

The Adoption of the Directive on Alternative Dispute Resolution for Consumer Disputes in Italian Law

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Abstract

The essay analyses some of the legal problems associated with implementing Directive 2013/11/EU on the alternative dispute resolution of consumer disputes in the Italian legal system. The author explains important jurisprudential cases and focuses on two judgments of the Italian Constitutional Court and the Court of Justice. The aim of the essay is to underline the 'dialogue' between these Courts regarding alternative dispute resolution (ADR). In fact, both Courts propose a systematic and axiologically oriented interpretation of the Italian-European discipline, and, inspired by the principle of proportionality, both Courts operate a balancing of the principles involved in order to implement the values that inform the Italian legal system.

I. Regulatory Framework

On 3 September 2015, the decreto legislativo of 6 August 2015 no 130¹ entered into force in Italian law, implementing Directive 2013/11/EU on the alternative dispute resolution for consumer disputes (Directive on consumer ADR), which amended Regulation (EC) no 2006/2004 and Directive 2009/22/CE. The Italian legislator introduced the new regulation on consumer Alternative Dispute Resolution (ADR), through the modification of two legal texts already in force for more than a decade: decreto legislativo of 6 September 2005 no 206, so called Consumer Code, and the decreto legislativo of 8 October 2007 no 179,² entitled

'Establishment of reconciliation and arbitration procedures, compensation system and guarantee fund for savers and investors in the implementation of Art 27, paras 1 and 2, of the law of 28 December 2005 no 262'.

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¹ For some initial considerations on the saga in the Italian legal system, see T. Galletto, 'Adr e controversie dei consumatori: un difficile equilibrio' *Foro padano*, II, 79 (2015); O. Desiato, 'Le politiche dell'Unione Europea in favore della «degiurisdizionalizzazione» e i più recenti interventi del legislatore italiano in tema di ADR per i consumatori' *Responsabilità civile e previdenza*, 1802 (2016); M. Angelone, 'La «degiurisdizionalizzazione» della tutela del consumatore' *Rassegna di diritto civile*, 723 (2016).

² Subsequently, Art 10, para 12, of decreto legislativo 3 August 2017 no 129, abrogated this regulatory act: the provisions referred to in the text have now been included in the decreto legislativo 24 February 1998 no 58, so called Testo Unico della Finanza.

Art 1 of the decreto legislativo no 130 of 2005 inserted after the Art 140-*bis* of the Consumer Code, Title II-*bis*, is entitled ‘Out-of-court settlement of disputes’. The collocation of new legislation in this part of the Consumer Code is consistent with its structure. Part V of the Consumer Code already provides for certain specific tools for consumer protection; however, these relate to judicial protection. In particular, the representative associations at a national level are governed by Title I;³ in Title II⁴ the modalities of access to justice in a collective form are regulated. Furthermore, precisely by virtue of the decreto legislativo no 130 of 2015,⁵ from 9 January 2016 this form of protection of the collective interests of users and consumers can also be exercised in the field of online dispute resolution (EU Regulation, 21 May 2013 no 524).⁶ Therefore, the new regulation of ADR is part of a set of safeguards already partially outlined by the national legislator.

Art 1, para 2, of decreto legislativo no 130 of 2015, modified the content of Art 141 and has identified in detail the scope of the objective and subjective applications of the new legislation. The following articles regulate: ‘Obligations, Duties and Requirements of ADR Bodies’, ‘Joint Negotiations’, ‘Transparency, Effectiveness, Equity and Freedom’, ‘Effects of ADR Procedure on Limitation and Prescription Terms’, ‘Information and consumer assistance’, ‘Cooperation’, ‘Competent authorities and single point of contact’, ‘Information to be transmitted to competent authorities by dispute resolution bodies’, and ‘Role of competent authorities’. Moreover, Art 1-*bis*, of the decreto legislativo no 130 of 2015 introduces Arts 5-*bis* and 5-*ter* to decreto legislativo no 179 of 2007. In these two articles, new forms of ADR are regulated for the subjects in respect of which the National Commission for Companies and the Stock Exchange (CONSOB) carries out its supervisory activity. In particular, these subjects

‘must adhere to out-of-court dispute resolution systems with investors other than the professional clients referred to in Art 6, paras 2-*quinquies* and 2-*sexies* referred to in decreto legislativo no 58 of 24 February 1998’.

The procedures for implementing these ADR systems are defined by a specific CONSOB regulation.

The new regulations adopt long portions of the text of the Directive on consumer ADR, but they are not an absolute novelty in the Italian legal system.

