European Review of Private Law 6-2019 [1251–1278] © 2019 Kluwer Law International BV, The Netherlands.

The Spanish and Portuguese Systems: Two Examples Calling for a Further Reform – Uncovering the Architecture Underlying the New Consumer ADR/ODR European Framework

Fernando Esteban de la Rosa* & Cátia Marques Cebola**

Abstract: The article scrutinizes the European Framework for consumer ADR and ODR with the purpose of uncovering how Europe aims to develop ADR and ODR in EU MS in order to deliver justice and ensure a better enforcement of EU consumer protection rules and a better functioning of the markets. It deepens on the transformations in the ADR systems required to better fulfil the new functions assumed by the certified ADR entities and the role that the technology may play inside efficient certified consumer ADR entities. The domestic implementation of EU law in Spain and Portugal rather seems to perpetuate the pre-existing systems although wrapped up in European packaging with a ribbon on top. The exam reveals the existence of a further path for improvement and for obtaining additional advantages that could lead to a better functioning of the markets and a more suitable encompass with the philosophy that underlies the EU Regulatory Framework. The article explores different ways to move forward and achieve a higher degree of compliance with the ADR/ODR Regulatory Framework.

Résumé: Le présent article examine le cadre légal européen de la résolution extrajudiciaire des litiges de consommation et le règlement des différends en ligne (ADR et ODR) avec l'objectif de découvrir comment l'Europe a l'intention de développer cette matière dans les États membres afin de rendre la justice et d'assurer une meilleure application des règles communautaires de protection des consommateurs et un meilleur fonctionnement des marchés. Il approfondit les transformations des systèmes d'ADR nécessaires pour mieux remplir les nouvelles fonctions assumées par les entités ADR certifiées et le rôle que la technologie peut jouer au sein des entités ADR consommateurs certifiées et efficaces. La mise en œuvre nationale de la législation communautaire en Espagne et au Portugal semble plutôt perpétuer les systèmes préexistants, bien qu'ils soient enveloppés dans des emballages européens avec un ruban sur le dessus. L'examen révèle l'existence d'un nouveau chemin pour améliorer et obtenir d'avantages supplémentaires qui pourraient conduire à un meilleur fonctionnement des marchés et une meilleure adéquation à la philosophie qui sous-tend le cadre réglementaire européen. L'article explore les différentes façons d'avancer et d'atteindre un degré plus élevé de conformité avec le cadre réglementaire ADR/ODR.

* Chair Private International law, Director of the Research Excellence Unit, 'Digital Society: Security and Protection of Rights', University of Granada Fellow of The National Center for Technology and Dispute Resolution (University of Massachusetts, Amherst). Email: festeban@ugr.es.

** Assistant Professor on ESTG, Polytechnic of Leiria – Portugal and Researcher on IJP-IPLeiria. Email: catia.cebola@ipleiria.pt.

Zusammenfassung: Dieser Beitrag untersucht den europäischen Rahmen von ADR- und ODR-Streitbeilegungsverfahren in Verbrauchersachen, um herauszufinden, wie Europa ADR und ODR in den Mitgliedstaaten entwickeln will, um sowohl Gerechtigkeit für Konsumenten zu schaffen als auch eine bessere Durchsetzung der EU-Verbraucherschutzvorschriften und ein Funktionieren der Märkte zu gewährleisten. Es wird vertieft auf die Anpassungen am ADR-Verfahren eingegangen, die erforderlich sind, damit die zertifizierten ADR-Stellen ihre neuen Aufgaben erfüllen können und auf die Rolle, welche die Technologie innerhalb effizienter zertifizierter ADR-Stellen für Verbraucher spielen kann. Die nationale Umsetzung des EU-Rechts in Spanien und Portugal hingegen erscheint eher als eine Weiterführung bestehender Systeme, gehüllt in eine EU-Verpackung mit einer Schleife obendrauf. Bei genauerer Betrachtung offenbart sich einen langen Weg mit Verbesserungen und zusätzlichen Vorteilen, der zu einem besseren Funktionieren der Märkte führt und zugleich mit der dem EU-Rechtsrahmen zugrunde liegenden Philosophie besser vereinbar ist. Es werden verschiedene Wege untersucht, wie man zukünftig einen höheren Grad an Konformität mit der ADR/ODR-Regulierung erreichen könnte.

Keywords: ADR, ODR, Consumer Redress, European Regulatory Framework, Consumer Arbitration System, Spanish Law, Portuguese Law.

1. Introduction[1]

1. The globalization of online consumer trade has given rise to new strategies for the enforcement and protection of consumer rights in the European Union (EU). In 2011 the European Commission concluded that an effective Consumer Alternative Dispute Resolution (CADR) could bring important benefits to the EU economy (around 0.4% of total GDP) as effective ADR mechanisms increase consumer trust and therefore give an impulse to cross-border transactions.[2] Aware of this reality and in order to enhance the protection of consumers in terms of redress, as well as to allow an easier way for delivering of justice, the European Union published the Dir. 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes (the ADR Directive) and the Reg. 524/2013 on Online Dispute Resolution for Consumer Disputes (the ODR Regulation). The main goal of this European legal framework is to increase the availability of high quality ADR entities, ensuring that they meet some minimal quality standards (mostly a reformulation of the principles that were formulated by the 1998 and 2000 recommendations), as well as to encourage their awareness and their use.

---

1 This contribution has been developed with the support of the Research Project I+D DER2017-88501-P entitled 'La mediación de consumo: hacia una construcción legislativa estatal y autonómica con arquitectura europea', financed by the Spanish National Research Agency. The leader of the Project is Dr. Fernando Esteban de la Rosa.

2 European Commission Staff Working Paper, *Impact Assessment Accompanying the Document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes* [SEC(2011) 1409 final]. See also P. Cortes, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016), p 5.

2. The EU Regulatory Framework for ADR/ODR makes explicit its wish to respect the existing traditions and structures in the Member States (MS) in the field of consumer ADR. However, its attentive reading reveals mandates, somehow implicit, related to two key issues. On the one hand, and this is an important novelty that distances the new European regulatory framework from the 1998 and 2000 Recommendations, the New EU Regulatory Framework contains a change of philosophy, as it assigns new functions to the national ADR entities that goes beyond the tasks assumed by traditional ADR entities in the EU MS. Indeed, the ADR Directive orientates the ADR systems towards a new paradigm, where dispute resolution is only one of the columns in a wider strategy of promoting fairness in the markets for the benefits of consumers and traders. The new Regulatory Framework is conceived to take the benefits coming from the dispute resolution by way of making possible the aggregation of data and the knowledge of the difficulties in every sector with the aim of providing information and, as a result, preventing conflicts. Information that should be ready to be useful both for companies, to change their commercial policies, and for the regulatory authorities in charge of detecting and punishing fraud cases, the use of unfair terms or unfair commercial practices. Thus, the Regulatory Framework aims to go beyond the resolution of disputes between two private parties and introduces other objectives in the public interest, intending to profit from ADR. According to the new philosophy, only the regulatory developments that take into account this sequence will produce a real improvement in the position of consumers and will be fully consistent with the new philosophy.

3. On the other hand, even if apparently the Online Dispute Resolution (ODR) issues are kept in the ODR Regulation, the New European Regulatory Framework for ADR/ODR seems to drive to a much more intensive use of the technology, also more than what it expressly declared. It so emerges the need to manage the incorporation of technology to consumer ADR systems and to verify how ODR may be seem as an ally in the strengthening of the position of consumers promoted by the New Deal and according to which requirements the development of ODR should take place.

4. The New European Regulatory Framework for ADR/ODR must have been transposed in every EU MS. As the EU Regulatory Framework admits different options for its implementation, the procedure followed by most of the EU countries has consisted in upgrading, into the certification, to many of the pre-existing ADR entities. However, as the points of departure were different, the degree of compliance of the results with the underlying mandates of the EU Regulatory Framework, that as above mentioned goes beyond what expressly indicated, are also different. Our analysis will focus in the examples given by the Spanish and Portuguese Systems, where the similar points of departure has driven to comparable situations and an equivalent degree of compliance with the EU Regulatory Framework. The article analyses the nowadays situation and indicates directions to

move forward with the aim of reaching a higher degree of compliance with the EU Regulatory Framework and to use ODR to strengthen consumer rights online, particularly in light of digital developments. Both inside the discussions on possible adaptations of the national ADR landscapes that the Directive and the Regulation has made emerged at the European Union level.[3]

2. The New European Regulatory Framework for ADR/ODR and the Transformation of the MS ADR Structures

2.1. Impact of the New Functions of the ADR Entities on the Consumer ADR Structure of the MS

5. The political success of the ADR Regulatory Framework has been based on its apparently minimally invasive character on the existing ADR structures of the MS. As provided in section 15 of the Preamble ADR Directive, 'the development within the Union of properly functioning ADR is necessary to strengthen consumers' confidence in the internal market, including in the area of online commerce, and to fulfil the potential for and opportunities of cross-border and online trade. *Such development should build on existing ADR procedures in the MS and respect their legal traditions*' (emphasis added). However, the reading of the ADR Directive and the way in which the obligations of the MS are conceived raises serious doubts as to the declared minimal impact of the European law on the ADR structure in any MS. The European Directive allows MS multiple choices to implement the European Law. But the EU Law has assigned some important functions to the European certified ADR entities that those have to fulfil in any case and that should have an impact on the structure of ADR entities in any MS. If we read carefully the new obligations and functions that the ADR entities have to accomplish, they should have a further impact on the ADR entities structure in any MS.

