Alternative Dispute Resolution Regulation: A Work of Modern Art?

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Abstract

Scholars and judges are confronted with the potential interferences between mediation in civil and commercial matters and alternative dispute resolution for consumer disputes, in view of the possible implementation models in the individual Member States. The modern work of the related regulations, the apparent contradictions and the overlapping of the scopes worry the interpreter in need of certainties. Any effort to systematise the whole range of provisions collides with the current trend of the Court of Justice to adapt the domestic regulations to the ADR directive formal provisions.

I. ADR for Consumer Disputes and Compulsory Mediation: The Regulatory Framework

The European legislator welcomes developments towards alternative justice and this is reflected in an extremely complex regulatory framework.[1] Given that

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[1] Alternative justice is highly recommended by European institutions since the early 1990s, at first only with regard to consumer disputes – where the gap between the extent of damage and the cost of process is particularly marked – and then for all civil and commercial matters. The Commission Green Paper on 'Access of consumer to justice and the settlement of consumer disputes in the Single Market' [COM(93) 576 def, 16 november 1993] shows openness to ADR systems; then they are also mentioned in Directive 97/7/EC, on the protection of consumer on respect of distance contracts, following the Action Plan published by European Commission in the previous year (14 february 1996) on out-of-court settlement of consumer disputes. In this respect, see, with a special focus on the principles applicable to the responsible bodies, Commission Recommendations 98/257/EC and 2001/310/EC. Commission Green Paper on 'Alternative dispute resolution in civil and commercial law' [COM(2002) 196 def, 19 april 2002] refers ADR to the whole area of civil and commercial disputes; see then the proposal for the directive of 22 october 2004 [COM(2004) 718 def] (annotated by E. Minervini, 'La proposta di direttiva comunitaria sulla conciliazione' *Contratto impresa/Europa*, 427 (2005); N. Giudice, 'Dalla Comunità europea una scelta "flessibile" per il futuro della mediation' *Contratti*, 102 (2005)), and the following Directive 52/2008/EC (annotated by E. Minervini, 'La disciplina comunitaria della conciliazione in materia civile e commerciale' *Contratto impresa/Europa*, 45 (2009)). Mediation could turn disputants into more 'psycologically and morally individuals' according to R.A. Baruch Bush and J.P. Folger, *The Promise of Mediation. The Tranformative Approach to Conflict* (San Francisco: Jossey-Bass, revised edition, 2005). Among the authors favourable to ADR mechanisms, R.F. Peckham, 'A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution' *Rutgers Law Review*, 253 (1985); F.E.A. Sander, 'Varieties of Dispute Processing' *Federal Rules Decision*,

the scope of the relevant rules is often unclear, the interpreter has to deal with the difficult task of composing such puzzle.

Recently, scholars and judges have been confronted with the potential overlap between mediation in civil and commercial matters (as regulated under the Directive 2008/52/EC) and alternative dispute resolution for consumer disputes (as regulated under the Directive 2013/11/EU), in view of the possible models of implementations in the individual Member States.

Pursuant to Art 3, para 1, '(s)ave as otherwise set out', the ADR directive shall always apply in the event of concurrence and conflict

> 'with a provision laid down in another Union legal act and relating to out-of-court redress procedures initiated by a consumer against a trader, the provision of this Directive shall prevail'.

Even if aimed to 'ensure legal certainty' (recital 19), this declaration of prevalence does not really dispel the doubts raised by the potential overlapping of Directives 2008/52/EC and 2013/11/EU, as far as that overlapping is acknowledged, with no further specifications, in Art 3, para 2, ADR Directive.

Assuming that the primary purpose of ADR directive is to provide a single, exclusive and harmonized system for consumer disputes – binding the Member States as to achievement of the objective pursued by that directive and to improvement the quality standards –, such legal framework should affect *all* the ADR systems considered by Directive 2013/11/EU, including the dispute resolution mechanisms regulated under Directive 2008/52/EC.

Nevertheless, the single provisions are not in line with the intention (expressed in recital 19) to secure that procedures for mediation in civil and commercial matters are compliant with the quality standards laid down by ADR directive.

The problem arises mainly from the authority of Member States to make compulsory the use of mediation procedures (as Italy, Belgium, Greece and other Countries have actually done),[2] whether before or after judicial proceedings

111 (1976). O.M. Fiss, 'Against Settlement' *Yale Law Journal*, 1073 (1984), is highly skeptical about the settlement as a practice preferable to judgment on a wholesale and indiscriminate basis, and intends mediation as a 'problematic technique for streamlining dockets'; the author investigates ADR limitations. Mediation and other kind of alternative justice are not intended to be the best practice in the opinion of T. Grillo, 'The Mediation Alternative: Process Dangers for Women' *Yale Law Journal*, 1545 (1991). R. Delgrado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' *Wisconsin Law Review*, 1359 (1985), refers to ADR the risk of disadvantaging minority disputans. For an investigation on the topic, see also S.B. Glodberg et al, *Dispute Resolution. Negotiation, Mediation, and Other Processes* (Austin: Aspen Law & Businnes, 1994); A.W. McThenia and T.L. Shaffer, 'For Reconciliation' *Yale Law Journal*, 1660 (1985); C. Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem-Solving' *UCLA Law Review*, 754 (1984); C. Menkel-Meadow, 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Case)', 1995, available at https://tinyurl.com/yxzb5qgd (last visited 28 May 2019); D.N. Smith, 'A Warmer Way of Disputing: Mediation and Conciliation' *American Journal of Comparative Law*, 205 (1978).