³ Arts 136-138.

⁴ Arts 139-140-*bis*.

⁵ Art 2, para 1.

⁶ For further details see: E. Minervini ed, *Le Online Dispute Resolution (ODR)* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; M. Imbrenda and A. Fachechi eds, *Meccanismi alternativi di risoluzione delle controversie nel commercio elettronico* (Napoli: Edizioni Scientifiche Italiane, 2015), 1; T. Rossi, ‘Effettività della tutela nella recente regolamentazione europea di ADR e ODR’ *Rassegna di diritto civile*, 831 (2014); A. Spedicato, ‘Il regolamento europeo n. 524/2013. L’istituzione della piattaforma ODR - I nuovi strumenti di risoluzione alternativa delle controversie nel mercato unico europeo’ *Nuova procedura civile*, 76 (2013).

The internal legislator had already intervened in numerous sectors to regulate ADR systems, also due to the endemic slowness, costs, and risks of going to trial in Italy. A systematic reading of the legal system demonstrates the legislator's preference for the resolution of disputes 'outside of court',⁷ also through the negotiating instrument. In addition to the specific regulation on the settlement contract, included in Arts 1965-1976 of the Civil Code, it is worth considering, for example, settlements governed by Art 208, of the decreto legislativo of 18 April 2016 (so called Procurement Code) or the numerous hypotheses of conciliatory agreements in labour and family law. However, the presence of various sources of regulation can create difficult problems in coordinating the various disciplines,⁸ as will be analysed in the following paragraphs. A careful assessment of the current functions of the different ADR systems compared to the objectives of Directive on consumer ADR will allow for a critical re-reading of the recent jurisprudence of the Court of Justice on the matter.

An important novelty, also on a systematic level, concerns the addition of the letters *v-bis* and *v-ter* to Art 33 of the Consumer Code, entitled 'Unfair terms in agreements between a professional and a consumer'. By virtue of the new regulations, clauses that have as their object or effect

'to impose on the consumer wishing to access an out-of-court dispute resolution procedure provided for in Title II-*bis* of section V to apply exclusively to a single type of ADR entity or to a single ADR entity are presumed to be vexatious until proven otherwise';⁹

as well as 'making the out-of-court dispute resolution procedure excessively difficult for the consumer foreseen by Title II-*bis* of Section V'.¹⁰ Regarding the latter provisions, Italian doctrine has noted the importance of the need to anchor the presumption of harshness of the predetermination clauses of the ADR body to the need for effective protection, which can actually guarantee these remedies.¹¹ This doctrine also reported that these provisions demonstrate how the legislator

⁷ The suggestive expression, capable of describing an extremely complex phenomenon, is in the title of the recent monograph by E. Del Prato, *Fuori dal processo. Studi sulle risoluzioni negoziali delle controversie* (Torino: Giappichelli, 2016).

⁸ It is also worth considering how the same configurability of a unitary ADR system, even with the specificities of each sector, is rather controversial under Italian doctrine. For various positions, see, for example, T. Rossi, *Effettività della tutela* n 6 above, 846, e S. Viotti, 'Brevi spunti per una configurazione unitaria delle Alternative Dispute Resolution (ADR)' *Giustizia civile*, II, 828 (2013). Claiming that ADR systems are not useful, A. de la Oliva Santos, 'Adr o la riscoperta dell'acqua calda' *Rivista trimestrale di diritto e procedura civile*, 507 (2016).

⁹ Art 33, para 2, letter *v-bis*, of the Consumer Code.

¹⁰ Art 33, para 2, letter *v-ter*, of the Consumer Code.

¹¹ See: G. Recinto, 'Foro del consumatore e clausole di predeterminazione dell'organismo ADR: le novità derivanti dal d.lgs. 6 agosto 2015, n. 130, e l'occasione per ripensare la relazione tra strumenti di deflazione del contenzioso, da un lato, e giustizia, statale o privata, dall'altro' *Nuove leggi civili commentate*, 125 (2016).

has finally abandoned a vision of progressive ‘judicialization’ of these procedures. The radical distinction between so-called conciliatory models (when the definition of the dispute is entrusted exclusively to an agreement of the parties) and properly awarded models (when the definition of the dispute is left to the determination of a third party, unrelated to the dispute) is firmly supported. From this point of view, even mandatory mediation does not properly belong to ‘alternative systems of justice’; it simply takes the form of a ‘conflict resolution system’. Otherwise, arbitration can be considered a ‘contracting instrument’, qualifying as ‘private alternative justice’.¹²

In this regulatory context, constitutional principles, including those established at the European level, assume a decisive role. These principles represent the point of reference for the interpreter and are the foundation of the specific rules of the ADR sector. The resolution of disputes must respect, according to the cases, the principles of the ‘fair trial’, if it is based on strictly decision-making systems, and the principles that guarantee the ‘fair contract’ (also in relation to the possible weakness of one of the parties), if it is based on conciliatory systems or in any case due to contractual autonomy.