6. According to the ADR Directive, MS must ensure that ADR entities make publicly available on their websites annual activity reports with information related to '*the number of disputes received and the types of complaints to which they related*'. The information provided by the ADR entities must also cover 'any systematic or significant problems that occur frequently and lead to disputes between consumers and traders'. According to the Directive, this information should be accompanied by recommendations as to how such problems can be avoided or resolved in future, in order to raise traders´ standards and to facilitate

3 See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, of 25 September 2019. Doc COM(2019) 425 final, p. 8.

the exchange of information and best practices. This requirement may be put aside the requirement established in Article 17 of ADR Directive, according to which 'MS must ensure cooperation between ADR entities and national authorities entrusted with the enforcement of Union legal acts on consumer protection'. 'This cooperation must in particular *include mutual exchange of information on practices in specific business sectors about which consumers have repeatedly lodged complaints.* It must also include the provision of technical assessment and information by such national authorities to ADR entities where such assessment or information is necessary for the handling of individual disputes and is already available'.

7. As already mentioned, these new functions the ADR Directive subtly points the way from traditional ADR entities to modern ADR entities whose growing role in the market goes beyond simple dispute resolution and allows for data aggregation, provides information to the public for the purpose of prevention and helps the market function well. In the way Professor C. Hodges has indicated,[4] the European legislation has taken the view that dispute resolution is only one of the pillars on which the proper functioning of the market is based; ADR is the second. Hence, data aggregation, information and prevention are complementary functions for ADR entities. At the same time it allows the detection and punishment of cases of fraud by public authorities.[5] The ADR Directive does not expressly go beyond by imposing MS a consumer ADR structure and types of entities. However, for the sake of the better fulfilling of these functions, it is possible to submit that they drive the systems in a determined direction, according to the following premises.

2.1.1. Towards a Specialized Treatment of the Disputes Stemming from Different Economic Sectors

8. Specialization of the ADR entities in one field of consumer disputes appears as a key requirement to the better achievements of the goals planned by the EU Regulatory Framework. It is true that ADR entities with competence to know on any kind of consumer disputes allow MS a quick fulfilment of the obligation of having sufficient coverage of consumer disputes according to Article 5, paragraph 1, of ADR Directive. However, ADR entities with competence in disputes stemming from one economic activity sector are in a better situation in order to fulfil the new functions given by the New European Regulatory Framework. Indeed, this kind of ADR entities are in a better position to identify specific and recurrent problems and transmitting accurate information about them. In the other side, ADR with competence to resolve a wider range of consumer disputes will probably lack of higher

4 See for instance C. Hodges & S. Voet, *Delivering Collective Redress. New Technologies* (Hart 2018), p 9.

5 With this aim, Art. 17 of the ADR Directive establishes the cooperation between ADR entities and national authorities enforcing Union legal acts on consumer protection.

degree of expertise and the capability of providing the necessary triage of the cases in order to ensure its classification for the aim of making data aggregation and providing information for the consumers and businesses.

9. This specialization requirement may also be extracted, in an implicit manner, from the reading of some provisions of the ADR Directive like, for instance, Article 5, paragraph 3, that envisages the existence of a residual ADR entity 'to deal with disputes (...) for the resolution of which no existing ADR entity is competent'. The very wording of this provision makes out that the residual ADR entity must be considered as an 'exceptional solution' comparing with the preferred treatment that may be given by a specialized ADR entity. The Spanish version of the ADR Directive makes this vision clearer as the translation into Spanish used to mean 'residual ADR entity' is '*entidad de resolución alternativa complementaria*' (complementary ADR entity). Even if the ADR Directive does not expressly define which are the sectors for which every MS must provide a specialized treatment of the claims, and for which all the mentioned functions has to be fulfilled, it seems clear that the ADR Directive is not considering as the ideal a MS to take profit of the very wide competence of an ADR entity to know about consumer claims to fulfil with the obligation of providing a full coverage of consumer disputes. Provided that the entity will not be able to offer the possibility of giving different treatments to claims from different sectors of economic activity. Conversely, the possibility of creating a residual ADR entity aiming to reach a full coverage has been placed by the very European legislator at the same level to the option of relying on ADR entities established in another MS or regional, transnational or Pan-European dispute resolution entities, where traders from different MS are covered by the same ADR entity.

2.1.2. Crisis of the Territorial Criteria

10. The better fulfilment of the new functions assigned to the ADR entities does neither fit optimal with the territorial based ADR entities. On the one hand, the ADR Directive underlying principles do not seem to admit the possibility of an assignment of claims to specific ADR entities based on a territorial connection between a dispute and an ADR entity. This comes as the result of the voluntary nature of submission, of the company and the consumer, to ADR entities, a decision for which will be relevant information published by every ADR entity according to Article 7 of ADR Directive, which establishes the obligations deriving from the principle of transparency.

11. On the other hand, data aggregation in a limited territory does not help well to provide relevant information for consumers and traders. Counting with many different ADR entities restrict the effect of the case load, of the aggregated data and of the information offered to the public, being possible even to generate biases in the generated reports. The higher the number of ADR entities is, the worse

quality the information collected. This does not mean to remove the worth of the proximity of the ADR entity to the consumer, especially when the physical presence in the procedure may be required as the own ADR Directive authorizes to require [Art. 20, para. 2, s. f)]. But it orientates the system towards having a lower number of ADR entities with, to put it somehow, territorial delegations. Both perspectives seem that should orientate the systems, just in case, towards the reduction of the number of the ADR entities and their fusion, even if the possibility of having territorial delegations may be considered as an advantage.

2.1.3. Discovering a Preferred Type of Certified ADR Entities

12. Considering the additional functions assigned to the ADR entities (data aggregation, information, prevention), two questions emerge: the funding channels and the better suitability to perform the functions. On the one hand, the ADR entities may require an improvement of their channels of funding. The supplementary financing options could rely on the side of the consumers, the traders or the public aid. However, funding from the first side is limited by the ADR Directive itself, which only allows to tax the consumer with a symbolic fee. Therefore, the only realistic options are the two latter. Many ADR entities work under a public aid funding scheme. However, it is questionable to assign the costs of the procedure exclusively to the general budgets, as the procedures take places in benefit of consumers and businesses. In fact, a key question by transposing the ADR Directive relies on which extent traders may be taxed with the costs of the procedures before ADR (either public or private) entities, taking into consideration, for instance, the weakness that small and medium-sized companies may show and, especially in cases of private ADR entities, the need of ensure the respect of the independence principle. For that reason, Associations of traders may also participate in the funding of ADR entities, possibility allowed by Article 6, paragraph 4, of ADR Directive.

