

GENERAL TERMS OF THE AMICABLE SETTLEMENT OF DISPUTES BETWEEN CONSUMERS AND TRADERS

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Abstract

In transposing the provisions of Directive 2013/11/EU¹ of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer and of Regulations 524/2013² and 2006/2004³ of the European Parliament and of the Council on 26.08.2015, published in the Official Gazette of the Government Ordinance no. 38/2015 on alternative dispute resolution between consumers and traders⁴. The normative act sets the legal framework for alternative dispute resolution national and cross under contracts of sale or service contracts between a trader operating in Romania and a consumer resident in the European Union through an entity of alternative dispute resolution. Ordinance provides the opportunity for consumers to present their complaints volunteer entities applying alternative dispute resolution procedures in order to ensure a high level of consumer protection and market functioning. This paper aims to present the scope of the order, persons who are subject to these legal regulations, the procedure they must follow consumers if they want to benefit from the provisions of this ordinance, analyze entities ADR, to highlight the importance of regulating this procedure.

Keywords: Alternative Dispute Resolution, consumers, traders, OG 38/2015, the ADR entity, sale and purchase contract, service contract.

JEL Classification: K12, K22

1. Introduction

Pending the entry into force of Government Ordinance no. 38/2015, in case of legal problems between consumers and traders, when both parties were resident / registered in Romania, consumers could address:

- Courts, the negative aspect being the fact that the settlement by the court takes time and costs, which is why most consumers do not appeal to court;
- Mediators, Having regard to the provisions of Law no. 192/2006 on mediation and the profession of mediator⁵, the parties can appeal to a neutral person to resolve disputes amicably;
- Directly to traders;
- Public authorities which resolves individual complaints of consumers in a transparent, impartial, effective and fair, in accordance with Government Ordinance no. 27/2002 on regulating the resolution of petitions⁶. These public authorities are in charge of protecting consumers, namely National Authority for Consumer Protection (ANPC), Ministry of Health, Ministry of Transport, the Authority for Management and Regulation in Communications, the National Authority for Tourism etc⁷.

In most cases, the NAPC is empowered public authority to settle such disputes. Authority receives and consumer complaints free of charge within 30 days, using the 42 county

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¹ Directive 2013/11 / EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer published in the Official Journal of the European Union L 165 of 06.18.2013;

² Regulation 524/2013 of the European Parliament and of the Council concerning our online settlement of consumer disputes and amending Regulation 2006/2004 published in Official Journal of the European Union L 165 of 06.18.2013.

³ Regulation 2006/2004 of the European Parliament and of the Council on cooperation in consumer protection, published in the Official Journal of the European Union L 364 of 09.12.2004;

⁴ Government Ordinance no. 38/2015 on alternative dispute resolution between consumers and traders published in the Official Gazette of Romania, Part I, no. 654 dated 28 August 2015;

⁵ Law no. 192/2006 on mediation and the mediator profession, published in the Official Gazette of Romania, Part I, no. 441 of 22 May 2006.

⁶ Government Ordinance no. 27/2002 on regulating the resolution of petitions, published in the Official Gazette of Romania, Part I, no. 84 of 1 February 2002, as amended and supplemented.

⁷ Background note - GO No. 38 / 08.26.2015; http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-og-nr-38-26-08-2015&page=10NF_OG_38-2015.doc (last visited on 20.10.2015).

commissioners which provides nationwide coverage. Under the general provisions laying down the procedure for settling consumer complaints commissioners tried, initially, resolve it amicably. Thus, in 2013, about 72% of substantiated complaints were resolved amicably. If the complaint is not settled amicably, the territorial structure of control triggers action for research and conclusion complaint, applying, if appropriate, sanctions. This system of complaint handling individual work in Romania for over 20 years, is a system with tradition, covering almost all areas of interest to consumers - food, non-food, services, including services of general interest, financial services - a system that and has proven over time⁸.

2. Field of application

Starting from the provisions of Directive 2013/11 / EU, the Romanian legislature has regulated ADR procedure of alternative dispute resolution between traders and consumers, as well as ADR entities, those structures that give the parties resolve the dispute through an ADR procedure.