[2] Germany, Netherlands, Poland and Portugal have no general mandatory mediation. In

have started (Art 5, para 2, Directive 2008/52/EC). The Directive 2013/11/EU – which does not contain any provision about that, even admitting the potential interference between the regulations – leaves room for manoeuvre and appears to allow compulsory ADR for consumer disputes.

As a matter of fact, Art 1 ADR Directive, ensuring that consumers can file a complaint with an ADR entity 'on a voluntary basis', does not prevent national law from making participation in such procedures mandatory, even upon condition that 'such legislation does not prevent the parties from exercising their right of access to the judicial system'.

The prospect of this happening casts doubts regarding the compatibility between the mandatory use of mediation proceedings and the ADR ontological voluntary basis. The ADR Directive ensures the freedom to choose whether or not to take part into an ADR procedure and the possibility of withdrawing from it at any stage (Art 9, para 2, letter *a*); quite the opposite, many domestic regulations in compulsory mediation (the Italian regulation, among others)[3] allow the parties to withdraw from the mediation procedure just by relying on a valid reason.

Italy requires the use of mediation as a precondition for the admissibility of legal proceedings in banking, financial and insurance sectors, so dividing the ADR for consumer disputes into two different groups:[4] a group of compulsory ADR for clients of banks, financial intermediaries and insurance agencies,[5] and a group of ADR, on a voluntary basis, for all the disputes about other sales and service contracts.

In light of the above, a general concern might be noticed about the correct interpretation of Arts 1 and 3 ADR Directive. The real convenience to allow Member States to restrict the mandatory use of mediation procedures to the disputes not considered by ADR Directive should be investigated.[6]

France participation in a mediation process can only take place on a voluntary basis. Mandatory mediation is also provided in non-European Countries: as an example, the Turkish new Act on Labor Courts settles a mandatory mediation in labor disputes, as a condition precedent to court litigation.

[3] With regard to Italian regulation, see Art 8, para 4-*bis*, decreto legislativo 4 March 2010 no 28.

[4] Tribunale di Verona 26 January 2016, *Contratti*, 543 (2016), with note by N. Scannicchio, 'La risoluzione delle controversie bancarie. ADR obbligatoria e ADR dei consumatori'.

[5] E. Minervini, *L'Arbitro Bancario Finanziario. Una nuova «forma» di A.D.R.* (Napoli: Edizioni Scientifiche Italiane, 2014), 21, gives a clear notion of 'client'.

[6] Recently, Case C-75/16 *Menini and Rampanelli* v *Banco Popolare*, Judgment of 14 June 2017, *Foro italiano*, IV, 551 (2017), with note by A.M. Mancaleone, 'La mediazione obbligatoria nelle controversie bancarie alla luce della direttiva 2013/11/UE sull'Adr dei consumatori'. Arguing about compulsory mediation in divorce cases or other family matters, T. Grillo, n 1 above, claims that 'Although mediation can be useful and empowering, it presents some serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its virtues are lost. More than lost: mediation becomes a wolf in sheep's clothing. It relies on force and disregards the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes

II. The View of the Court of Justice

Through the implementation of the ADR Directive, Italian legislator introduced a new set of provisions in the Consumer Code (decreto legislativo 6 August 2015 no 130, hereinafter Consumer Code). She chose to preserve the existing compulsory mediation for civil and commercial matters (Art 141, para 6, letter *a*), Consumer Code)[7] and the existing precondition for the admissibility of legal proceedings in the electronic communications sector prescribed under Art 1, para 11, legge 31 July 1997 no 249 (Art 141, para 6, letter *b*), Consumer Code), and for the matters reserved to the competence of the Italian Authority for Electricity, Gas and Water Supply System under Art 2, para 24, letter *b*), legge 14 November 1995 no 481. In other words, Art 141, para 6, Consumer Code would seem to rule out, from the implementation of ADR Directive, all the consumer disputes which are already ruled by Directive 2008/52/EC.

At the same time and in apparent contradiction, Art 141, para 4, Consumer Code requires that Title II-*bis* shall also apply to mediation for consumer disputes.

It concerns the mediation procedures in banking, financial and insurance sectors. Particularly, it concerns all disputes reserved to the competence of 'Arbitro Bancario e Finanziario' (ABF) (set up under Art 128-*bis* Testo Unico Bancario)[8] and to the competence of 'Arbitro per le Controversie Finanziarie' (set up by Consob resolution 4 May 2016 no 19602). All the proceedings in compliance with guidelines of Art 5, para 1, decreto legislativo 4 March 2010 no 28 (as recently modified) should be added.[9]

Italian compulsory mediation seems to (at least apparently) contradict the provision of ADR Directive, thereby leading judges to doubt whether,

> 'through the reference to Directive 2008/52, (the Italian legislator) intended to save, implicitly, the right of Member States to opt for a

like the patriarchal paradigm of law it is supposed to supplant. Seen in this light, mandatory mediation is especially harmful: its messages disproportionately affect those who are already subordinated in our society, those to whom society has already given the message, in far too many ways, that they are not leading proper lives'. See also L.V. Katz, 'Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin' *Journal of Dispute Resolution*, 1 (1993); D. Golann, 'Making Alternative Dispute Resolution Mandatory: The Constitutional Issue' *Oregon Law Review*, 487 (1989); L. MacGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Right-Based Approach through the ECHR' *The European Journal of International Law*, 607 (2015).