13. On the other hand, the regulators in charge of the supervision and inspection of an economic sector (the so-called regulators, but also having the competence for redress) are in a very good position to fulfil the mentioned new functions of the ADR entities. This occurs mainly due to their own interest in knowing which are the difficulties and the problems in a specific economic sector. As they have their own aims for collecting such information, they are well placed to become certified ADR entities, in particular if they use dispute settlement mechanisms such as mediation or settlement agreements regarding redress for consumers. Regulators, as public regulatory or enforcement bodies, usually have a wide range of powers that may typically include powers to cease an infringement (injunction), to investigate and obtain evidence, to require changes in behaviour (undertakings), to require redress and to impose or seek sanctions. The existence of these powers means that cases are rarely resolved by issuing court proceedings but are settled through negotiated settlements between authorities and traders that cover

agreement on infringement, actions to reduce reoccurrence, payment of redress and any sanction.[6] A regulator providing redress and having the specific powers mentioned would in all likelihood be in a very good position to enhance the protection of consumers and the market and to become a successfully certified ADR entity, specifically using means of amicable conflict resolution after an infringement has been detected and reported.[7] Logically, in order to strength the fulfilment of the principle of impartiality, it is convenient that both the inspection and the redress functions were fulfilled by different departments. Regulators should also work with the existing ADR entities to collect information on the resolution of consumer disputes or, as in Portugal, by financing ADR entities[8]

2.1.4. The Role of the Customs and Habits of Consumers and Traders

14. The adaptation of a system must also pay attention to the customs and habits of consumers and traders by resolving disputes. As shown by the data provided by the European Commission related to the first 2 years of operation of the EU ODR platform,[9] offering a completely new ODR platform, or a new ADR entity, with the highest level of IT functionalities, does not guarantee success. As trust is a question of time and perseverance, reform of the system should not occur not considering the nowadays ADR structures, with their lights and shadows, as a point of departure. Under this consideration it is possible to understand better the section 15 of the ADR Directive's preamble when it indicates that 'such development should build on existing ADR procedures in the MS and respect their legal traditions. Both existing and newly established properly functioning dispute resolution entities that comply with the quality requirements set out in this Directive should be considered as 'ADR entities' within the meaning of this Directive'.

2.1.5. The Need to Subject the Consumer ADR System to a Permanent Supervision

15. Finally, the ADR Directive possesses a characterization that distances it from other directives. Conversely, it may require new legislative measures on how to

---

6 C. Hodges, 'Collective Redress: The Need for New Technologies', 18. JCP (*Journal of Consumer Policy* 2018), pp 1–32.

7 There are many examples in Europe. For Italy, see M.P. Gasperini, 'La resolución alternative de litigious de consumo en Italia a la luz de la aplicación de la directiva 2013/11/UE: entre buenas prácticas y problemas abiertos', in F. Esteban de la Rosa (dir) and O. Olariu (coord), *La resolución de conflictos de consumo* (Cizur Menor: Aranzadi 2018), pp 313–317.

8 See Art. 4.º-A and Art. 4.º-B introduced by the amending Law 14/2019, of 12 February in the Portuguese Act 144/2015, of 8 September..

9 Data provided in the *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*, of December 2017.

boost the development of the whole system. Every MS needs to provide its own well-greased system where all the parts (ADR entities) work correctly, that ensures full coverage, and that ensures that the new steps taken are made taking the whole system into consideration. That is the reason why, even if this is not an obligation derived from the ADR Directive, it is desirable to have a special entity supervising not only the degree of fulfilling of the obligations, something that belongs to the competent authorities, but also to impulse the system by proposing changes. That explains why some jurisdictions, like France, have created this kind of organization.[10]

2.2. A Further Development of IT Tools and Artificial Intelligence to Achieve a Higher Level of Consumer Protection

16. The ODR Regulation and ADR Directive point the way towards the institutionalization of ODR in Europe and represent a break-even between reaching efficiency through the use of the technology and the submission of this use to access to justice standards.[11] However, the new European legislation does not exhaustively regulate the use of the technology in Europe. The task of EU technological development, and its implementation in the most diverse sectors of disputes, has been technically entrusted to the MS and to the certified ADR entities in every MS. We submit that, in practice, the EU legislation conditions the development of the technology by setting express procedures and standards that both MS and certified ADR entities have to abide by. This conditioning may be observed in two different areas: coming from the own new functions assigned to certified ADR entities and also from the natural development to be expected in the near future in the use of the Artificial Intelligence in the field of the resolution of disputes.

17. The EU law envisages the existence of IT tools in the EU ODR platform and in the certified ADR entities. These functions find expression in the role of intermediation that the European platform plays in the context of the European ADR System.[12] The European design also affects the certified ADR entities. ADR entities

---

10 In France, the CDR is monitored by a new *ad hoc* entity, the Commission d'Evaluation et de Contrôle de la Médiation de la Consommation-CECMC.

11 For an analysis of the extent to which the ODR platform responds to the demands arising from the access to justice principle, see F. Esteban de la Rosa, 'Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes. The Achilles' Heel of the EU ODR Platform', 4. *IJODR* (*International Journal of Online Dispute Resolution*) 2017(2), pp 26-30.

12 C. Marques Cebola, 'La resolución en línea de litigios de consumo en la nueva plataforma europea ODR: perspectiva desde los sistemas español y portugués', in F. Esteban de la Rosa (dir) & O. Olariu (coord), *La resolución de conflictos de consumo. La adaptación del Derecho español al marco europeo de resolución alternativa (ADR) y en línea (ODR)* (Cizur Menor: Aranzadi 2018), pp 369-393; A.E. Vilalta Nicuesa & I. Barral Viñals, 'Puesta en marcha de la plataforma EUR ODR y obligaciones derivadas del Reglamento UE nº 524/2013', in *La Plataforma ODR: Un mecanismo al*

must fulfil some requirements for whose fulfilment the IT tools may help a lot by contributing to boost efficiency. ADR entities must maintain an up-to-date website providing the parties with easy access to information concerning the ADR procedure and enabling consumers to submit complaints and supporting documents online; it also enables the exchange of information between the parties via electronic means. Furthermore, the technology could also help in getting ready the information that ADR entities have to make publicly available (specifically referring to the annual activity reports providing information on the number of disputes received and the types of complaints to which they were related; the systematic or significant problems that frequently occur and lead to disputes between consumers and traders, with recommendations on how such problems can be avoided or resolved in the future, in order to raise traders' standards and to facilitate the exchange of information and best practices; the rate of disputes the ADR entity has refused to deal with and the percentage share of the types of grounds for such refusal as referred to in Article 5, paragraph 4; the percentage share of ADR procedures that were discontinued and, if known, the reasons for their discontinuation; and the average time taken to resolve disputes; the rate of compliance, if known, with the outcomes of the ADR procedures). IT tools may also be instrumental in collecting the information that has to be communicated to the competent authorities every 2 years by every certified ADR entity.[13]

18. Evidently, this refers to information that nowadays, and without a special software or IT tools, any certified ADR entity will have to obtain, by using for instance an excel page and by incurring high costs of personnel. It will have to be seen to which extent every ADR entity is reaching the goals of the EU Regulatory Framework. By introducing the new functions, the ADR Directive is implicitly demanding the development of IT tools limb to the ADR-certified entities,

---

alcance de todos los consumidores? (Zaragoza: ADICAE 2016), pp 57–80; F. Esteban de la Rosa & P. Cortés, 'Un nuevo Derecho europeo para la resolución alternativa y en línea de litigios de consumo', in F. Esteban de la Rosa (ed.), *La protección del consumidor en dos espacios de integración: Europa y América* (Valencia: Tirant lo Blanch 2015), pp 548–561.

13 Related to (1) the number of disputes received and the types of complaints to which they related; (2) the percentage share of ADR procedures that were discontinued before an outcome was reached; (3) the average time taken to resolve the disputes received; (4) the rate of compliance, if known, with the outcomes of the ADR procedures; (5) any systematic or significant problems that occur frequently and lead to disputes between consumers and traders. The information communicated in this regard may be accompanied by recommendations as to how such problems can be avoided or resolved in future; (6) where applicable, an assessment of the effectiveness of their cooperation within networks of ADR entities facilitating the resolution of cross-border disputes; (7) where applicable, the training provided to natural persons in charge of ADR in accordance with Art. 6, para. 6; (8) an assessment of the effectiveness of the ADR procedure offered by the entity and of possible ways of improving its performance.

considering it *via naturalis* to achieving these goals. The creation of their own ODR Platforms servicing ADR-certified entities is on the table.

19. The development of Artificial Intelligence may also help the dispute resolution process by employing tools such as solution explorers, automated negotiation or blind bidding tools, thus facilitating the settlement of the dispute. Unfortunately, the EU legislation is silent on this matter, and there are no direct European criteria applicable at the moment. Even if the ADR Directive envisages that certified ADR entities will have to provide functions such as issuing recommendations and detecting cases of fraud, for example, it fails to provide a comprehensive flight plan: it falls short of introducing the online version of the last step of the procedure: for example, the Artificial Intelligence Model.[14] The ADR Directive takes the steps of data aggregation, that of prevention and the one of recommendation related to any systematic or significant problem that occurs frequently but, surprisingly, leaps over the step of classifying the disputes and offering solutions for them. At the same time, it seems difficult to imagine the possibility of offering the information related to the systematic and significant problems without using the technology to prepare this classification, counting disputes and offering solutions. It is important to note that the use of technology offers best results when the field of action is narrower: thus when applied to specific sectors of disputes it is easier to identify specific and recurrent problems and transmit accurate information about them. For that reason, in an ADR structure embodying Artificial Intelligence tools specialization may become also an important paradigm.

