectors with more than 70% belong to the group of telecoms (which capture almost 50% of the total of claims), sales, passenger transport and electricity and gas; hence the system is general in concept but specialized in practice.⁶⁴ Secondly, in such sectors, there are a very small number of traders. This situation questions why the State needs to finance the whole cost of these ADR services which only benefits a small number of traders.

to be fullfill in order to be obtained (BOE 241, 8/10/2015), abrogating the Royal Decree 292/2004, of 20th February, (BOE 50, 27/02/2004).

⁶² Art. 1 Royal Decree 231/2008.

⁶³ For disputes arose of postal service, see Additional Provision number 11.2 Act 3/2013. For electric sector disputes, see art. 43.4 Act 24/2013. For the telecommunications disputes see art. 55.2 Act 9/2014, and for financial services disputes see art. 10 Order ECC/2502/2012.

⁶⁴ See Immaculada Barral Viñals, "La mediación de consumo: determinación del marco normativo y diseño de la mediación institucional" in F. Esteban de la Rosa (editor), *La protección del consumidor en dos espacios de integración: Europa y América. Una perspectiva de Derecho internacional, europeo y comparado*, Valencia, Tirant lo Blanch, 2015, pp. 839-846.

C. Main Features of the ADR Entities in Spain

1. The Caseload of CADR

There is no comprehensive information available on this matter. With regards to the Consumer Arbitration System, the last public annual report dates back to 2007 in which 61,759 claims were filed. In 2010 claims augmented to 92,355, which confirms the rising trend since 2007.⁶⁵ The Transport Arbitration Boards have also increased in demand from the 2,105 cases filed in 1999, to 6,801 cases in 2009. The Office for the Telecommunication User has maintained similar numbers following an increased trend. In 2010 the number of cases resolved were 29,299, and in 2014 it reached 38,797. Although it did not increase every year, the Spanish Central Bank has had an overall increase from 5,000 cases in 2004 to 35,000 in 2013. The Investors' Department of the National Stock Exchange Commission has also moved up from 2,296 cases in 2010 to 10,900 cases in 2012. Similarly, the Directorate General of Insurance and Pension Funds in 2013 had 12,457 cases filed, while in 2004 there were only 4,615.

The information related to the consumer associations refers not only to claims but also consumer's enquiries. In 2014 the enquiries and claims received reached the figure of 1,095,259. Of this amount only 15% (61.224) refers to actual claims. That figure represents a reduction of 12% related to 2013.⁶⁶ Endesa's Ombudsman received 1,675 complaints in 2014, experiencing an increase respect to 2013 of a 14%.⁶⁷ AGBAR's Ombudsman received 374 complaints in 2014.⁶⁸

2. The Sectorial Approach to Mandatory CADR

Spanish law sets a compulsory adherence to the companies in some sectors to specific ADR entities. Telecoms companies are obliged to be submitted to the proceedings before the Office for the Telecommunication User.⁶⁹ Companies in the electrical sector are also legally required to participate in the CADR of the Minister of Industry,

⁶⁵ Data provided by Iris Benöir and Franziska Weber, "Spain", in Christopher Hodges, Iris Benöir and Naomi Creutzfeld-Banda, *Consumer ADR in Europe, Civil Justice Systems*, Oxford and Portland, Hart, 2012, p. 216.

⁶⁶ The report is available in <http://www.consumo-ccu.es/dictamenes/recla14.pdf>.

⁶⁷ See the annual report in <http://tinyurl.com/ha3myez>.

⁶⁸ See the annual report in <http://tinyurl.com/jthfyv5>.

⁶⁹ See art. 55 Act 9/2014.

Energy and Tourism.⁷⁰ The banking industry is linked to the decisions of the bank and insurance ombudsmen.⁷¹ Such an obligation may also be considered as existing for the trader in a consumer contract to the Transport Arbitration Boards.⁷² Banks and financial entities are submitted to the Claims Service of the Spanish Central Bank, the Investors Department of the National Stock Exchange Commission and the Directorate General of Insurance and Pension Funds. Air companies are also submitted to the proceedings before the State Agency for Air Security.