[7] N. Scannicchio, n 4 above, 543.

[8] About the competences of the Arbitro Bancario Finaziario, E. Minervini, *L'Arbitro* n 5 above, passim; A.V. Guccione and A.C. Russo, 'L'arbitrato bancario finanziario' *Nuove leggi civili commentate*, 491 (2010); B. De Carolis, *L'arbitrato bancario finanziario come strumento di tutela della trasparenza* (Roma: Banca d'Italia Eurosistema, 2011), 29; G. Finocchiaro, *L'arbitro bancario finanziario tra funzioni di tutela e di vigilanza* (Milano: Giuffrè, 2012), 74; V. Sangiovanni, 'Regole procedurali e poteri decisori dell'Arbitro Bancario Finanziario' *Società*, 955 (2012); A. Berlinguer, 'L'ABF tra giudizio e media-conciliazione' *Rivista dell'arbitrato*, 36 (2013).

[9] Relating to alternative justice in banking and financial disputes, see A. Fachechi, 'La gestione delle controversie finanziarie: il nuovo ACF' *Foro napoletano*, 377 (2017).

compulsory mediation instead of ADRs for consumers in those cases where those are set up'.[10]

One may argue that the Italian legal framework is less favourable for consumers than ADR Directive, especially in relation to the freedom of the parties (or, at least, of the consumer) of whether or not to take part in the ADR procedure and the freedom of withdrawing from it at any stage (Art 9 ADR Directive).

The Tribunale di Verona expresses her concern to the Court of Justice, even with reference to some specific aspects of the domestic regulation.[11]

The Court of Justice uses a remarkable methodological approach in going beyond the mere wording of Art 1 ADR Directive. She decides on the basis of a systematic interpretation, target-oriented to the objectives pursued by the directive and expressed in its preliminary recitals.[12]

The voluntary nature of the procedure – explicitly ensured to mediation in civil and commercial matters, where not compulsory (Art 3 letter *a*) Directive 2008/52) – does not mean that the parties are free to choose whether or not to use that process, but it means that 'the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time' (recital 13 to Directive 2008/52). With this line of reasoning, the European legislator does not contradict herself in admitting that the proceeding could be 'suggested or ordered by a court or prescribed by the law of a Member State' (Art 3 letter *a*)) or in allowing the individual Member States to make 'the use of mediation compulsory' (Art 5, para 2).

In other words, the voluntary nature of the procedure is not about whether the procedure is mandatory or optional, but it is always about the guarantee of the parties' right of access to the judicial system. In this respect, the Court excludes that the provision of the mediation as a precondition for the admissibility of legal proceedings disregards the objectives pursued by the directive.[13]

[10] Tribunale di Verona 26 January 2016, n 4 above.

[11] ibid.

[12] Case C-75/16, Judgment of 14 June 2017, n 6 above.

[13] Before 2017, the Court of Justice has already ruled about the compatibility of compulsory mediation with principle of effective judicial protection (Art 6 Cedu), with special regard for the Italian procedural rules for settlement disputes between telecoms operators and end-users. In Case C-317/08 *Rosalba Alassini* v *Telecom Italia SpA*, Judgment of 18 march 2010 and Case C-320/08 *Multiservice Srl* v *Telecom Italia SpA*, Judgment of 18 march 2010, available at www.curia.europa.eu, judges establish that mandatory out-of-court settlement procedure does not totally impede nor make extremely difficult the exercise of rights, above all if *i*) the outcome of the settlement procedure is not binding on the parties, *ii*) the period for time-barring of claims is suspended, *iii*) the procedure involves no substantial delay in the legal process; *iv*) it involves no cost or at least involves very low costs; and *v*) there are alternatives to mediation process offered over internet. On the basis of 'Alassini case', J. Davies and E. Szyszczak, 'ADR: Effective Protection of Consumer Rights?' *European Law Review*, 695 (2010), pay attention to the system of compulsory ADR implemented by United Kingdom for telecommunication disputes.

In her reasoning, the Court of Justice balances the interests involved and acknowledges that the fundamental rights should be subject to restrictions in respect of 'objectives of general interest'. The judges focus on the role of the principle of proportionality and warn against restrictions which are 'intolerable' and unreasonable and infringe 'upon the very substance of the right guaranteed'.[14]

So, if the principle of effective judicial protection is respected, Member States are free to choose the means they deem appropriate for the purposes of ensuring the access to judicial system (recital 45 to ADR Directive). *Inter alia*, the outcome of the settlement procedure should not be binding and the period of prescription for the right to access to the judicial system should stop running.