Because, as I stated earlier, the National Authority for Consumer Protection is most often the public authority vested with resolving such disputes, according to art. 19 of Ordinance 38/2015, in it to set up a body responsible for the conduct ADR procedures. This structure is impartial and are independent of market surveillance and control.

The establishment of this ADR does not prevent other public authorities to set up their own ADR entities. If the central authorities or independent administrative authorities that have responsibility for certain sectors, ADR entities not established until November 30, 2015, the ADR entity from the National Authority for Consumer Protection. In this situation, the ADR entity may request advisory standpoint that authority on disputes within the scope of their activity.

As stated above, the Ordinance have a clearly defined scope of art. 2, respectively, procedures ADR domestic and cross arising from sales contracts or contracts for services between a trader operating in Romania and a consumer resident in the European Union through the intervention of an entity ADR which proposes or imposes a solution and acting in Romania.

This text allows us to identify individuals who may benefit from ADR procedures and the legal nature of the operations that triggered the dispute.

Thus, according to art. 2 para. 2 order shall be sent consumers, that any individual or group of individuals organized in associations as defined in Art. 2 pt. 2 of the Government Ordinance no. 21/1992⁹. Ordinance addresses also of the traders, the individuals or legal entities, public or private, acting within their trade, industrial production, craft or profession and anyone acting in the same end, their names on their behalf. If the trader natural person, he shall be deemed "set" in the place where their professional activity and if the trader legal person "company or other legal person or association of natural or legal persons", it "is established "the place where it has its registered office or their principal place of business, including a branch, agency or other establishment.

We should also note that the legislature has removed at least terminology, the text of the Civil Code which refers to "professional" and "operation of an undertaking."

Given that ADR procedure can be triggered only under certain conditions stipulated in the Ordinance (only at the initiative of the consumer only if the trader has agreed procedure) and the ADR entity, for most disputes is established in the ANPC, one wonders what is the meaning of this law since, however, dissatisfied consumers already have the possibility to apply either ANPC either the trader or mediator or court or other public authorities?

The usefulness of this law could be explained on the merchant if dialing from an ADR procedure can avoid application by NAPC sanction by fines. But, and this is conditioned by

⁸ Idem, the background note - GO No. 38 / 26.08.2015.

⁹ Government Ordinance no. 21/1992 on consumer protection, republished in the Official Gazette of Romania, Part I, no. 208 of 28.03.2007.

consumer attitude alone can choose to apply ADR procedure. Therefore, theoretically, we hope that this Ordinance to provide, indeed, all guarantees consumer transparency, expertise, independence, impartiality, effectiveness and fairness referred to in Articles 5, 6, 7, 8 and 9.

The legal transactions to which it applies, the order in art. 2 para 1, art. 2 para. 2 and art. 3 para. 1 refers to procedures ADR stemming from national and cross-border sales contracts or contracts for services between a trader operating in Romania and a consumer resident in the European Union.

Therefore, the scope of the order is restricted to: contracts of sale, that any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any having as its object both products and related services and service contracts, meaning any contract other than a sales contract under which the trader supplies or undertakes to supply a service consumer and the consumer pays or undertakes to pay its price.

Ordinance also specifies in what situations does not apply, namely:

- In case a consumer complaint resolution procedures carried out by traders through its own procedures;
- For non-economic services of general interest;
- Disputes between traders;
- If direct negotiations between consumers and traders;
- Where attempts made by a judge to settle a dispute in the course of judicial proceedings concerning that dispute;
- Proceedings initiated by a trader against a consumer;
- For health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensing and supply of drugs and medical devices;
- For units and public institutions of post-secondary education or higher.

Extrajudicial disputes that can be resolved by the ADR may be national or cross-border.

The dispute is national when arising from a contract of sale or provision of services, the consumer in control when such products or services, residing in the same Member State in which the trader is established;

The dispute is the border when arising from a contract of sale or provision of services, the consumer, when the command such products or services, residing in another Member State of the European Union than it is established.