In addition a number of traders are adhered to their own (in-house) ombudsmen, as for example Telefonica, Agbar and Endesa. It is important to highlight that, according to art. 13 ADR Directive, the traders adhered to non certified ADR bodies are still required to inform consumers of the existence of non certified ADR entities operating in their sectors. That would occur just in case Spanish legislator would opt to admit such services as ADR entities according to art. 2.2 ADR Directive.

According to the data of the *Instituto Nacional de Consumo* in 2008 the adhesion to the boards was more common in the following sectors: electronic communication sector (telephone and Internet services); dry-cleaners; gas; furniture; clothes; home appliances; cars; informatics; travel agencies; and houses.⁷³ Traditionally the air transport and the banking sectors have been very reluctant to participate in any CADR scheme.

In terms of reporting it must be noted that the Spanish draft legislation envisages that the competent authority, AECOSAN, is required to feedback to the Minister of Industry, Energy and Tourism, for those disputes related to energy, and the Transport Minister for disputes related to postal services.⁷⁴ The same Ministers are required in turn to inform the National Commission of Markets and Competition in order to facilitate the supervision of the market.⁷⁵

⁷⁰ See art. 43.4 Act 24/2013.

⁷¹ See art. 29.2 Act 44/2002 and art. 7 of the Order ECO/734/2004.

⁷² See art. 38.3 Act 16/1987.

⁷³ See the annual report of the Spanish Consumer Arbitration System for 2008.

⁷⁴ See Additional Provision 13 Act 3/2013, creating the National Commission of the Markets and of the Antitrust.

⁷⁵ See 8th additional provision of the same Act.

3. Time and cost in resolving complaints

According to the requirements derived from the principle of effectiveness, ADR entities must reach the outcomes within a 90 calendar days from the date on which the ADR entity has received the complete complaint file. Although the present Spanish law requires awards to be issued within four months of being submitted, currently most arbitration boards take six months to issue them.⁷⁶ Similarly, the law in the financial sector needs to change to reduce the time limit to resolve claims from four months to 90 days.⁷⁷ For the mediation taken places inside the OMICs there is no general legislation applicable on the matter.

A short time limit guarantees better consumer protection, but it requires more human resources or the introduction of innovations related to the organization. The Spanish Draft may cause some surprise in this respect since while it requires the reduction to ninety days, it also announces that all the changes will not suppose the allocation of new public funds.⁷⁸

Private ADR entities use shorter terms: Two months by the financial services ombudsmen,⁷⁹ and the same for the ombudsmen of Endesa,⁸⁰ AGBAR,⁸¹ and Telefonica.⁸² The public ADR services offered in Spain as noted above are free of charge for consumers and businesses.⁸³ This principle is also followed by the other CADR schemes,⁸⁴ but consumers associations do not usually accept claims coming from not affiliate

⁷⁶ For the Spanish Consumer Arbitration System, see art. Artículo 49 Royal Decree 231/2008.

⁷⁷ See art.12.1 Order ECC/2502/2012.

⁷⁸ See Lourdes García Montoro, “Las medidas incluidas en la norma no supondrán incremento de dotaciones ni de retribuciones ni de otros gastos de personal. A propósito de la disposición adicional tercera del Anteproyecto de Ley de Resolución Alternativa de Conflictos de Consumo”, CESCO 3 de junio de 2015.

⁷⁹ See art. 15 Order ECO/734/2004.

⁸⁰ See art. 14 of the Regulation, available in the following website: <http://tinyurl.com/zklu5da>.

⁸¹ See art. 11 of the Regulation, available in the following website: <http://tinyurl.com/zzp4gv5>.

⁸² See art. 13 of the Regulation, available in the following website: http://www.telefonica.es/es/servicio_defensa_cliente/pdf/af_folleto_cas.pdf.

⁸³ See art. 41 Royal Decree 231/2008; art. 9.9 Royal Decree 1211/1990; art. 55.1 Act 9/2014.