II. The Implementation of Directive 2013/11/EU and Directive 2008/52/EC in the Italian Legal System

The regulatory framework outlined above is completed, with regard to the mediation systems aimed at conciliation, with Directive 2008/52/EC, at the European level, and with the aforementioned decreto legislativo no 28 of 4 March 2010 (on mediation aimed at reconciling civil and commercial disputes) (‘decreto legislativo no 28’), in the Italian legal system. With reference to the coordination of these last two measures with ADR for consumers, the Court of Verona, with an

¹² G. Recinto, ‘La natura giuridica del *settlement* tra giusto processo e giuste *Online Dispute Resolution*’ www.dirittifondamentali.it, 7 January 2015. In these terms, see P. Perlingieri, ‘Sui modelli alternativi di risoluzione delle controversie’ *Rivista giuridica del Molise e del Sannio*, 93 (2014); Id, ‘Sulle cause della scarsa diffusione dell’arbitrato in Italia’ *Giusto processo civile*, 657 (2014); Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 37; Id, *Arbitrato e Costituzione* (Napoli: Edizioni Scientifiche Italiane, 2002), 19. Also T. Rossi, *Arbitrabilità e controllo di conformità all’ordine pubblico* (Napoli: Edizioni Scientifiche Italiane, 2017), 62; M. Marinaro, ‘La proposta “mediata” non è aggiudicativa ma solo facilitativa’ *Guida al diritto*, 64 (2015); A. Tartaglia Polcini, *Modelli arbitrali tra autonomia negoziale e funzione giurisdizionale* (Napoli: Edizioni Scientifiche Italiane, 2002), 260. In a different sense, however, it has been noted how the Directive on consumer ADR introduces a proceeding, whose structure is basically ‘litigation-decisive’, similar to what happens in arbitration and in the declaratory judicial process: F.P. Luiso, ‘La direttiva 2013/11/Ue, sulla risoluzione alternativa delle controversie dei consumatori’ *Rivista trimestrale di diritto e procedura civile*, 1302 (2014). See also, E. Minervini, ‘L’arbitrato e gli strumenti alternativi di composizione dei conflitti’, in L. Ruggeri and L. Mezzasoma eds, *L’arbitro nella moderna giustizia arbitrale* (Napoli: Edizioni Scientifiche Italiane, 2013), 11.

order dated 28 January 2016,¹³ proposed a preliminary ruling for the Court of Justice. The Veronese judge decided to turn to the Court, since, in domestic law, some provisions for civil and commercial mediation (and included in decreto legislativo no 28) seem to be in conflict with the Directive on consumer ADR. In many cases, the scope of application of the various disciplines is the same: these are disputes between professionals and consumers in the banking, financial, and insurance sectors. In particular, the Court of Verona asks whether the Directive on consumer ADR must be interpreted:

a) as precluding national legislation, such as that at issue in the main proceedings, which provides, first, for mandatory recourse to a mediation procedure, in disputes referred to in Art 2, para 1, of that directive, as a condition for the admissibility of legal proceedings relating to those disputes;

b) that, in the context of such mediation, consumers must be assisted by a lawyer; and

c) that consumers may avoid prior recourse to mediation only if they demonstrate a valid reason in support of that decision.

According to internal regulations on mediation aimed at the reconciliation of civil and commercial disputes, the parties are obliged to attempt reconciliation (Art 5, para 1-*bis*, of decreto legislativo no 28) and to be assisted by a lawyer (Arts 5, para 1-*bis*, and 8, para 1, of decreto legislativo no 28). Furthermore, pursuant to Art 8, para 4-*bis*, of decreto legislativo no 28,

‘from the failure to participate without justified reason to the mediation process, the judge can infer arguments in the subsequent trial pursuant to Art 116, second para, of the Code of Civil Procedure. The judge condemns the constituted party that, in the cases provided for in Art 5, has not participated in the proceedings without justified reason, to the payment at the entrance of the Member State budget of a sum of the amount corresponding to the unified contribution due for the judgment’.