20. The certified ADR entities are called to use IT tools much more than the EU ODR platform, to some extent precisely for fulfilling, in an efficient way, the requirements that come from the ADR Directive. Following this orientation, they will play better their role as improving consumer protection by granting a better functioning of the ADR entities. According to this view, and taking into consideration the difficulties that the ADR entities and the MS may have in developing their own IT tools, and the possibility of having different kinds of growth in the MS, and the difficulties in finding the investment needed to further this aim, it will be most appropriate to officially involve the European Union in these efforts.

21. The systems should also enhance the functionalities and possibilities that allow the parties to negotiate and find a solution. Every legal system should take the benefit of the technology allowing the parties to reach an agreement in any stage of the procedure. Here emerges a significant element to take into consideration by transforming the nowadays ADR entities.

---

14 See J. Zeleznikow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts', 8. *IJCA (International Journal for Court Administration)* 2017(2), pp 30–45.

3. Analysis of the Spanish and the Portuguese Systems

3.1. Legal Background and Framework

3.1.1. Spanish System

22. The transposition of the ADR Directive in Spain at the central state level has taken place through Act 7/2017, of 2 November, transposing Directive 2013/11/UE.[15] Act 7/2017 regulates the procedure that ADR entities have to follow in order to obtain the accreditation, which entities are allowed to apply for it, which are the requisites to be fulfilled and which are the obligations that rely on traders and on the public authorities involved. As competent authorities Act 7/2017 has appointed the Presidency of the Spanish agency for consumption, food security and nutrition (AECOSAN), acting also as point of contact with the European Commission. However, there are different competent authorities for two specific sectors of disputes.[16] The autonomous communities with competence in the matter may also appoint competent authorities. The legal field on consumer mediation in Spain must be completed with the regulation that may come from the autonomous communities, as many of them have legislative power to legislate on this matter. In 2014 the autonomous community of Catalonia passed a Decree, and, for now, there are Drafts of Acts in Andalusia and Extremadura.

23. The Spanish legislator has taken some choices by transposing the ADR Directive. Act 7/2017 has not authorized ADR entities whose financing depends entirely on the individual trader. As an important consequence, some ADR entities financed by the traders and competent in some specific sectors of disputes, like the '*Defensor del Cliente de Telefónica*'[17] or the 'Customer Counsel de Suez'[18] have not been admitted for European accreditation. The grounds of refusal of ADR complaints envisaged by Article 5, paragraph 4, of ADR Directive have been considered, with the exception of that related to the value of the claim (falls below or above a pre-specified monetary threshold). ADR entities are obliged to subscribe an insurance to cover civil liability, except if they are public entities, thus establishing a privilege for public ADR entities. However, there are no limitations to operate for non-accredited ADR entities, even if the accredited ones are not going to be distinguished by a trust mark.

---

15 Spanish Official Bulletin (BOE) number 268, 4 November 2017.

16 In the financial services field there are three competent authorities: the Bank of Spain, the National commission of the stock market and the general direction of insurance and pension funds of the ministry of economy, industry and competitiveness. For the accreditation of ADR entities knowing of claims using air transport competent authority is the Ministry of development.

17 www.telefonica.es/es/acerca_de_telefonica/servicio-defensa-cliente.

18 www.customercounsel.agbar.es/es.

24. Act 7/2017 has helped clarifying the regulatory framework for consumer mediation, in comparison with the former situation of no legal frame for consumer mediation. The new regime grants a privileged position to the consumer.[19] For instance, and it is something rare among the European countries systems, according to Spanish law[20] as well as Portuguese law[21]) an *ex ante* consumer mediation agreement is not binding for consumers but do bind traders. Therefore, should the consumer opt to trigger judicial proceedings, there would be no impediment for him whatsoever to do so.

3.1.2. Portuguese System

25. In Portugal the ADR Directive was transposed by the Act 144/2015, of 8 September,[22] which does not differ so much from the literal content of the Directive's rules.[23] In essence, the ADR Directive requirements were accomplished by two different mechanisms established by the Act 144/2015. On the one hand, a Consumer Arbitration Network was implemented to ensure that the existing consumer arbitration centres share common information systems.[24] On the other hand, under a certification process, a national list of all Portuguese ADR entities, responsible for resolving consumer disputes that meet the quality criteria established in that Act,[25] was created. Thus, the Portuguese legislator regulated the consumer dispute resolution sector by raising the requirements set out in the Directive as necessary for the exercise of this activity. The body in charge of certifying the ADR entities is the Portuguese Directorate-General for Consumer (DGC).

26. It is important to remark that after the Act 144/2015, only certified ADR entities are allowed to resolve consumer disputes in Portugal.[26] In fact, the Portuguese legislation has established fines for entities that do not comply with the legal requirements, which range from €500 to €5,000 for natural persons, and

---

19 Act 7/2017 has abrogated the exclusion of consumer mediation from the scope of application of Spanish Act on Mediation on Civil and Commercial Matters. Therefore, consumer mediation is now also submitted to the General Act on Mediation on Civil and Commercial Matters, the Spanish implementation of Dir. 2008/52/UE.

20 Art. 13 of Act 7/2017.

21 Art. 13, para. 1, of Act 144/2015.

22 Since its publication this law has been amended by the Decree Law No 102/2017, of 23 August and by the Law No 14/2019, of 12 February.

23 The implementation of the Dir. 2013/11/EU in Portugal was assigned to the Ministry of Justice and the Directorate-General for Justice Policy (DGPJ) was the body responsible to technically assist the legal transposition with the Directorate-General for Consumer support.

24 Art. 4 of Act 144/2015. This new network replace the first Consumer Arbitration Network implemented by the Decree-Law No 60/2011 (DR, I Série, No 88, of 6 May 2011) and referred by the acronym RNCAI.

25 Art. 16 of Act 144/2015.

26 Art. 16 and Art. 17, para. 5, of Act 144/2015.

from €5,000 to €25,000 for legal persons.[27] Therefore, and different from the Spanish System, non-certified entities are not allowed to operate in Portugal, at least legally. The legislator had a dual objective: firstly, to control the quality level of these entities, and secondly to provide a compilation of the Portuguese entities which consumers and traders can use via the EU ODR Platform pursuant the Regulation (EU) No 524/2013. Yet, the idea that there is a total or absolute certification system of all consumer ADR entities may not be entirely true since non certified entities, such as the Peace Courts and the private mediators, can also solve consumer disputes, among other conflicts.[28] Nevertheless, entities which are only competent for the resolution of consumer disputes have to comply now with the legal requirements in line with the requirements of the ADR Directive.

3.2. The Consumer ADR Structure in Spain and Portugal

3.2.1. Spanish System

27. Even if there exist also private entities, the consumer ADR landscape in Spain continues to be dominated by public ADR entities, and especially by the Consumer Arbitration Boards belonging to the Spanish Arbitration System.[29] In addition, arbitration is reserved for public entities. In normal cases Consumer Arbitration Boards resolve consumer disputes using a double step system where mediation is tried before the arbitration stage. And even the mediation may be tried in the very arbitration stage before the arbitral body.

28. The Consumer Arbitration System is made up today of seventy-two Consumer Arbitration Boards,[30] at national, regional, provincial, communities and local levels, created by territorial administrations, under agreement with the AECOSAN, and submitted to a uniform procedure approved by the Spanish Government (nowadays the Royal Decree-Law 231/2008). Any Consumer Arbitration Board may resolve disputes arising between consumers or users and companies or professionals in relation to legal rights or contractually recognized to the consumer, with the sole limitation based on matters not freely available to the parties and those that deal with intoxication, injury, death or those in which there

27 Art. 23 of Law No 144/2015.

28 It can be argued that Peace Courts are non-true extrajudicial entities because they have a similar structure to the courts, and that private mediators can solve civil and commercial conflicts in general and not just consumer disputes. Consequently, for these reasons, they will not have to comply with the legal requirements imposed by Act 144/2015.

29 See F. Esteban de la Rosa, 'Challenges for the Implementation of the Consumer ADR Directive in Spain', in P. Cortes (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press 2016), pp 276–296.

30 See in the following website, www.aecosan.msssi.gob.es/AECOSAN/web/consumo/ampliacion/Juntas_Arbitrales/juntas_arbitrales.htm.

are reasonable indications of crime, including responsibility for damages directly derived from them. Therefore, the full coverage required remains guaranteed only by relying on the Consumer Arbitration Boards. Participation in the procedures before the Consumer Arbitration Boards is free of charge for consumers and traders (Art. 41 Royal Decree 231/2008). However, it must be highlighted the original way followed by an autonomous community in Spain in order to tax, through a new inspection tax, the traders who have had a high number of claims.[31] Consumer Arbitration Boards are financed by the territorial entity on which the Consumer Arbitration Boards depends and by public aid.