The Court concludes that

> 'the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that the procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purpose of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or give rise to very low costs – for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires'.[15]

On the other hand, but following the same reasoning, the ADR Directive would not prevent the domestic legislator from requiring the consumer taking part in a ADR procedure to be assisted by a lawyer nor from denying to consumers

[14] Along the same lines, the Court of Justice has consistently held that 'it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed' (Cases C-317/08 and C-320/08, Judgments of 18 march 2010, para 63, n 13 above). Above reasonableness as a fundamental criterion in balancing principles, see Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich*, Judgment of 12 June 2003, available at www.curia.europa.eu; and C-36/02, Judgment of 14 October 2004, available at www.curia.europa.eu. In literature, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), *passim* and 102: fundamental rights are protected in different ways with regard to the interests involved and the particular factual circumstances, on the basis of the balancing with the competing rights with which they interfere. P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 13, claim that, whereas the 'rule' is a norm which requires a set of specific conducts for its implementation, the principle is a norm which imposes the maximum achievement of a value and could be implemented at different levels. In that view, there would never be a conflict between principles related to a case, as far as all of them could be implemented at the same time but at different levels. The problem is understanding the criteria of preferences; the solution sets upon the argumentative criterion of reasonableness.

[15] Case C-75/16, Judgment of 14 June 2017, para 61, n 6 above.

the right to withdraw from mediation procedure irrespective of the existence of a valid reason.

III. The View of the Italian Constitutional Court. A Few Critical Remarks

To sum up, the Court of Justice assumes that the voluntary nature of ADR procedure is compatible with any form of compulsory mediation, as long as the parties are not prevented from exercising their right of access to judicial system.

Albeit on the basis of a different reasoning, Italian Constitutional Court proposes a similar interpretative solution. When constitutional judges are questioned about the compliance of the compulsory nature of mediation with the fundamental right of defence, they exclude the contrast.[16] Following the Constitutional Court case-law, the implementation of Art 24 of the Italian Constitution[17] does not imply the 'immediacy' of legal action;[18] the access to justice could be postponed for the purpose of safeguarding 'general'[19] or 'social'[20] interests, avoiding abuses of rights or pursuing superior objectives of justice.[21] Any possible postponement should not prevent or make extremely difficult the exercise of rights.[22]

Both the European Court and the Italian Constitutional Court acknowledge that the access to justice could be subject to conditions, in so far as those conditions do not impede the recourse to dispute resolution proceedings based on the guarantees of a due process.

Even if this solution could be theoretically followed, it does not seem sufficient to solve the problem.

[16] Corte costituzionale 30 November 2007 no 403, *Giustizia civile*, I, 307 (2008), and, among others, Corte costituzionale 19 December 2006 no 436, available at www.cortecostituzionale.it.

[17] About the implementation of the fundamental right of defence, A. Pizzorusso, 'Garanzia costituzionale dell'azione' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1992), VIII, 608.

[18] Corte costituzionale 18 January 1991 no 15, *Diritto del lavoro*, II, 167 (1992); Corte costituzionale 22 October 1990 no 470, *Foro italiano*, I, 3057 (1990); Corte costituzionale 11 December 1989 no 530, *Giustizia civile*, I, 309 (1990).

[19] Corte costituzionale 16 June 1964 no 47, *Foro italiano*, I, 1334 (1964); Corte costituzionale 13 July 1970 no 130, *Foro italiano*, I, 2289 (1970); Corte costituzionale 9 July 1974 no 214, available at www.cortecostituzionale.it; Corte costituzionale 20 April 1977 no 63, *Rivista dei dottori commercialisti*, 740 (1980); Corte costituzionale 21 January 1988 no 73, available at www.cortecostituzionale.it; and Corte costituzionale 4 March 1992 no 82, *Foro italiano*, I, 1023 (1992).

[20] Corte costituzionale 15 July 2003 no 251, available at *www.cortecostituzionale.it*.

[21] Corte costituzionale 23 November 1993 no 406, *Foro italiano*, I, 3214 (1993); Corte costituzionale 22 April 1997 no 113, *Giustizia civile*, 1087 (1997); Corte costituzionale 4 July 1996 no 233, *Giustizia civile*, I, 2466 (1996); and Corte costituzionale 23 June 1994 no 255, *Foro italiano*, I, 3327 (1994).

[22] Corte costituzionale 13 July 2000 no 276, *Giurisprudenza costituzionale*, 675 (2000).

Intending mediation as a mandatory preliminary step do not infringe, in itself, the right of defence, but, as far as the right to access the justice is postponed, it is unavoidably restricted. The legitimacy of that restriction cannot be verified *a priori*, once and for all. The interpreter should verify, in each case, whether and, if so, to what extent the right of direct action (Art 24 of the Italian Constitution and Art 6 Cedu) and the reasonable duration of trial (Art 111 Constitution and Art 6 Cedu) could be restricted and conditioned.

To this end, the specific proceeding should give the parties a guarantee of accessing the justice of the Courts or appealing subsequently. It should be also verified that the limitation of the right of free access to justice finds a reason in interests protected by constitutional requirements which are equally (or more) relevant. That balancing has to evaluate the functioning of the specific proceeding, the purpose of the related regulation and the nature of the single dispute and of the interests to be protected, taking also into account that – with reference to ADRs for consumer disputes – the ontological imbalance of negotiating power in b2c relationships could easily turn out into an imbalance of defence power.[23]

The reference to a 'general interest', with no further specifications, is not sufficient to legitimate the filter. Quite the opposite, the combination of different needs could be solved only through an adequate balancing.[24] So, a conditioning is possible only if it meets interests allocated at a higher level of the hierarchy of values.