⁸⁴ See the Market Conduct and Complaint Service Department of the Spanish Central Bank, the Investors Department of the National Stock Exchange Commission and the Directorate General of Insurance and Pension Funds. At local level, OMICs also offer free of charge services. In the private field, the services are always offered free (e.g. Ombudsmen for Banks and insurance companies, Endesa, AGBAR and Telefonica’s Ombudsmen), but in some cases only for final consumers (e.g. Confianza online).

consumers (e.g. FACUA). The annual fee charged, however, cannot be considered as a charge associated to the dispute resolution, and for that reason it should be considered as not in contradiction with the requirements coming from art. 8 c) ADR Directive. It is also necessary to consider the rule according to which the parties are required to cover the costs derived from the evidence or the expert witnesses, as envisaged by a number of CADR bodies. These costs also seem to be compatible with art. 7 (l) ADR Directive.

4. Online access to the ADR process

The ADR Directive requires ADR entities to maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint online. This requirement is currently fulfilled by only some ADR entities in Spain. It is expressly envisaged in the law for the consumer arbitration system.⁸⁵ The National Board and the different territorial consumer arbitration boards may use the platform made available at national level.⁸⁶ However, they may also have their own platform, as the one made available by the Andalusian Consumer Arbitration Board.⁸⁷ In this case, the law requires the different electronic systems and platforms to guarantee the compatibility and the information exchange inside the consumer arbitration system. Platforms ready to receive the claims are also available for the proceedings before the Market Conduct and Complaint Service Department of the Spanish Central Bank, the Investors Department of the National Stock Exchange Commission and the Directorate General of Insurance and Pension Funds⁸⁸. This option is also offered by the Office for the Telecommunication User.⁸⁹

Even more, the possibility of filing the complaint through the email address is envisaged for the Bank Ombudsmen,⁹⁰ the ombudsmen of AGBAR, Endesa and Confianza online. Many of these make available the complaint form in their website and allow all communications via email.

⁸⁵ See art. 51.2 Royal Decree 231/2008.

⁸⁶ See <http://arbitrajedeconsumo.mspsi.es/>

⁸⁷ The platform is available by clicking on this link: <http://tinyurl.com/hs7r2zz>.

⁸⁸ See art. 5.1 b) of the Order ECC/2502/2012.

⁸⁹ See the following website: <http://tinyurl.com/3xfxsd5>.

⁹⁰ See art. 11.3 Order ECO/734/2004.

5. Information and Advice Provided by ADR bodies

The different ADR entities that operate in Spain provide the consumers with information and advice, but not always in the same extent. The best examples are found in the Claim Service of the Spanish Central Bank, the Investors Department of the National Stock Exchange Commission, the Directorate General of Insurance and Pension Funds and the Office for the attention of the telecommunication user. The information provided refers not only to statistical data related to the number of cases filed and resolved, but also includes information about the significant problems and the criteria followed, just as required according to the transparency principle by art. 7.2 b) ADR Directive.

The reports related to the Spanish Consumer Arbitration System, although available only until 2007, provide with some information, such as the number of complaints filed and the sectors where the complaints use to arise. They do not however contain information related to the significant problems detected or feedback on the criteria followed to resolve the disputes. Consumer Associations also provide with some information related to the number of inquiries and disputes received, and the sectors where they arise, but there is still some need to adapt the information provided to fulfil the European standards.⁹¹

The ADR Directive does not require ADR entities to make their outcomes public. As general criteria, the decisions issued by the ADR entities are not made public, even if this is envisaged so for the Consumer Arbitration system.⁹² The exception to this is given by Confianza Online, which gives publicity to every mediation agreement and every award issued.⁹³ However, it does not provide with separate information related to the significant disputes and criteria followed.

6. The ADR procedure and the legal effect of settlements and decisions

Under the Spanish system consumer arbitration has only been used within the institutional framework of the Consumer Arbitration Boards and Transport Arbitration Boards. It seems that this situation will not be changed by the future Spanish legislation as the Draft Bill reserves the possibility of imposing a solution to consumers only by the ADR entities created by law. The rules governing some ADR entities

⁹¹ See <http://www.consumo-ccu.es/dictamenes/recla14.pdf>.

⁹² See art. 15 i) Royal Decree 231/2008.