29. The Spanish legislator has also envisaged the creation of ADR entities competent to hear disputes stemming from one specific sector: air transport and financial services. However, elapsed the scheduled time, these two entities have not yet been developed. There also exist specialized ADR entities in specific sectors. Among them highlights the telecommunication user service office,[32] depending on the central government. However, the Act 7/2017 did not take any step towards its accreditation as European ADR entity. So, the path towards the specialization of the certified ADR entities has been programmed only partially (for air transport and for financial services) and have not yet been developed. As a result, practically Spain has bet strongly, as a way to fulfil the European Regulatory Framework, on the popular, and territorial disseminated, Consumer Arbitration Boards. Indeed, today, from the thirteen Spanish ADR entities listed in the EU ODR Platform[33] ten of them are Consumer Arbitration Boards.[34]

30. The other certified ADR entities in the list of the EU ODR Platform are Mediation Quality, Confianza Online and the Association for the self-regulation of commercial communications (AUTOCONTROL). Mediation Quality, accredited by the Catalonian Consumer Agency[35], is a mediator with competence in any matter (familiar, civil and commercial matters, bankruptcy, criminal, etc.) that now has reached the European accreditation. The Mediation Committee for Confianza Online[36] extends its

---

31 See in Catalonia the First final provision of the Act 20/2014, of 29 December, modifying Act 22/2010, of 20 July, approving the Consumer Code of Catalonia, to improve the protection of consumers in matters of loans, economic vulnerability and consumer relations. Spanish Official Bulletin (BOE) number 18, of 21 January of 2015.

32 https://www.usuariosteleco.gob.es/Paginas/Index.aspx.

33 The list is available in the following website, www.aecosan.msssi.gob.es/AECOSAN/web/consumo/ampliacion/listado_entidades_acreditadas.htm.

34 There are the following: National Consumer Arbitration Board and the Consumer Arbitration Boards of Castilla y León, Catalonia, Euskadi, Extremadura, Autonomous Community of the Canary Islands, Autonomous Community of Madrid, Autonomous Community of Navarra, North-West of the Community of Madrid and Asturias.

35 See the website, www.mediationquality.com/documentacion/reglamento-de-mediacion.

36 See the website, www.confianzaonline.es/consumidores/guia-practica-de-consumidores-faq.

competence to resolve any dispute, also there included any consumer disputes, deriving from the e-commerce. Finally, the situation of the Association for the self-regulation of commercial communications (AUTOCONTROL) is a little weird, as it has no competence to hear consumer disputes derived from a sales or a service contract, but only 'disputes in relation to a certain commercial communication'. Its inclusion in the list of the EU ODR Platform may cause confusion.

3.2.2. Portuguese System

31. The Portuguese Consumer ADR System is based in ADR entities using also a multi-step resolution scheme through mediation (as first step) and arbitration (as last step).[37]

32. In Portugal there are today ten arbitration centres[38] focused specifically in consumer disputes that can be divided in two main categories:

- Eight arbitration centres with general competencies for any kind of consumer conflict [seven centres with regional/local coverage in Lisbon, Oporto, Coimbra, Braga, Vale do Ave, Algarve and Madeira, and the National Consumer Center (CNIACC) that have competencies in all areas which are not covered by other consumer arbitration entity];
- Two specialized arbitration centres, responsible for disputes related to the purchase, sale, maintenance and use of motor vehicles (CASA)[39] and conflicts related to the insurance sector (CIMPAS)[40], both with national coverage, covering all Portuguese territory. Therefore, the idea of ADR entities specializing to resolve the disputes stemming only from a specific sector of disputes is in these two entities.

---

37 As noted above, although Peace Courts (*Julgados de Paz*) and private mediators can also resolve consumer conflicts in Portugal, it is essentially in specialized arbitration centres that this type of dispute is resolved. About the Portuguese consumer ADR/ODR system, see among others C. Marques Cebola, 'The Implementation of the Consumer ADR Directive in Portugal: The Necessary Reform or Missed Opportunity?', in Pablo Cortés (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press 2016), pp 251-273; J. Pedroso & C. Cruz, *A Arbitragem Institucional em Portugal: o caso do Centro de Arbitragem de Conflitos de Consumo de Coimbra e Figueira da Foz* (Coimbra: Centro de Estudos Sociais 1999).

38 The first arbitration centre for consumer disputes was created in Lisbon in 1993. Gradually similar arbitration structures began to emerge in other regions as Coimbra (1993), Porto (1995), Guimarães (1997), Braga (1997), Algarve (2000), Madeira (2005). Since there were regions in Portugal that did not have any ADR centre for consumers, in 2009, the Ministry of Justice supported the creation of the National Center for Information and Consumer Disputes Arbitration (CNIACC) that has subsidiary jurisdiction as it only receives consumer complaints when there is no other competent Centre.

39 http://www.centroarbitragemsectorauto.pt/site/site/index.php.

40 https://www.cimpas.pt.

33. Consumer arbitration centres are private and institutional entities, managed by a private board formed by several entities, including municipalities, consumer associations and trade associations.[41] Thus, each centre can approve its own regulation with different rules and procedures.[42] Nevertheless, after the Act 144/2015 the consumer arbitration centres joined forces in order to adopt a uniform regulation and in 2019 an amendment to the Act made imperative the adoption of this regulation.[43] Although some differences persisted (regarding the claim value, for instance), today there is more uniformization among these centres, a fact that is commendable since it is not defensible that the same consumer conflict can be subject to different arbitration rules depending on where it arises.

34. The centres may hear consumer disputes arising from the supply of goods or services by a natural or legal person[44], on a professional basis and under a profit economic activity. Therefore, the full coverage required by the ADR Directive is also guaranteed only considering the centres of arbitration. In addition, all the conflicts excluded from the scope of application of the Portuguese Consumer ADR Act scope, following the ADR Directive, are also not covered by the consumer arbitration centres competence.[45]

35. At the beginning, dispute resolution services of the consumer arbitration centres were, like still in Spain, free of charge for consumers and traders, and their functioning was co-financed by the associate bodies and by the Ministry of Justice. Nevertheless, the increasing volume of cases, especially after the introduction of the compulsory arbitration of essential public services in 2011, demonstrated that these funds were insufficient. In this context some centres have begun to approve their own fees,[46] but no uniform charges have been introduced.[47] This means that the same conflict with the same claim value could imply different costs

41 After the Act 144/2015, the consumer arbitration centres have to be authorized both by the Ministry of Justice and by the Portuguese Directorate-General for Consumer (DGC). Before this Act only the Ministry of Justice authorization was necessary under the Decree-Law No 425/86, of 27 December of 1986.

42 Defending on why a CDR system should have a unified and not pluralist design see C. Hodges, 'Consumer Redress: Implementing the Vision', in Pablo Cortés (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press 2016), pp 351–369.

43 Art. 2, para. 3, of Act 144/2015 introduced by the amending Law 14/2019, of 12 February.

44 Even when the supply of goods or services is made by public entities or by the Administration.

45 Art. 2, para. 2, of Act 144/2015, that transcribe the Art. 2, para. 2, of ADR Directive.

46 The businesses financing was always rejected in order to protect their transparency and independence as well as to avoid consumer doubts about their neutrality. The same rational was adopted by the ADR Directive when it required separate budgets for ADR entities employed or funded by businesses [Art. 6, para. 3, s. (d) of Dir. 2013/11/EU]. So, the decision was to establish in some CAC low case fees to cover the increase in expenses and maintain their function.

47 The Art. 10, para. 3, of Act 144/2015 only prescribes that ADR entities should ensure that its procedures are free or available to consumers under a low value fee, but no specific charges were

to the parties depending on the Centre where the claim was presented, and the uniform Regulation adopted by the centres did not introduce more standardization in this aspect. The differences in centres fees were incomprehensible since there is no competition amongst them, therefore standardization on this matter is essential.