On top of that, in order to make sense, the choice to make mediation compulsory should also fit for all the purposes of the legislator. Otherwise, the

[23] Italian scholars use to express that concern arguing about the combination of limited active legitimation and declarations of a 'protective nullity' (*nullità di protezione*) on Courts' own motion. The weaker party, usually not provided with economic resources sufficient for a proper defence, could not be able to adequately assess the means of protection provided by legal system (S. Monticelli, 'Limiti sostanziali e processuali al potere del giudicante *ex* art. 1421 c.c. e le nullità contrattuali' *Giustizia civile*, II, 295 (2003), and Id, 'La rilevabilità d'ufficio condizionata della nullità di protezione: il nuovo "atto" della Corte di Giustizia' *Contratti*, 1119 (2009)). Indeed, the Court own-initiative should be subordinate to the specific circumstance that party's inactivity is not a specific choice, but depends on a deficiency in defence capability (S. Polidori, 'Nullità di protezione e interesse pubblico' *Rassegna di diritto civile*, 1019 (2009), and Id, 'Nullità protettive, neoformalismo ed eccessi di protezione: applicazioni in tema di esercizio abusivo dell'azione di nullità per vizio di forma nel campo dell'intermediazione finanziaria' *Annali della Facoltà di Economia di Benevento*, 56 (2012)). Both limitation in active legitimation and Courts own-initiative are 'protection techniques serving the same ideology'; they get along with each other to adequately protect the weaker party and guarantee the economic public policy (G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2010), 18. About the topic, see also E. Minervini, 'La nullità per grave iniquità dell'accordo sulla data del pagamento o sulle conseguenze del ritardato pagamento' *Diritto della banca e del mercato finanziario*, I, 199 (2003); A. Gentili, 'Le invalidità', in P. Rescigno ed, *Trattato dei contratti* (Torino: UTET, 1999), I, 2, 1542; G. Chiovenda, 'Le riforme processuali e le correnti del pensiero moderno', in Id, *Saggi di diritto processuale civile* (Milano: Giuffrè, 1993), I, 385, e M.G. Civinini, 'Poteri del giudice e poteri delle parti nel processo ordinario di cognizione. Rilievo officioso delle questioni e contraddittorio' *Foro italiano*, V, 3 (1999).

[24] § 2 above.

restriction would be unreasonable and expose the Member States to the risk of condemnation by European Court of Human Rights for the excessive duration of civil trials.

IV. The Legitimacy of the Postponement and the Balancing of Interests

At first glance, the option for compulsory ADR would aim to optimising the resolution proceeding, looking for a reduction of costs and time required for the judgment. Some scholars claim that this purpose – certainly worthy of attention – is not supported by any Constitutional provision and, for this reason, it cannot legitimate the barrier to accessing the justice of the Courts.[25] As a matter of fact, it is questionable whether needs related to the structure of the proceeding, even if achievable,[26] could justify the weakening of fundamental rights granted by Constitution.

It is hard to believe that ADR for consumer litigations, compulsory or not, could actually correct the contradiction between the heavy increase in disputes (due to the frequent market failures characterizing financial, banking and insurance situation for the last few years) and the inefficiencies of the justice of the Courts.[27]

It seems more likely that the *favor* for alternative justice is related to the idea that one of the ineradicable components of b2c relations is the fear of consumer for her normal inability to understand the details and the risks of each transaction, especially in financial, banking and insurance sectors. Indeed, investors and savers do not have any sufficient technical knowledge and so they

[25] L.P. Comoglio, *sub* art. 24, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zannichelli, 1981), 36.

[26] The proposal for a Directive (com(2004) 178 final, 22 october 2004), followed by Directive 2008/52/EC, clarifies that this is not the unique nor principal purpose. Compulsory mediation could be a benefit in that way, but 'mediation has a value in itself as a dispute resolution method (…) which deserves to be promoted independently of its value in off-loading pressure on the court system'. So that 'the availability of ADRs in general can not in any way detract from the obligation of Member States to maintain an effective and fair legal system that meets the requirements of the European Convention of Human Rights, which forms one of the central pillars of a democratic society'. The correct functioning of mediation postulates the correct functioning of the justice of the Courts, in the view of D. Dalfino, 'Mediazione, conciliazione e rapporto con il processo' *Foro italiano*, V, 101 (2010). See also C. Vaccà, 'La Direttiva sulla conciliazione: tanto rumore per nulla' *Consumatore diritto e mercato*, 122 (2008). For a study about the function of ADR and ODR, A. Fachechi, 'La giustizia alternativa nel commercio elettronico. Profili civilistici delle ODR' (Napoli: Edizioni Scientifiche Italiane, 2016).