⁹³ They are available in the following website: <http://tinyurl.com/jqjdotj>.

envisages also that the resolution will be binding only for the trader. That happens in cases such as the resolutions of the ombudsmen for banks and insurance companies,⁹⁴ the ombudsmen for Endesa, Telefonica and AGBAR, the Office for the telecommunication user,⁹⁵ and the Minister of Energy, Industry and Tourism.⁹⁶ In other cases, the resolutions issued are not binding at all (for instance, the resolutions of the State Agency for Air Security, the Claims Service of the Spanish Central Bank, the Investors Department of the National Stock Exchange Commission and the Directorate General of Insurance and Pension Funds). This explains why the current public ADR system for financial services, which recommendations are not followed by the banks in most cases, is criticised for being ineffective.⁹⁷

Collective redress is envisaged by some of the Spanish ADR entities. The Spanish consumer arbitration system offers this option in arts. 56-62 Royal Decree 231/2008. It is also envisaged for the Claim Service of the Spanish Central Bank, the investors Department of the National Stock Exchange Commission and the General Directorate of Pensions and Funds.⁹⁸

The Consumer Arbitration System envisages the possibility of reaching an agreement through mediation before the start of the arbitral proceedings,⁹⁹ and even during the arbitral proceedings, leading to a conformity award.¹⁰⁰ Moreover, in mediations developed by Consumer Associations and OMICs may also be followed by an application for consumer arbitration. The rules governing Confianza online also envisage the mediation as first step for the dispute resolution, and further the arbitration before the National or the Madrid Regional Arbitration Board. In other public ADR entities this kind of triage is not envisaged.

Despite the fact that many of the existing ADR entities use mediation to resolve disputes,¹⁰¹ the Spanish legislation does not count with a general regulation for consumer mediation. Following an (incorrectly) interpretation of the Directive 2008/52/UE, the Spanish Mediation

⁹⁴ See art. 7.3 Order ECO/734/2004.

⁹⁵ See art. 55 Act 9/2014.

⁹⁶ See art. 43.4 Act 24/2013.

⁹⁷ See <http://laeconomiadelosconsumidores.adicae.net/?articulo=3023>.

⁹⁸ See art. 9 of Orden ECC/2502/2012.

⁹⁹ See art. 38 Royal Decree 231/2008.

¹⁰⁰ See art. 48 Royal Decree 231/2008.

¹⁰¹ E.g. Consumer Associations, OMICs, Confianza online, and the first step in the Consumer Arbitration Boards.

Act¹⁰² excludes consumer mediations from its scope of application.¹⁰³ Indeed, the special treatment to be given to the consumer mediation to take into consideration the existency of a weaker party in the procedure has not been objet of attention of the Spanish doctrine.¹⁰⁴ The present Draft Bill has not resolved this lacuna, leaving many open questions such as the enforceability of the mediation agreements, its *res judicata* effect between the parties, the suspension of the prescription periods, the duty of confidentiality of the mediator, or the possibility to take into consideration the legal costs of the mediation later by imposing the judicial costs. Amending the scope of application of the Mediation Act to include consumers (as proposed *inter alia* by the General Council for the Judicial Power)¹⁰⁵ would possibly contribute to resolve this legal anomaly.

In absence of general rules related to consumer mediation, many ADR entities are using informal mediation techniques without providing the consumers, for instance, with the information required and the reasonable period of time to reflect before accepting a settlement. The introduction of the requirements derived from the principle of fairness would suppose an important improvement of the system. Furthermore, even without an European obligation, this principle should also be required by the Spanish legislation for non-accredited ADR entities as it addresses the imbalance of power in a consumer dispute.

7. ADR and Access to Court and the Principle of Liberty

The possibility of opting for litigation is always present in the mediation process. Yet, Spanish consumers may not always be informed or aware of this right. Under Spanish law there is no rule applicable to the effects

¹⁰² See Act 5/2012, of 6th July, of mediation in civil and commercial matters (BOE 162, 07/07/2012).