36. Recently, the Act 144/2015 was amended[48] in order to allow and define the terms of the financing of these centres by the Regulators of essential public services. According to Article 4-A (introduced by the 2019 amendment), the financing of the centres that are part of the consumer arbitration network is now composed of two parts: one fixed and one variable. The fixed part, without prejudice to other sources of financing, shall consist of financing assigned by the State, through the Directorate General of Justice Policy of the Ministry of Justice and, in equal parts, by each Regulator of essential public services.[49] The variable part of the financing is allocated by the Regulators of the essential public services, payable quarterly, and defined in specific protocols signed with each centre, according with the objectives of efficiency, effectiveness, speed, transparency and accessibility and due to the volume of processes covered by the sectorial scope of each Regulator.[50] The funding by Regulators is a suitable solution since these bodies have their own financial resources that often result from fines charged to businesses when they violate consumer laws. Moreover, Regulators are independent entities, so no doubts about their aims should be raised if they finance consumer arbitration centres.[51]

37. In terms of value, the competence of consumer arbitration centres is also limited.[52] Currently, this limit is €30.000 in all centres, with the exception of the centres of Coimbra and Lisbon (where the limit is €5.000); CASA and CIMPAS (where there is no limit). In Spain such kind of limitations have been also available.

---

set. Comparing the Lisbon and the Porto centres for instance, if the value of the case is up to €200 no fees are charged in Lisbon, but in Porto for cases up to €200 have a fee of €10.

48 By the Law No 14/2019, of 12 February.

49 The amounts of financing above referred are determined by Order of the members of the Government responsible for the areas of justice and consumer protection, after hearing the Regulators of the essential public services, and should be updated annually according to the annual inflation rate [Art. 4-A, para. 4 of Act 144/2015].

50 Are regulatory authorities for essential public services such as the ANACOM (electronic and postal communications); ERSE (energy services); ERSAR (water and waste services). These protocols were already signed in July 2019 with these three regulators.

51 There is no obstacle in the ADR Directive to adopt this possibility, therefore increasing the centres' budget and keeping case fees low or not charging any fees at all are both better options than the existing scheme. Advocating this idea to the Portuguese System see C. Marques Cebola, 'The Implementation of the Consumer ADR Directive in Portugal: The Necessary Reform or Missed Opportunity?', in Pablo Cortés (ed.), *The New Regulatory Framework*, pp 251-273.

52 As prescribed in Art. 11, para. 3, of Act 144/2015 and allowed by the ADR Directive in Art. 5, para. 4, s. (d).

Its maintenance today, however, is doubtful, at least for accredited consumer arbitration boards. On the one hand, Act 7/2017 has excluded in Spain the possibility of rejecting a dispute on the ground that the value of the claim falls below or above a pre-specified monetary threshold. However, it seems difficult to ignore such limitations stemming of the arbitration agreement without, at the same time, making emerged a ground for the challenge of the award.

38. The DGC appointed as Portuguese certified ADR entities all ten consumer arbitration centres previously referred, as well as the Consumer Ombudsman for Travel and Tourism Agencies and the Lisbon Autonomous University Arbitration Center. These are also the entities included in the list available on the European ODR platform.

3.3. Evaluation of the Spanish and Portuguese Systems: Degree of Fulfilment with the EU Regulatory Framework

39. Spanish and Portuguese legislators have incorporated a few changes in their systems in order to adapt to the EU Law. Neither has created new ADR entities, even if in Spain two new have been programmed. Both countries have trusted the fulfilment with the EU Regulatory Framework mainly to the existing arbitration ADR entities. That was possible as they already fulfilled roughly the quality standards required by the ADR Directive.[53] However, some changes have been necessary like, for instance, the term to notify the decision, now limited, according to the ADR Directive, to up to 90 days once the claim was filed. This legal change, which in Spain, even if not necessary, applies to all, accredited and not accredited, consumer arbitration boards, works however more like a legal proclamation than a real guarantee. Indeed, the duration of the procedure in practice may vary from entity to entity. The situation in Portugal is positive as, according to the data available, the average consumer arbitration centre procedure, from the admission of the complaint by the centre to the final award, is around 60 days. If the procedure finishes by mediation or conciliation the average duration falls between 15 to 20 days, depending on the Center.[54] In Spain the evaluation of the fulfilling of this requirement is more difficult as the data are not always available. It is important to highlight that both countries have established the 90 day term for the

53 For Spain see O. Olariu, 'El sistema español de arbitraje de consumo ante su acreditación europea', in F. Esteban de la Rosa (dir) & O. Olariu (coord), *La resolución de conflictos de consumo* (Cizur Menor: Aranzadi 2018), pp 127-146.

54 In the Triave Center, for example, in 2018 the average time of the procedures was 58 days (information available in https://www.triave.pt/wp-content/uploads/Rel2018.pdf). Statistics relating to the operation of consumer arbitration centres can be consulted at http://www.siej.dgpj.mj.pt/webeis/index.jsp?username=Publico&pgmWindowName=pgmWindow_636942959361423750.

double procedure mediation-arbitration, having so opted for a higher degree of requirement, taking into consideration that they had the opportunity to exclude from the accreditation either the mediation or the arbitration part of the procedure.

40. But there are still some difficulties asking for a better accommodation in the European Regulatory Framework.

41. Specialization of ADR entities in a sector of disputes would make it easier to fulfil the functions assigned to the ADR entities. Both systems have very few economic sectors provided with a specialized ADR entity. Beyond, the specialization criteria may be also found inside the configuration of ADR entities with competence to hear of any kind of consumer dispute. But in practice the results have not been satisfactory. In Spain, the specialized treatment of the disputes stemming from different economic sectors is expressly envisaged by the Royal Decree 231/2008, but only as a possibility.[55] According to those provisions some Consumer Arbitration Boards have done efforts in favour of giving an expert treatment to the disputes stemming of different economic sectors. This has allowed to create specialized sections in only some Consumer Arbitration Boards, such as the tourist claims section of the Andalusian consumer arbitration board.[56] It has been allowed to appoint arbitrators with expertise in a specific economic field, for instance belonging to a representative of the business sector in which the claim takes place, to integrate the arbitration body to resolve the dispute (compounded of three persons). The results in this field are difficult to assess since, first, there is no uniformity in the way followed by the different Consumer Arbitration Boards and, second, the alleged effect is neutralized once the three people body may be substituted by a one person arbitrator, as may happen in many cases.[57] On the other hand, the effort has been oriented towards obtaining, and making publicly available, a classification of the awards issued by sectors of activity.[58] Again, the results are difficult to be evaluated as the situations in the different Consumer Arbitration Boards are not comparable. However, no Consumer Arbitration Board provide the information required by Article 7 of ADR Directive and the Act 7/2017

55 See Art. 5, para. 2, s. (b) of Royal Decree 231/2008. This article envisages the possibility of creating delegations of the consumer arbitration board, with a territorial or a sectorial scope. See also Arts 15 and 40 of Royal Decree 231/2008.

56 See www.consumoresponde.es/sites/default/files/articulos/Memoria%20de%20Actividades%20JACA% 202017.pdf.

57 Art. 19 of Royal Decree 231/2008. As a general rule when the amount of the dispute is below 300 Euros.

58 See for instance the classification made public by the Consumer Arbitration Board of the Autonomous Community of Madrid in the following website: http://www.madrid.org/cs/Satellite?c=Page& childpagename=PortalConsumidor%2FPage%2FPTCS_contenido&cid=1354665766095&pagename=PTCS_wrapper.

related, for instance, to any systematic or significant problems that occur frequently and lead to disputes between consumers and traders and recommendations as to how such problems can be avoided or resolved in future. This is a task that, according to the Spanish Arbitration System, belongs to the Commission of the Consumer Arbitration Boards and to the General Counsel of the Consumer Arbitration System. However, the provisions of the Royal Decree 231/2008 envisaging these functions[59] have nowadays no real effect. The issue of recommendations remains, for now, only in the Spanish Official Bulletin. We do not really know the reason why these provisions do not obtain application today. But it is possible to imagine that the lack of human and material resources, in the Consumer Arbitration Boards and in the central committees, may be one of them. And maybe also the difficulty associated to the management of many claims related to very different subjects, a difficulty that could be overcome by introducing IT Tools and more clear standards to be followed. There are other provisions in the Royal Decree 231/2008 that lack real application. Among them highlights the one related to the registry of traders adhered to the Spanish Consumer Arbitration System,[60] something that now is affecting the very functioning of the EU ODR Platform, as it is really difficult to discover which traders adhered to the Arbitration System more than those adhered to the National Consumer Arbitration Board. A problem that is aggravated as, for now, the Spanish Administration seems not to be effectively acting to demand compliance with the information obligations of the trader that derive from Article 13 of the ADR Directive.