In cross-border disputes between consumers and traders, the trader and the consumer is not domiciled or resident in the same Member State of the European Union, consumers may contact the European Consumer Centre.

European Consumer Centres Network (ECC-Net Consumer Centres Network -European) is a network established at EU level in order to strengthen consumer confidence, advising Europeans on consumer rights and facilitating resolve the problems¹⁰.

3. ADR procedure

In order to settle a dispute regarding national and transboundary a contract of sale or service through the ADR procedure:

- The consumer sends complaint against the trader to ADR Directorate within the NACP. The complaint can be made electronically (email) or support writing (on paper).
- ADR entity has received the complaint immediately after receiving notification parties all documents that contain information relevant to the complaint.

¹⁰ Corina Cioroabă, *Reglementări privind soluționarea alternativă a litigiilor dintre consumatori și comercianți*; <http://www.juridice.ro/397951/reglementari-privind-solutionarea-alternativa-a-litigiilor-dintre-consumatori-si-comercianti-2.html>; (last visited on 20.10.2015)

- The parties to the dispute have the right to express their views on the complaint in dispute within 15 calendar days from the date of communication, and to receive the ADR entity arguments, evidence, documents submitted the other part or any statements and expert opinions, and can comment on them.

- The result of the ADR procedure shall notify the parties in writing or on a durable medium, stating the grounds on which it is based. The maximum resolution of a dispute is 90 calendar days from the date on which the ADR entity has received the complete file of the complaint. In the case of complex disputes, the ADR entity may extend this period.

4. ADR mechanisms

To resolve a complaint, art. 10, art. 11 and 12 of Government Ordinance no. 38/2015 provide for the possibility of conducting two mechanisms, namely: a proposal and / or impose a solution. ADR entities may conduct one or both mechanisms, must clearly and accurately inform the parties of the consequences of choosing one mechanism.

If the ADR entities menus both mechanisms, it is the consumer who chooses the entity if it wishes to propose or impose a solution.

According to art. 11 if a solution proposal, consumers are able to withdraw from the proceedings at any time if you are not satisfied with the conduct of the proceedings.

Before accepting the proposed solution, parties are informed that: they can choose whether to accept the proposed solution, that involvement does not rule out the possibility to seek compensation through a judicial procedure, the proposed solution may be different from an outcome determined by a court applying legal rules.

To become binding solution proposed by the ADR entity, it must be accepted by both sides. If the proposal is accepted, the ADR entity issues a judgment becomes enforceable, if that is not contested.

According to art. 12 by imposing a solution issued by the ADR entity, it is binding on the parties, they do not have a choice whether or not to accept the solution. Assuming art. 12 of Ordinance no party may withdraw from the case, which does not preclude the possibility to seek compensation through legal proceedings¹¹.

Also, the ADR entity announces parties that the proposed solution may differ from an outcome determined by a court applying legal rules;

Judgment issued by the ADR entity becomes enforceable, if it is attacked.

5. The ADR result

If the parties accept the proposed solution, and if the remedies imposed, the ADR entity shall issue a reasoned decision and, if the parties do not accept the proposed solution, the ADR entity shall issue a resolution that includes a description of facts, the proposed solution and the Parties'.

If the trader does not accept the proposed solution, the ADR entity shall inform the consumer, by conclusion about administrative remedies, namely that judicial recourse for dispute.

Judgment or conclusion shall notify the parties within 15 calendar days of the adoption and effects of the communication, which may be appealed to the competent court. Decisions that are not appealed within 15 calendar days of receiving notification law is enforceable.

ADR procedures be completed within 90 calendar days of the date on which the ADR entity has received the complete file of the complaint. In the case of complex disputes, the ADR entity

¹¹ Idem. Corina Cioroabă, *Reglementări privind soluționarea alternativă a litigiilor dintre consumatori și comercianți*; <http://www.juridice.ro/397951/reglementari-privind-solutionarea-alternativa-a-litigiilor-dintre-consumatori-si-comercianti-2.html> (last visited on 20.10.2015).

responsible may, if necessary, to extend the period of 90 calendar days and inform the parties of any extension, and in connection with the estimated period for completion of the proceedings.

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