¹⁰³ See Immaculada Barral Viñals, “La mediación de consumo: determinación del marco normativo y diseño de la mediación institucional”, op. cit, p. 819; Fernando Esteban de la Rosa, “Principios de protección del consumidor para una iniciativa europea en el ámbito de la resolución electrónica de diferencias (ODR) de consumo transfronterizas”, *Revista General de Derecho Europeo*, 25, 2011, p. 16. P. Cortés, “Un análisis comparativo de los mecanismos de resolución alternativa de litigios de consumo”, *Indret* 4/2015, pp. 1-34. The situation today is clearer as it results expressly from art. 3.2 ADR Directive.

¹⁰⁴ See however some interesting considerations in Iuliana Raluca Stroeie, “¿Es viable un modelo de mediación de consumo autónomo desde el punto de vista de las materias que puedan ser objeto de mediación?”, CESCO, 1 de julio de 2015.

¹⁰⁵ See conclusion number six of its report, cited in footnote 6. See also Ana María Carrascosa Miguel, *Consideraciones en torno al anteproyecto de ley de resolución alternativa de conflictos de consumo*, available under the following website: <http://tinyurl.com/zq36y8n>.

of a consumer mediation agreement. The only reference is contained in the Mediation Act, which gives effect to these clauses in civil and commercial matters in order to allow the start of the mediation procedure. Art. 63 Civil Procedure Rules makes, however, no distinction and allows the parties to request a stayed in the proceedings when there is an agreement to go to mediation. The Spanish system giving such effects to the consumer mediation clauses appears to be consistent with the EU Law here represented by the criteria given by the ECJ in the Alassini case.¹⁰⁶

The exceptions occur when the parties have submitted a claim to Consumer Arbitration Board or a Transport Arbitration Board. Related to the latter, the requirements of the principle of liberty (art. 10 (1) of the ADR Directive) are not fulfilled by the law that regulates it,¹⁰⁷ that follows the decision of the Constitutional Court of Spain.¹⁰⁸ This ruling held that the former Spanish provision requiring an expressed consent of the parties to exclude the arbitral jurisdiction, and to straight to court was not compatible with the right to access to justice (art. 24 Spanish Constitution). Taking this into consideration, the reform consisted in requiring an expressed or implicit consent to arbitrate, depending on the value involved. Today, the Directive establishes however a higher standard of protection, as it obliges Member States to ensure pre-dispute arbitration agreements are not binding for consumers. Accordingly, art. 10 ADR Directive will have to provoke changes in art. 38.1 Act 16/1987.

With regards to the Consumer Arbitration Boards, the Spanish system has been modified in 2014 in order to fulfil with the principle of liberty. According to the new legal provision arbitral agreements entered before the conflict arises will not be binding on the consumer. They will be binding however for the trader.¹⁰⁹ According to this, changes should be considered to affect the application of art. 63 Civil Jurisdiction Act and art. 4.3 Draft Bill, remitting to art. 11 of the Spanish Arbitration Act.

Yet, the new provision does not contain the full transposition of the principle of liberty which requires that the parties are informed by the ADR entity of the binding nature of the award and they have specifically accepted this. It is still early to know if the specific acceptance required by the ADR Directive will be objet of an autonomous and uniform

¹⁰⁶ Joined Cases Rosalba Alassini and Others v Telecom Italia C-317/08.

¹⁰⁷ Specifically the first and third paragraph of art. 38.1 Act 16/1987.

¹⁰⁸ BOE 310, 28/12/1995.

¹⁰⁹ Art. 57.4 RTGLPCU.

interpretation, as it would be desirable. When the information is provided online to the consumer it should be contained in a durable medium and it should require the acceptance through an additional click. If we have a look into the Spanish proposed legislation, it is possible to consider that it does not embody an appropriate development of the European Law, as the *specific acceptance* required by the ADR Directive has been changed into an *express acceptance in writing* (art. 7.2 Draft), the wording clearly does not having the same meaning.¹¹⁰ The “in writing” requisite for the acceptance proposed by the Draft may be seen as enabled by art. 2.3 ADR Directive, authorizing Member States to introduce rules beyond those laid down there. However, that requirement, under our opinion, does not take into consideration the possibility for the parties of following an online procedure, even managed through the EU Platform, and the difficulties that this requirement may create to start such a procedure. For that reason we consider that the Spanish legislation should allow the possibility of an electronic acceptance as alternative to the acceptance in writing.¹¹¹ We will not go further on the problem of determining the applicable law to the special requirements every Member State may submit the validity of the arbitral agreement according to art. 2.3 ADR Directive. We submit however that the general rule followed by the ECJ, which orientates the solution towards the *lex fori*,¹¹² may not be suitable for all cases. To grant the effectiveness of the consumer protection derived from the principle of liberty, the validity of the arbitration agreement should be a question to be decided by state courts, and therefore not submitted to the in commercial arbitration existing competence-competence rule.¹¹³ The nowadays Spanish System will have to be analyze further on this matter.¹¹⁴