Instead, the Directive on consumer ADR provides for ‘voluntary’¹⁴ ADR systems,¹⁵ to be carried out without the assistance of lawyers or consultants¹⁶ and requires Member States to ensure that the parties have the possibility to withdraw from the procedure at any time, if they are not satisfied with the performance or operation of the procedure.¹⁷ A problem arises since Art 141

¹³ The provision was published in *Contratti*, 537 (2016), with a note by N. Scannicchio, ‘La risoluzione delle controversie bancarie. ADR obbligatoria e ADR dei consumatori’.

¹⁴ On the meaning of the term refer to para III.

¹⁵ Art 1, European Parliament and Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) no 2006/2004 and Directive 2009/22/EC [2013] OJ L165/13.

¹⁶ Art 8(b) and Art 9, para 1(a) of the Directive on consumer ADR, n 15 above.

¹⁷ Art 9 para 2(a) of the Directive on consumer ADR, n 15 above.

para 6 of the Consumer Code¹⁸ (which, as previously mentioned, transposes the Directive on consumer ADR), shall apply without prejudice to certain provisions that require the compulsory procedures for out-of-court dispute resolution; among these is precisely Art 5, para 1-*bis*, of decreto legislativo no 28.

The Court of Verona also posed another question as to the relationship between the two directives cited. The referring court asked, in essence, whether Art 3, para 2, of the Directive on consumer ADR, insofar as it provides that that directive applies ‘without prejudice to’ Directive 2008/52, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a mandatory mediation procedure in the disputes referred to in Art 2, para 1, of the Directive on consumer ADR. On this point the Court of Justice,¹⁹ with the ruling of 14 June 2017, preliminarily specified that the 2008 directive applies to cross-border disputes, although it allows the Member States to extend the related regulation also to internal mediation procedures. Where a Member State decides to make use of this option, as the Italian legislator did with the enactment of decreto legislativo no 28, the scope of the 2008 directive remains, of course, unchanged. Consequently, the Court of Justice considered it unnecessary to rule on this specific issue.

On the other issues previously illustrated, however, the European Judges have taken a very important position for the Italian legal system, since similar problems have already been addressed by the Italian Constitutional Court, with regard to some of the norms of decreto legislativo no 28. The latter legislative provision had been the subject of heavy criticism by the Constitutional Court in 2012 and its content, following the sentence of 24 October-6 December 2012 no 272, had been distorted.²⁰ Subsequently, the Italian legislator intervened again to change the text of decreto legislativo no 28 (at that point devoid of many provisions declared unconstitutional); thus, the decreto legge of 21 June 2013 no 69,²¹ substantially restored the provisions declared unconstitutional and redefined many other aspects of the discipline of these forms of ADR.²²

¹⁸ This provision is strongly criticised by O. Desiato, n 1 above, 1807; N. Scannicchio, n 13 above, 556, defining it as ‘improvised’ and ‘botched’.

¹⁹ Case C-75/16, *Livio Menini and Maria Antonia Rampanelli v Banco popolare – Società Cooperativa*, [2017] EU:C:2017:457, *Nuova giurisprudenza civile commentata*, 1634 (2017), with a note by F. Ferraris, ‘Adr e consumatori: rapporti e interferenze’, and *Il Foro italiano*, IV, 566 (2017), with notes by A.M. Mancaloni, ‘La mediazione obbligatoria nelle controversie bancarie alla luce della direttiva 2013/11/Ue sull’Adr dei consumatori’, and N. Scannicchio, ‘La risoluzione non giurisdizionale delle controversie di consumo. Rimedi alternativi o diritti senza rimedio?’.

²⁰ The ruling was published in *Giustizia Civile*, I, 10 (2013). Obviously, this ruling was the object of a great deal of attention from the doctrine: *ex multis*, C. Besso, ‘La Corte costituzionale e la mediazione’, note to the Corte costituzionale 6 December 2012 no 272, *Giustizia civile*, 605 (2013); F.P. Luiso, ‘L’eccesso di delega della mediazione obbligatoria e le incostituzionalità consequenziali’, note to the Corte costituzionale 6 December 2012 no 272, *Società*, 71 (2013).

²¹ Converted with modifications from the legge 9 August 2013 no 98.

²² On the innovative profiles of the new discipline, see: D. Dalfino, *Mediazione civile e commerciale* (Bologna: Zanichelli, 2016), 91; G. De Luca, ‘Il quadro normativo di riferimento

Before describing the position of the Court of Justice, it is worth reconstructing the position of the Italian Constitutional Court in the logic of a 'loyal collaboration between the Courts',²³ in order to better understand the correct interpretation of the provisions currently in force. In both decisions, it is possible to notice complementary arguments useful for the identification of the inspiring principles of the various disciplines.