[27] Neverthless, many scholars use to consider ADR a solution for justice inefficiencies. On the topic, G. Romualdi, 'Problem Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' *Utrecht Law Review*, 52 (2018). According to L.P. Comoglio, 'Mezzi alternativi di tutela e garanzie costituzionali' *Rivista di diritto processuale*, 370 (2000), the alternative justice started from the important Conference named in honour of Roscoe Pound (USA, 1976) and his indictiment of civil justice distortions (R. Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' *American Law Review*, 729 (1906)).

are induced to simply rely on the other party's reassurances, hoping the business to describe accurately and honestly the concrete possibilities of failures (rather than to provide all information about the negotiation, as far as consumers would not be able to handle them).[28]

This consumer – aware, on one side, of her own weak negotiation position and, on the other side, of the known cumbersome and length of process – is discouraged over the possibility of adequately managing the relationship with the business in its potential pathological stage and over the possibility of obtaining a compensation for the potential damages. This is particularly the case of minor damages (where keeping the damage is more convenient than trying to remove it) and of the transnational dispute (where there is a general concern about competent jurisdiction and applicable law).

That lack of consumer's confidence affects negatively the performance of individual market sectors and holds back their development.

Actually, the Directive 2013/11/EU does not aim to rectify the malfunction of justice of the Courts, but it aims to create consumer confidence in market, promote the market and ensure its correct functioning.

The European legislator pays special attention to consumer's confidence. She agrees with the need to build a properly functioning ADR infrastructure for consumer disputes and a properly integrated online dispute resolution (ODR) framework for consumer disputes arising from online transactions.[29] ADR and ODR are necessary in order to achieve the Single Market Act's purpose of boosting citizens' confidence in the internal market (recital 11). Consistently, the legislator admits that the development, within the Union, of properly functioning

[28] More details in A. Fachechi, n 9 above, 377.

[29] On the idea that '(t)he more relationships that are formed online and the more transactions that take place, the more disputes are likely to occur', E. Katsh, 'Dispute Resolution without Borders: Some Implications for the Emergence of Law in Cyberspace' available at https://tinyurl.com/yy44stym (last visited 28 May 2019). D.R. Johnson, 'Dispute Resolution in Cyberspace' available at https://tinyurl.com/y5f63u3r (last visited 28 May 2019), assumes that the increase in disputes is accompanied by a certain increase in time spent on electronic communications. See also P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (London-New York: Routledge, 2011); M. Wahab, 'Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement' *International Journal of Law and Information Technology*, 128 (2004); E. Katsh, J. Rifkin and A. Gaitenby, 'E-Commerce, E-Dispute, and E-Dispute Resolution: In The Shadow of "eBay Law" ' *Ohio State Journal of Dispute Resolution*, 725 (2000); P. Cortés and F. Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' *International and Comparative Law Quarterly*, 412 (2013); M. Imbrenda and A Fachechi eds, *Meccanismi alternative di risoluzione delle controversie* (Napoli: Edizioni Scientifiche Italiane, 2015). A complete reconstruction of existing ODR model framework is operated by M. Conley Tyler, '115 and Counting: The State of ODR 2004', in M. Conley Tyler, E. Katsh and D. Choi eds, *Proceedings of the Third Annual Forum on Online Dispute Resolution. International Conflict Resolution Centre in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP)*, 2004, available at https://tinyurl.com/yxup7hnj (last visited 28 May 2019) and G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague: Kluwer Law International, 2004).

ADR is essential to strengthen consumers' confidence in the internal market, including in the area of online commerce (recital 15). That aim is confirmed by the symmetrical regulation 524/2013/EU (ODR regulation):

> 'in order for consumers to have confidence in and benefit from the digital dimension of the internal market, it is necessary that they have access to simple, efficient, fast and low-cost ways of resolving disputes which arise from the sale of goods or the supply of services online. This is particularly important when consumers shop cross-border' (recital 2).

Moreover, 'being able to seek easy and low-cost dispute resolution can boost consumers' and traders' confidence in the digital Single Market' (recital 7). After all, the Communication 13 April 2011 ('Single Market Act – Twelve levers to boost growth and strengthen confidence – 'Working together to create new growth') mentions ADR regulation among the 'twelve levers to boost growth and strengthen confidence in single market'.

Definitely, the objective is to strengthen the credibility of the market sector through a justice system easily accessible and (more or less) free of charge, independent, impartial and transparent and so attractive for consumers and businesses, as well.[30] The objective is to build a justice system suitable for giving the perception of a secure market (also thanks to the supervision of the competent Authorities; Art 141-*octies* Consumer Code).[31]

As mentioned above, the postponement of the access to justice is legitimate when it is an instrument of best protection of parties' interests. In the view of that, the introduction of a condition to legal action – of course, with the minimum requirements expressed in Art 141-*bis* ff. Consumer Code – could serve the interests of the weaker party to a contract.

Compulsory ADR, for disputes with a high technical complexity, could activate that virtuous circle which starts from the strengthening of consumer's confidence and leads to the development of the single market sector, solely to benefit (non only of businesses, but also) of the consumers. Public interest in correct functioning

[30] Recital 19 to ADR directive confirms that ADR and mediation are in a relationship of gender to species: '(t)his Directive is intended to apply horizontally to all types of ADR procedures, including to ADR procedures covered by Directive 2008/52/EC'. See F. Luiso, 'Il modello italiano di mediazione. Il «giusto» procedimento di mediazione (contraddittorio, riservatezza, difesa, proposta)' *Giurisprudenza italiana*, 214 (2012).