¹¹⁰ The wording of the ADR Directive comes directly from the German system, which in the normal cases requires the arbitral clause to be accepted separately, not being possible for this clause to incorporate obligations of other character. See Rosa Miquel Sala, “La adecuación del sistema alemán al nuevo derecho europeo de resolución alternativa de litigios de consumo”, en Fernando Esteban de la Rosa (editor), *La protección del consumidor en dos espacios de integración: Europa y América. op. cit.* p. 618.

¹¹¹ See a most suitable wording in art. 58.1 RTGLPCU. See also art. 126a Bürgerliches Gesetz Buch.

¹¹² See ECJ Judgment of 17 october 2013 in case C-184/12: United Antwerp Maritime Agencies (Unamar) NV *versus* Navigation Maritime Bulgare.

¹¹³ See Norbert Reich, “A Trojan Horse in the Access to Justice – Party Autonomy and Consumer Arbitration in conflict in the ADR-Directive 2013/11/EU?”, ERCL, 2014, 10-2, pp. 278-280.

¹¹⁴ See Diana Marcos Francisco, *El convenio arbitral de consumo y su control*, Pamplona, Civitas, 2011, pp. 302-416.

One shall not ignore that the wording of art. 10 ADR Directive may also give rise to some debate related to its scope of application,¹¹⁵ as according to the wording of the ADR Directive it is possible to understand that art. 10 ADR Directive is only applicable to clauses referring to proceedings before European accredited ADR entities,¹¹⁶ and only when the consumer is the plaintiff.¹¹⁷ Even if the wording of the ADR Directive does not contribute to clearing this matter, it is possible to maintain the application of art. 10 ADR Directive regardless of such circumstances. The contrary interpretation would compromise the effectiveness of the Directive, as it would suppose giving different effects to the arbitration clauses depending on its direction (accredited or non-accredited ADR entity) and on the position (plaintiff or defendant) of the parties. This problem will however not emerge if the Member States extend the application of the principle of liberty to all CADR procedures, as Spanish legislation gives an example in art. 57.4 TRLGDCU.

8. The adjudication of disputes and the principle of legality

The principle of legality provided in art 11 of the ADR Directive is only applicable to procedures which aim at resolving disputes by imposing a solution. We submit the Spanish Draft Bill has had more success in the wording employed to define the principle of legality than the one followed by art. 11 ADR Directive. Aiming to guarantee the rights of consumer the latter does not take into consideration every rule governing the applicable law to consumer contracts. For instance, if a consumer with residence in Spain, knowing the French language, buys goods from a French company website, art. 6 Regulation Rome I is not applicable but, however, it is still needed to guarantee the consumer rights with the application of the harmonized consumer European law. Making a global remission to the Private international law system, including Regulations Rome I and Rome II and the other European private international law provisions such as the conflict of law rules derived from the Directives 1993/13/CE and 1999/44/CE will guarantee the application of the consumer mandatory law rules¹¹⁸

¹¹⁵ See both possible interpretations and the consequences on the systems of each one in Fernando Esteban de la Rosa and Pablo Cortés, “Un nuevo derecho europeo para la resolución alternativa y en línea de litigios de consumo”, en Fernando Esteban de la Rosa (editor), *La protección del consumidor en dos espacios de integración: Europa y América. op. cit. Footnote 97*, pp. 524 and 539.

¹¹⁶ See art. 5 ADR Directive.