III. The Positions of the Italian Constitutional Court and the Court of Justice

With the aforementioned sentence of 2012, the Italian Constitutional Court declared the unconstitutionality of Art 5, para 1, of decreto legislativo no 28,

'in the part in which it introduces, on the part of those who intend to exercise an action related to disputes in the matters expressly listed, the obligation of the prior experimentation of the mediation process, provides that the experiment of mediation is a condition of the admissibility of the judicial request and that the objection can be raised by the defendant or taken over by the court'.

Furthermore, the Court declared consequentially unconstitutional a whole series of other provisions incompatible with the alleged non-obligatory nature of the mediation procedure.

Although, as already mentioned, the obligatory nature of the mediation procedure was subsequently reintroduced by the internal legislator, it is appropriate to give a few brief references to the reasons that led the Constitutional Court to take this decision. Since coming into force, the decreto legislativo no 28

dopo il "decreto del fare" (decreto-legge 21 giugno 2013, n. 69)', in A. Maietta ed, *La nuova mediazione civile e commerciale* (Padova: CEDAM, 2014), passim; E. Cavuoto, 'La nuova mediazione obbligatoria: una scommessa già persa?' *Giusto processo civile*, 531 (2014); G. Reali, 'La mediazione obbligatoria riformata' *Giusto processo civile*, 729 (2014); G. Spina, 'Le novità introdotte alla disciplina della mediazione civile dal c.d. decreto del fare convertito in legge' *Nuova procedura civile*, 36 (2013); A.D. De Santis, 'La mediazione finalizzata alla conciliazione delle controversie civile e commerciali' *Il Foro italiano*, V, 265 (2013); F. Ferraris, 'La novellata mediazione nelle controversie civili e commerciali: luci e ombre di un procedimento «revitalizzato»' *Contratti*, 951 (2013); U. Carnevali, 'Nuova mediazione civile e commerciale e «decreto fare»' *Contratti*, 977 (2013).

²³ On these profiles, reference should be made to P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), passim, 28. See also: G. de Vergottini, *Il dialogo transnazionale fra le Corti* (Napoli: Editoriale Scientifica, 2010), passim; G. Vettori, 'Diritti, principi e tecnica rimediabile nel dialogo fra le Corti' *Europa e diritto privato*, 237-256 (2011); R. Caponi, 'Giusto processo e retroattività di norme sostanziali nel dialogo tra le Corti' *Giurisprudenza costituzionale*, 3753-3777 (2011); R. Cosio and R. Foglia eds, *Il diritto europeo nel dialogo delle corti* (Milano: Giuffrè, 2013), passim.

has received numerous criticisms by the doctrine;²⁴ some judges of merit then submitted various questions of legitimacy to the Court, mainly in relation to the obligatory nature of the mediation procedure and the consequent non-admissibility of the claim filed in court without the prior experience of the reconciliation procedure. Following eight re-ordination orders, the Constitutional Court declared the non-compliance of the legislative novella with Arts 76 and 77 of the Constitution. The latter Articles govern the cases in which the Government exercises its legislative function. In particular, Art 76 of the Constitution provides that the government cannot be delegated the legislative function, ‘if not with determination of principles and criteria and only for a limited time and for defined objects’. As a ‘*decreto legislativo*’, decreto legislativo no 28 was issued by the Government by virtue of an enabling act, namely, Art 60 of the enabling act (‘*legge delega*’) of 18 June 2009 no 69. The Constitutional Court found that there was no reference to the mandatory reconciliation procedure in the enabling act. The same Court also analysed in detail Directive 2008/52/EC and held that even in the latter there were no references to the obligation. Art 5, para 2 of Directive 2008/52/EC provides that

‘this Directive is without prejudice to national legislation which makes recourse to mediation mandatory or subject to incentives or sanctions, both before and after the start of the judicial proceedings, provided that this legislation does not prevent the parties from exercising the right of access to the judicial system’.

In short, from the European discipline ‘no explicit or implicit option is envisaged for the compulsory nature of the institution of mediation’; European law

‘does not impose or even recommend the adoption of the mandatory model but limits itself to establishing that national legislation which makes recourse to compulsory mediation remains unaffected (...). The EU regulations are neutral with regard to the choice of the model of mediation to be adopted, which remains delegated to the individual Member States, provided that the right to appeal to the courts competent for the judicial definition of disputes is guaranteed’.