42. In the Portuguese system, conversely, the consumer arbitration centres are more than a common ADR entity since the centres also provide legal information and advice to both consumers and traders.[61] Moreover, the information requirements established by the ADR Directive were accomplished in Act 144/2015 and the implemented Consumer Arbitration Network ensures that all the existing consumer arbitration centres share common information systems,[62] giving place to a situation very different to the one

59 Art. 11 of Royal Decree 231/2008 indicates that the Commission of the Consumer Arbitration Boards has the power of: 2. – The issuance of technical reports, opinions or recommendations that serve as support to the arbitrators in the exercise of their functions, in particular, in the presence of contradictory awards that reach divergent pronouncements before facts, fundamentals and substantially equal pretensions. The reports, opinions or recommendations safeguard the independence and impartiality of the arbitrators who, motivated, may deviate from its content. At the same time, Art. 15 envisages as functions for the General Counsel of the Consumer Arbitration System the edition and dissemination of the technical reports, opinions and recommendations of the Commission of the Consumer Arbitration Boards and of the awards issued by the Consumer Arbitration Boards.

60 Art. 31 of Royal Decree 231/2008.

61 Nordic Council of Ministers, *A Study on Alternative Dispute Resolution and Cross-Border Complaints in Europe* (Copenhagen: Nordic Council of Ministers 2002), p 45–48.

62 Art. 4 of Act 144/2015.

already described for the Spanish system. In fact, the consumer arbitration network has to promote the integrated operation of consumer arbitration centres and the collection of all relevant statistical information concerning their operation. To this end, the consumer arbitration centres have to publish the annual activity report and the Network promotes the consultation and sharing of statistical data from those reports between arbitration centres and the State for the purposes of performance monitoring, through the use of appropriate IT tools.

43. The territorial character of the consumer arbitration boards in Spain and of the private arbitration centres in Portugal do not fit completely well with the underlying principles of the ADR Directive wanting to allow the parties to agree on the ADR entity to resolve the dispute, and taking into consideration for this aim the relevant information published by every ADR entity according to Article 7 of ADR Directive. According to Article 8 of Royal Decree 231/2008 the agreement between the consumer and the trader is the first criterion to take into consideration in order to determine which Consumer Arbitration Board is to hear the dispute. If there is no agreement the consumer may in any case apply for arbitration. Article 8 also contains criteria to determine which Consumer Arbitration Board is competent in cases where the trader did submit to all of them *ex ante* (the Spanish arbitration system) by subscribing an offer for consumer arbitration. If this is not the case, the Consumer Arbitration Board may resolve the case if the trader agrees *ad hoc* once required by the consumer arbitration board that has received the application of the consumer. According to Spanish law it is possible for the trader to introduce limitations in the submission, for instance declaring that he will accept only the arbitration before the National Consumer Arbitration Board or one regional. In that case, this is the only one to hear the case. Some of these rules may not be compatible with the philosophy of the ADR Directive, as it pretends to guarantee the parties to agree on the ADR entity to resolve the dispute taking into account the information published by every ADR entity according to Article 7 of ADR Directive. For this reason, in the absence of an agreement, the use of territorial criteria should not automatically serve to determine the competent Consumer Arbitration Board. Especially if the Consumer Arbitration Boards are not equivalent. According to that criteria it could happen, for instance, that one consumer was lucky to see his claim falling in an accredited consumer arbitration board and other consumer, with less fortune, could see it droping in a non-accredited one. The situation in Portugal is different due to the common character of certified entities of any consumer arbitration centre and the fact that there exists a real aggregation of data in the context of the Network, a circumstance that could legitimize relying on territorial criteria to determine the competent entity.

44. The plurality of entities does not help to the data aggregation in order to provide relevant information. The existence of a plurality of ADR entities does neither help investing in the platforms that must probably be developed to optimize the fulfilling of the functions. In Portugal having in mind the existing ten consumer

centres, of which two have a specialized competence, seven are territorially limited and one is a residual arbitration centre, it can also be difficult for a consumer to understand which entity is competent to solve his/her conflict. In this regard, both Spanish and Portuguese legislators should develop a single point to receive consumer complaints, available online in a digital portal.[63] Then, it would be this single point that would forward the complaint to the competent ADR entity. From our point of view, it will be significantly more efficient to advertise to consumers and traders a single point of contact, with a more marketable designation, and therefore increasing the use of the ADR system.

45. Both systems rely today on a public aid funding. Thus, traders do not have any incentive in contributing to achieving an efficient functioning of ADR entities and develop efficient internal ADR mechanisms to avoid the pursuit of complaints by ADR entities. Furthermore, the implementation of the ADR Directive will result in a further increase in public spending in both countries. In Spain the possibility of charging at least traders was open by Act 7/2017. But this possibility has not been made reality and the traders do not pay for the participation before the consumer arbitration boards. In Portugal just two centres have approved fees so that the trader (but also the consumer) can be charged. After the financing by the Portuguese Regulators of public services in 2019 just the Lisbon Centre continues to charge fees both to consumers and to traders.

46. The bet of the Spanish legislator on the consumer arbitration entities to fulfil the obligations of the EU Law has, as consequence, that in the event of a reluctant trader, not wanting to participate in the procedure, all the protection built by the ADR Directive will become smoke. It is true that the ADR Directive does not ensure the mandatory participation of the trader, nor the right to be heard. And that is absolutely compatible with the ADR Directive. But, conversely, to combat this situation the legislator has also the hands tied, as according to Spanish law it is not possible to oblige a trader to participate in a consumer arbitration procedure.[64]

47. The situation is partially different in the Portuguese system, as the rule is that the system is voluntary since both parties have to agree to bring their conflict before the arbitration centre.[65] However, since 2011, the disputes related to

---

63 As the existing 'BELMED' in Belgium for mediation. See S. Voet, 'The Implementation of the Consumer ADR Directive in Belgium', in Pablo Cortés (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press 2016), pp 125–147.

64 Constitutional Court of Spain 1/2018, of January 2018. It declared the nullity of Art. 76, s. (e), of Insurance Contract Act ignoring the voluntary of one of the parties in the consumer arbitration agreement. The Judgment had three particular votes. Spanish Official Bulletin (BOE) number 34, of 7 February 2018, pp 14701–14732.

65 Consumer and trader may sign an arbitration agreement regarding existent disputes (submission agreement) or introduce a pre-dispute arbitration clause in a contract (arbitration clause). Only consumer complaints are admissible, with exception of the CASA (for motor vehicles conflicts) that

essential public services (water, electricity, gas, transport, etc.) are subject to a unilateral compulsory arbitration system, since the trader cannot reject the competence of the centre when the consumer opts to choose this entity to resolve the dispute. [66] And since September 16 of 2019 all consumer disputes up to 5,000 euros are now subject to mandatory arbitration or mediation when the consumer files a claim on an authorized consumer dispute arbitration centre.[67] Therefore, consumer arbitration in Portugal after September 2019 regarding consumer conflicts up to 5,000 euros is only mandatory for the trader, but remains voluntary to the consumer who can choose between going to court or to a consumer arbitration centre. These legal amendments definitively marked the role carried out by consumer centres in Portugal. In fact, the number of cases filed at these entities regarding essential public services complaints has considerably grown after 2011. Even if in Spain it would be difficult to run this same path, in many types of disputes traders are obliged to participate in procedures before ADR entities.[68] It could be even possible to have a general rule establishing the mandatory participation of any kind of traders in the procedure before a certified ADR entity, or a specific one considering the type of dispute or selected by the trader (as it is the case in France).

---

allows traders' complaints against other traders (Art. 9 of CASA Regulation, available in https://www.arbitragemauto.pt/media/Regulamento_15-02-2016_c.pdf. By signing a 'statement of adherence' (*declaração de adesão genérica*), traders accept the jurisdiction of the arbitration centres every time a consumer submits a complaint, but the consumer can choose whether to go to arbitration or to the courts. The centres offer a trustmark for adhered businesses, so that they can display this logo in their premises attesting their adherence. The adhered companies are included in a list which is available and published in the centre's website.

66 The unilateral mandatory arbitration to public services was introduced by Law No 6/2011 in Art. 15 of Public Services Law No 23/96 – DR, I *Série*, No 49, of 10 March 2011. Are public services under this Law those inherent to the supply of water, electricity; natural gas and liquefied piped petroleum gases; electronic communications service; postal services; waste water collection and treatment service; municipal solid waste management services. Statistics relating to consumer arbitration centres in Portugal can be consulted at http://www.siej.dgpj.mj.pt.