¹¹⁷ See art. 2 g) ADR Directive.

¹¹⁸ See ECJ judgment of 7 December 2010, in the case Pammer Alpenhoff.

Furthermore, under the Spanish consumer arbitration law, there is priority for awards to be reached in equity, giving however the parties the opportunity to choose in favour of a decision in law.¹¹⁹ The ADR Directive allows Member States to keep solutions based in equity as this approach can suppose an advantage for the consumer, for instance when considering the evidence and remedies. However, the national law must ensure that decisions do not represent a loss of rights for consumers. Accordingly, it will be necessary to enable a judicial challenge of the decisions based on equity in order to monitor if they respect the consumer mandatory law.¹²⁰

D. THE CONSTRUCTION OF THE NEW SYSTEM: THE NATIONAL COMPETENT AUTHORITIES AND THE CERTIFICATION PROCESS

The Spanish main competent authority according to the Draft Bill would be the Presidency of the AECOSAN that also funds and controls the consumer arbitration boards, which casts some concerns regarding the rigour of the certification process. The Draft also notes that the Spanish Central Bank, the National Stock Market Commission and the General Directorate of Insurances and Funds are designated as competent authorities for the financial sector. In addition, the Draft leaves open the possibility of establishing more competent authorities in sectors where the complexity of the disputes so advise.

The Draft establishes all the details of the certification process, without mentioning any fees, following the same steps as indicated by the ADR Directive and contemplates the possibility for ADR entities to be removed from the accredited ADR entities list. Public and private ADR entities may seek the accreditation in Spain. It seems that Spanish Law is going to admit consumer ADR entities regardless of whether they are or not for profit entities, including natural persons. The Draft does not establishes if other public ADR entities, different to the Consumer Arbitration System and the specialized for the financial services, will or could be accredited. The Draft does not allow certified private ADR entities to resolve disputes by imposing a solution as these entities will only be allowed when created by statutes. The Draft does not expressly

¹¹⁹ See art. 33 Royal Decree 231/2008.

¹²⁰ See Norbert Reich, "A Trojan Horse in the Access to Justice – Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?", *ERCL*, 2014, 10-2, pp. 278-280.

make clear if non certified ADR entities will also be submitted to the same limitations.

E. CONCLUSIONS

1. Summary of findings

Spain has had a positive experience in CADR. The implantation of the ADR Directive offers the opportunity to review the current CADR system in order not only to improve its ability to provide effective redress to consumers, but also to avoid future disputes by inter alia advising consumers and allowing the aggregation of data in a way that prompts a speedy reaction from public authorities.¹²¹ The ADR Directive leaves Member States with a large margin to adapt their national systems to the new European requirements. The new legal framework takes into consideration not only the existing national traditions but it also incorporates best practices provided by the comparative law. Accordingly, Spain when transposing the European law should also take into consideration the opinion of the stakeholders and the implemented legislation in the other Member States.

Spain counts with a high number of public ADR entities that depend on different territorial administrations. Yet, the degree of compliance of these ADR entities with the ADR Directive varies. The highest standards correspond to ADR entities such as the Office for the Telecommunication User and the three public entities existing in the field of CADR in the financial services. They show a high compliance with the principles of independency, transparency, expertise, but less with others, such as the principle of effectiveness with regards to the time taken to deliver outcomes. It is especially noteworthy that they provide the consumer with useful information related to similar disputes and make annual reports fully available to the public.

The consumer arbitration boards could be considered as second best: even if the procedure does not show a poor level of compliance with the European standards, they do not publish information about resolved cases -with the exception of Confianza online-or even the criteria followed. Consumer arbitration boards also suffer the uncertainty related to the regime applicable to consumer mediation, which in many cases derives into an unsuitable procedure, as the principle of fairness is hampered. This problem is also experienced by the local OMICs, the

¹²¹ See chapter 16 in this book.

authentic Cinderella of the Spanish system of CADR, as they do not receive sufficient public funding, nor suitable rules to conduct the mediations procedures. As for other public ADR entities, such as the Minister of Industry, Energy and Tourism, the Minister of Infrastructure and the State Agency for the Air Security, they have very little impact. Indeed, the scarcity of information available has impeded their evaluation.