[31] Art 141-*octies* Consumer Code refers to the authority of Consob the supervision over the area of the disputes between investors and intermediaries due to the violation of relevant disclosure requirements, good faith and transparency obligations (letter *b*), and to the authority of Banca d'Italia the supervision over the area of disputes under the competences of the Arbitro Bancario Finaziario (letter *e*). The fragmentation of the competences required a coordination, with the Ministero dello Sviluppo Economico as single contact point. See A. Fachechi, *sub* art. 141 *octies*, in G. Perlingieri, E. Capobianco and L. Mezzasoma eds, *Codice del consumo annotato con la dottrina e la giurisprudenza*, forthcoming.

of the market and market single participants' interest are highly interdependent.[32]

On the other hand, ADR are not truly alternative to jurisdiction of any State Court nor to arbitration proceeding, even when they have a 'decisional nature'.[33] To the benefits of a quick and cheap resolution system, ADR sacrifice other values, fundamental to the justice of the Courts and of the Arbitral Board. Streamlined ADR proceedings are particularly attractive and convenient, but the simplification is difficult to reconcile with the principles of due process; the implementation of those principles would necessarily imply many formal constraints and so make the ADR more burdensome.[34]

However, the introduction of simpler and less expensive resolution systems could led to a certain compensation when, without them, the damaged party would choose to keep the damage; ie, when the justice of the Courts is not a possible way, as far as its length and the costs are inadequate as compared with the extent of the damage. In such cases, the being compulsory of the mediation, on one side, would imply a fake postponement of the access to justice, because the access would actually never take place, and, on the other, seeking to raise consumers' attention on the existence of alternative justice systems, would facilitate the management of the pathological stage in b2c relationship.

Lastly, the principle of subsidiarity (Art 118 Constitution) could also legitimate compulsory ADR; indeed it implies a significant restriction to government intervention with regard to substantive rules and procedural law: the access to justice of the Courts should be the last chance to solve the dispute for available rights protection.[35]

V. The Right of Withdrawing from the Proceeding

[32] P. Perlingieri, 'L'incidenza dell'interesse pubblico sulla negoziazione privata' *Rassegna di diritto civile*, 933 (1986), describes the consequences of the heightened opposition of public interest and individual interest. On the impossibility in considering a single contract as an isolated business see R. Di Raimo, 'L'art. 14 della direttiva 2005/29/CE e la disciplina della pubblicità ingannevole e comparativa', in G. De Cristofaro ed, *Le «pratiche commerciali sleali» tra imprese e consumatori. La direttiva 2005/29/Ce e il diritto italiano* (Torino: Giappichelli, 2007), 292.

[33] O. Fiss, n 1 above: 'Parties may settle while leaving justice undone'.

[34] A. Fachechi, n 9 above, and Ead, 'Natura arbitrale delle ODR aggiudicatorie. In particolare, la procedura UDRP', in P. Perlingieri et al eds, *L'autonomia negoziale nella giustizia arbitrale, Atti del X Convegno nazionale SISDiC*, (Napoli: Edizioni Scientifiche Italiane, 2016), 249, and in E. Minervini ed, *Online Dispute Resolution (ODR)* (Napoli: Edizioni Scientifiche Italiane, 2016), 75. O.M. Fiss, n 1 above, holds that the purpouse of adjudication is not exactly the same of the settlement function: Courts are intended not only to 'maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpreter those values and to bring reality into accord with them. This duty is not discharged when the parties settle'.

[35] About the implementation of principle of subsidiarity, see M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014); and D. De Felice, *Principio di sussidiarietà e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008).

It could be also questioned whether ADR proceeding for consumer disputes, as regulated, does not actually prevent the access to justice.

It is interesting to analyze problems arising from the consequences provided where parties fails to participate in mediation without a valid reason. Regarding compulsory mediation, Art 8, para 4-*bis*, decreto legislativo 5 march 2010 no 28, establishes that, in the potential subsequent trial about the same dispute, the judge might infer from that behaviour the existence of evidence under Art 116, para 2, Code of Civil Procedure and must order the party to pay to the State treasury an amount equal to the *contributo unificato* payable in respect of the proceeding.

In the different case of withdrawing from the existing proceeding, the Italian consumer law ensures the right only to consumer (Art 141-*bis*, para 6, Consumer Code); instead, the regulation on compulsory mediation does not contain any provision in this regard. There appears to be no real conflict with the guidelines provided by European legislator.

Based on the decision of the Court of Justice, ADR Directive 'must be interpreted as precluding a provision of national law to the effect that consumers may withdraw from a mediation procedure only in the event that they demonstrate the existence of a valid reason in support of that decision, on pain of penalties in the context of subsequent legal proceedings',[36] but the same directive

> 'does not preclude national legislation which entitles a consumer to refuse to participate in a prior mediation procedure only on the basis of a valid reason, to the extent that he may bring it to an end without restriction immediately after the first meeting with the mediator'.[37]

In the light of all above, the findings of the Court of Justice – where she states that a regulation providing that a consumer could withdraw from a mediation only relying on a valid reason is an unacceptable restriction of the right of access to justice, in opposition to the purposes of ADR Directive – only partially persuade.

Permitting the arbitrary cancellation of the mediation could affect and dismiss the benefits of the condition required for legal action.