67 See Art. 14 of the Law 26/96, of 31 July, amending in this issue by Law 63/2019, of 16 August.

68 Telecommunications traders are obliged to participate in the processes before the Telecommunications User Service Office. This is not an accredited ADR entity; Electricity companies have to choose an accredited ADR entity, therefore the affiliation seems to be ensured; Financial entities have also to participate in the procedure before the future, sole to be developed, ADR entity in the field of financial activity. And also the Air Transport lines have to participate in processes before the Spanish Agency for Air Security, the same as the new ADR entity, envisaged by Act 7 to be created, for protection of the air transport user. There are a few sectors where it is envisaged the mandatory participation of traders and the binding decision for the trader: the future sole Financial ADR entity and the future sole Airline ADR Scheme. But we are waiting the creation of these ADR entities. Binding for the traders are also the decisions issued by the telecommunications user service office (not accredited ADR entity) and by financial ombudsmen created according to the Spanish Act (also not accredited entities).

48. There are also other difficulties derived from the use of arbitration as a method of dispute resolution, where the adaptation required may not be sufficient. In Portugal all procedures and decisions are by default based on the applicable law (different from the Spanish Law whereby the decisions will be made in equity at least otherwise agreed). Parties can, however, unanimously opt for a procedure based on equity in consumer arbitration centres and the awards have the same value as a court decision and are enforceable.[69] Appeal will only be allowed in limited circumstances.[70]

What is more, according to Article 11 of ADR Directive (principle of legality) and Article 16 of Act 7/2017, in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, MS have to ensure that the solution imposed shall not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement. In the absence of any reform of Article 41 of the Spanish Arbitration Act[71] establishing the rules on challenging an arbitral award, could an award be found void on material grounds given that the system only allows to take into consideration formal circumstances? Would it be possible to obtain the nullity by invoking the *effet utile* of the European Law trying to obtain a new interpretation of the Spanish law in conformity with the European Law?

49. The Spanish Government has not reformed the regime of the consumer arbitration agreements in Royal Decree 231/2008. That is why Article 24 continues to give validity to the consumer arbitration agreement agreed before the dispute has arisen. This is not a real problem as Article 15 of Act 7/2017, in a general manner, declares two things: first, ex ante arbitration agreements are not binding for the consumer; and second, for the solution imposed to be binding the parties must be informed of its binding nature in advance and specifically accepted this (the informed consent). Nowadays there is no real evidence that this requirement is fulfilled by the consumer arbitration boards, so that it is possible to challenge the award issued by virtue of lack of a formal requirement of the arbitration agreement. In Portugal Article 13 of Act 144/2015 is similar to Article 15 of the Spanish Act 7/2017 so the requirements of Article 10 of ADR Directive are accomplished.

---

69 The rate of business compliance of the consumer arbitration centres awards is near of 100%. For instance, in Lisbon consumer arbitration centre, according to the DG Santo Report, the percentage of cases in which businesses complied with final decisions in favour of the consumer was 99.6% in 2008. See F. Alleweldt et al., *Study on the Use of Alternative Dispute Resolution in the European Union* (CPEC – DG SANCO 2009), p 505, available in http://www.civic-consulting.de/reports/adr_study.pdf.

70 Currently the appeal in Portugal will only be allowed if the claim value exceeds €5.000. Decisions based on equity cannot be appealed regardless of the claim value (Art. 39, para. 4 of Portuguese Arbitration Law – Act 63/2011, of 14 December).

71 Spanish Official Bulletin (BOE) number 309, 26 December 2003.

50. Nowadays both Spanish and Portuguese systems allow for electronic filing of a complaint. In Portugal, the arbitral procedure can commence by filling in a complaint form, which is available online in the centre's websites. The possibility of filing an online complaint already existed before the Act 144/2015. However, after this Act the centres revealed a greater concern about their respective websites. Yet, no platforms have been created that allows the procedure to be completely online, except by using electronic tools such as Skype.

51. Both systems allow parties to go through a mediation procedure before arbitration. In Portugal, even if the consumer already tried to negotiate with the trader with no success, after receiving a complaint, the centre contacts the parties in order to try an amicable solution for the conflict through mediation, which they can accept or decline. The agreement, if reached at this stage, is effective under the Portuguese Mediation Act.[72] Regardless of whether a mediation attempt existed or not, there is always a conciliation stage carried out by the arbitrator (or by the centre Director), prior to the arbitral hearing. If the parties agree to a settlement in conciliation, the arbitrator will homologate the agreement giving it the same effectiveness as a court decision. If no settlement is reached, an arbitral award will be issued. In this aspect the Spanish system contains similar solutions, as the Royal Decree 231/2008 envisages a mediation procedure before the arbitration procedure and an intra arbitration mediation. If the parties agree, the settlement will be considered as an award with the same effects.

52. Although the rules of the centres were designed to have the parties present in an oral hearing, nothing impedes an online procedure (as intended by the ADR Directive). Conversely, according to the information provided by the EU ODR Platform, the Consumer Arbitration Boards may require the physical presence of the parties during the procedure, which does not properly address the intentions of the ADR Directive.

4. Conclusions and Proposals to Move forward

53. The analysis made reveals that both Spanish and Portuguese Consumer ADR Systems have transposed the ADR Directive into domestic law without a sufficient and deep reflection on the path to move forward. In fact, a formal transposition with the aim of meeting the minimum requirements of European law was made,

72 Mediation in Portugal is regulated by the Law No 29/2013 – DR, I *Série*, No 77, of 19 April 2013. The scope of this Law covers the consumer mediation. According to Art. 9 of this Law, the mediation agreement is enforceable with no need for judicial homologation if the legal requirements set forth in that article are respected. About the Portuguese Mediation Law see C. Marques Cebola, 'Regulating Mediation: Yes or No? The Mediation Law in Portugal', 11. *RBD* (*Revista Brasileira de Direito)* 2015(2), pp 53-65. See also D. Lopes & A. Patrão, *Lei da Mediação Anotada* (Coimbra: Almedina 2014).

without thinking of the need to make more adjustments for a better functioning of the system and compliance with the additional functions that ADR entities have from now on. For that reason, we advise both legislators to provide a special committee to reflect on the steps to be taken in order to improve the systems.

54. The Spanish legislator barely made any adjustment to achieve a specialized treatment of the disputes in order to facilitate the supply of relevant information. The provisions in the Royal Decree 231/2008 in favour of a specialization do not ensure a systematic application of criteria to enable data aggregation of each sector.

A plus for the Portuguese system that all the arbitration centres have become certified thus creating a network comprising every private arbitration centre that allows good collection of information. However, it is still early to evaluate if the new network will be able to offer the results the provisions are aiming at. Both systems, however, will have difficulties to manage very different kinds of disputes and to reach its full potential in every specialized treatment. A way to move forward could be that of creating specialized sections of different ADR entities to be part of a sub-network. Such sections would make both Spanish and Portuguese arbitration entities networks be more operative.

55. They also did not think about the shortcomings derived of the existence of a very high number of ADR entities, something that may produce difficulties for the data aggregation process and identifying relevant information. In Spain the aggregation of data, although envisaged by Royal Decree 231/2008, has no factual reality. In the Portuguese system it is too early to evaluate if the envisaged network will produce good results. In Spain, a way to move forward could be to reduce the number of ADR entities, creating delegations when the physical presence may be required and for taking into consideration the situation of vulnerability of consumers that should have the opportunity of being assisted in the moment of filing a claim.

56. Both legislators did not pay attention to the difficulties caused by territorial criteria to determine the competent ADR entity. In Spain this may lead to give competence, alternatively, to certified and not certified ADR entities, something that is completely unsuitable. For this reason, the system should be reformed to ensure that only certified Consumer Arbitration Boards are part of the Network.

57. The best way to finance the Spanish Consumer Arbitration System is still on the table. In Portugal a new system was approved in February of 2019 establishing the funding by Regulators of public services. This solution seems to be suitable since these entities have their own financial resources and are independent entities. Time will tell what will be impact of this new system.

58. Both Spanish and Portuguese Systems should consider the creation of a single point platform to receive consumer complaints which would then send the

complaint to the competent arbitration centre or board. At the same time, both systems will also have to think about the requirements for the foreseeable future platforms that will be used by the ADR entities and how technology may help the parties to settle spontaneously, recurring less to the rigidity of the rules of procedure. And to decide in which kind of procedure the physical presence of the parties may be excluded and when it should be still required.

59. The arbitration entities in Spain and Portugal are being used to meet the EU requirements as well as cope with their long standing traditions, making the fundamentals of the future ADR system in both countries. But it is necessary to think about the changes required to let the Iberian arbitration systems enter the glove of the ADR Directive. And in this development Spain and Portugal could learn a lot from each other. The ADR Directive may be seen as an opportunity to improve an already good system, where the landscape may be complete with other ADR entities. The work of the evaluation committee will be very important to reach a smart orientation of the future steps and developments, and especially in order to reach an efficient incorporation of the technology in the Spanish and Portuguese certified ADR entities. The dice are cast, and one can only cross our fingers and hope for the best.