Even in the absence of a clear legal framework, if we consider the numbers of the disputes resolved, it is possible to assign a preponderant role to consumer associations. Amongst all, it is possible to highlight the mediation activities developed by ADICAE, OCU and FACUA. The degree of compliance of their procedures and structure with the European standards can be sometimes high (for instance, mediators must be lawyers, or at least have a law degree), but it can be even hard to gain access to the rules governing their mediation procedures (available only for mediators in the case of FACUA). At the same time, the reports made available do not offer information of the recurrent problems. This situation is, however, not imputable to the consumer associations but to the precarious existing legal framework.

In addition to the significant experience of the ombudsmen for Banks and insurance companies, Spain also counts with private ADR entities for the adhered traders, such as Confianza online; and the practice of traders organizing specific ombudsmen, such as Telefonica, Endesa and AGBAR, which show a decent degree of compliance with the European standards, obviously leaving the independence principle apart. The legislation proposed seems to be willing to clarify the legal framework and to allow their participation in the market of the ADR services.

2. Main recommendations

The new European law requires the Spanish legislator to make some efforts in clarifying and improving its legal framework for CADR. The current Draft Bill pretends to take a step forward admitting, as general rule, not only public but also private ADR entities have a role in the new CADR landscape. The future legislation, however, will have to clarify the treatment to be given to these private ADR entities, especially when these are financed by the traders, as the proposed text in the Draft has provoked the rejection of most of the stakeholders. Yet, the efforts taken by the traders resolving disputes ought to be valued too, so it is important for the Spanish legislator to find out a suitable place for these entities as complement to the CADR system.

The Spanish legislator should not forget that the Mediation Directive has not been transposed correctly in the part related to consumer mediation, leaving an important legal gap in this area. The legislator must be also aware of the consequences of adapting the whole system to the principle of fairness since currently consumer mediation in Spain is taken place in an informal manner, often via email or by telephone. The future Act should also decide the role to be given to the ombudsmen for banks and insurance companies, as the existing Draft ignores them, and it should also include the criteria to be followed by the other public ADR entities, establishing which ones should seek the accreditation. Even if it is clear that the implementation of the Directive may take place mainly through the adaptation of the Spanish Consumer Arbitration System, the legislator should take into consideration that its decentralized character, consisting of seventy one independent Consumer Arbitration Boards, only hardly can be subject to a single accreditation application. This does not mean that AECOSAN does not have an important role in helping the Consumer Arbitration Boards to obtain their certification. However, it is clearer and clearer that not every Consumer Arbitration Board will be in the position to applying and obtaining the European accreditation.

The challenges of implementing the ADR Directive in Spain require lots of steps and the collaboration of all the key stakeholders. The success of this reform largely depends on the ability of the legislator to keep the best features of the current CADR system while implementing the innovations required by the European law. The present parliament has this challenge in its hands.

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Abstract

The aim of this chapter is to analyse the challenges that the Spanish legislation will have to overcome in order to adapt to the new European Law on CADR. Spain counts with a long way experience in CADR consisting both in public and private ADR entities. In the public field the main role belongs to arbitration (the SCAS) and mediation (the OMICs), extended over the whole geography. Apparently this situation puts Spanish legislation in a good starting point for the adaptation. A closer look reveals, however, that every territorial entity (both CAB and OMICs) does not depart from the same position in order to reach the fulfilling of the European standards. Its decentralized character could orientate solutions towards a deep reform of the system to make it possible for every single entity (OMIC or CAB) to obtain its own accreditation. The legislator seems also willing to increase the role of private ADR, and also Ombudsmen paid directly by the trader, but only to some extent. This position counts today with the objection of many of the stakeholders. The Draft also leaves many questions waiting for answers by the future legislation. The chapter highlights some of the decisions the Spanish legislator should take when adapting the CADR system to the new European law.

Keywords

Spanish CADR System, Adaptation to EU Law, Public ADR entities, Private ADR entities, Consumer Associations, Ombudsmen, Principle of independency, Principle of liberty, Principle of legality, Principle of Fairness, Principle of Transparency