Significantly, Art 141-*quater*, para 5, Consumer Code, in allowing the parties to withdraw from mediation at any time, specifies that, where the business has an obligation to attend the proceeding, the right to withdraw from it is provided only to consumer. It seems reasonable that the provision of mediation as a preliminary condition of legal action matches the obligation to attend it seriously; the right to withdraw should be ensured only if the it is the best way to meet the consumer protection.

[36] Case C-75/16, 14 June 2017, n 6 above, para 66.
[37] Case C-75/16, 14 June 2017, n 6 above, para 70.

After all, Art 9, para 2 (a), ADR Directive, in allowing the parties (or the sole consumer, *ex* para 3) to withdraw from the proceeding at any time, subordinates the exercise of that right to dissatisfaction with the performance or the operation of the procedure.

Otherwise, if the restriction concerned only the formal access to alternative procedure and did not pursue the aim of mediating, requiring a condition for legal action would be of limited value.

VI. The Assistance of the Lawyer

Pursuant to Art 8 (b) (and Art 9, para 1) ADR Directive, the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor. In Italian legal system, the provision is implemented under Art 141-*quater*, para 3(c), Consumer Code (entitled 'transparency, efficiency, equity and freedom'), allowing parties to access the procedure representing themselves, with no prejudice to their right to independent advice or to be represented or assisted by a third party at any stage of the procedure.

Some scholars claim that there is no need for a technical defence because of the 'negotiation' nature of the procedure, also considered that the parties could retain a legal advisor when it is required by the nature of the dispute, the complexity of the questions or the interests involved.[38]

The obligation to be represented by a lawyer – as a guarantee of the right of defence, as far as the weaker party could not be able to adequately assess the existing forms of protection – would imply a certain increasing of the cost of the procedure[39] and a loss of its speed (it takes time to choose a lawyer and it takes time for her to study the dispute points).

Employing a legal advisor, even if optional, would lead the other party to retain a defending lawyer, not to be in a unfavourable position, even when she is highly motivated to minimize the cost of the procedure.

Quite the opposite, in compulsory mediation the assistance of a lawyer is required under Art 5, para 1-*bis*, decreto legislativo no 28 of 2010.[40]

[38] P. Bartolomucci, 'La nuova disciplina delle procedure di risoluzione alternativa delle controversie in materia di consumo: il d.lgs. n. 130/15 e le modifiche del codice del consumo' *Nuove leggi civili commentate*, 494 (2016).

[39] N. Scannicchio, 'La risoluzione delle controversie bancarie' n 4 above, 549. About ADR and ODR funding sources and some related problems, see M.G. Bowers, 'Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework' *Vanderbilt Law Review*, 1284 (2011); E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflict in Cyberspace* (San Francisco: John Wiley & Sons Inc, 2001); L.M. Ponte, 'Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions' *Albany Law Journal of Science and Technology*, 441 (2002).

[40] According to D. Dalfino, 'Mediazione civile e commerciale', in S. Chiarloni ed, *Commentario al codice di procedura civile* (Bologna: Zanichelli, 2016), 275, the absence of a lawyer does not

The formal contradiction between regulations, identified by the Court of Justice (in pointing out that 'national legislation may not require a consumer taking part in an ADR procedure to be assisted by a lawyer'),[41] could be justified in the light of the complexity of the procedure in financial, banking and insurance sectors.

Indeed, the parties could do without a legal advisor only where the procedure aims to help them in reaching an agreement. Instead, a technical defence is necessary when the procedure is a real 'pre-trial' and requires the taking of evidence and any briefs.[42]

Definitely, the choice of allowing the parties to access the procedure without retaining a legal advisor could ensure flexibility and accessibility to procedures; on the other side, in those disputes which are too complex to be easily accessible to consumers representing themselves, the obligation of the assistance of a lawyer could increase the level of protection pursued by ADR Directive.

VII. Concluding Remarks

The modern work of the alternative justice regulation, the above described apparent contradictions and the overlapping of the scopes worry the interpreter in need of certainties. Any effort to systematise the whole range of provisions sits at odds with the current trend of the Court of Justice to adapt the domestic regulations to the ADR Directive formal provisions, sometimes not considering that it is 'the aim to be achieved' that should remain unchanged, not the means provided to that aim.

Far from being able to solve the mentioned problems once and for all, the mandatory nature of mediation and the related rules (right of withdrawing form the proceeding, assistance of a lawyer, etc) should be considered legitimated when they can best serve parts' interests. Given the (more or less) evident aporias of the legal system, identifying the applicable rule is about investigating the dispute-settlement scheme more adequate to guarantee the access to justice with regard to the variable modulation of consumer relations.

imply the inadmissibility of the legal action, but affect the effectiveness of the settlement. This would not be enforceable in the view of A. Lupoi, 'Ancora sui rapporti tra mediazione e processo civile, dopo le ultime riforme' *Rivista trimestrale di diritto e procedura civile*, 19 (2016).

[41] Case C-75/16, 14 June 2017, n 6 above, para 65.

[42] M. Bottino, 'La nuova normativa europea in materia di risoluzione alternativa delle controversie dei consumatori' *Contratto impresa Europa*, 406 (2014); V. Vigoriti, 'Superabili ambiguità. Le proposte europee in tema di ADR e ODR' *Nuova Giurisprudenza civile commentata*, 313 (2012).