In a consistent sense, the Constitutional Court also recalled the resolution of the European Parliament of 25 October 2011 (2011/2117-Ini) and the resolution of the European Parliament of 13 September 2011 (2011/2026-Ini). Lastly, the Constitutional Judge reviewed a precedent of the Court of Justice and, more precisely, the ruling of 18 March 2010, delivered in Joined Cases C-317/08, C-318/08, C-319/08, and C-320/08. In this ruling, at para 65, it can be read that

²⁴ For example: G. Scarselli, ‘L’incostituzionalità della mediazione di cui al d.leg. 28/10’ *Il Foro italiano*, V, 54 (2011).

‘In the first place (...) no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives’.

Nevertheless, according to the Constitutional Court, this does not deny the normally optional nature of the reconciliation proceedings. What the Court of Justice stated in para 65

‘cannot constitute a precedent, either because it is an *obiter dictum*, or because the aforementioned ruling intervenes on a conciliatory procedure concerning a well-circumscribed type of dispute (those concerning electronic communications services between end users and providers of such services), where the mediation discussed here concerns a significant number of disputes, which makes the two procedures not comparable with the structural differences that characterize them’.

In European law, therefore, according to the Italian Constitutional Court, there is no general principle that imposes the obligation of ADR procedures.

In conclusion, the Constitutional Court declared a conflict with Arts 76 and 77 of the Constitution, due to the excess of delegation of every provision of decreto legislativo no 28, which referred to the binding nature of the reconciliation procedure. This explains why, a few years later, the Italian legislator was able to reinstate the same provisions in a new regulatory provision: this time a ‘*decreto legge*’ was issued, then converted into a ‘law’ by the Parliament, in accordance with Arts 76 and 77 of the Constitution.

The position taken by the Court of Justice, with the decision of 14 June 2017, C-75/2016, continues, in a certain sense, the ‘dialogue’ with the Italian Constitutional Court on the mandatory nature of ADR proceedings. Before discussing the position of European Judges on this point, it is worth mentioning two aspects of decreto legislativo no 28, censured by the Court of Justice, since they are incompatible with the Directive on consumer ADR. In particular, according to the Court of Justice, in an ADR procedure between professionals and consumers, the latter cannot be obliged by national legislation to be assisted by a lawyer or a consultant (para 65); moreover, the Member States cannot restrict the right of consumers to withdraw from the mediation procedure only if they demonstrate the existence of a justified reason to support that decision (para 69). Therefore, penalties of any kind cannot be imposed on the consumer who has chosen to withdraw from the procedure in the context of subsequent judicial proceedings. Moreover, these provisions are also reported in the internal regulatory act transposing the 2013/11/EU directive, respectively

in Art 141-*quater*, para 4, letter *b*), of the Consumer Code, and Arts 141-*bis* and 141-*quater*, para 5, letter *a*), of the Consumer Code.

However, the most important question concerns the mandatory nature of the mediation procedure. Art 5, para 1-*bis*, of decreto legislativo no 28, provides that the mediation procedure is a condition for the prosecution of a legal action relating to the dispute that is the subject of the procedure itself. This rule can also be applied, as mentioned, to disputes between professionals and consumers in some sectors (for example, in the banking, financial, and insurance sectors). Thus, the Court of Justice had to establish whether this provision is in conflict with the Directive on consumer ADR, which in Art 1 provides for consumers to present complaints ‘on a voluntary basis’ before ADR bodies *vis-à-vis* professionals. The Court of Justice has explicitly considered it appropriate to reaffirm the principle that imposes a logical-systematic interpretation of each provision.

‘(I)n interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part’ (point 47).

The meaning of the term ‘on a voluntary basis’, therefore, has been identified not only in light of the wording of the directive as a whole, but also in relation to Directive 2008/52/EC. In both directives, the Member States are allowed to adopt legislation that requires mandatory recourse to mediation,

‘whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system’.

In this perspective, Recital 13 of Directive 2008/52/EC has significant hermeneutic value, for which the voluntary nature of mediation consists in the fact that ‘the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time’. The interpretation given by the Court of Justice is also axiologically oriented, as the optional or compulsory nature of the mediation system is not relevant; however, it is necessary to implement the value expressed by the superordinate principle (also of a constitutional nature), that is to say, the parties’ right of access to the judicial system. Therefore, the problem is to understand, in light of the principle of proportionality, to what extent the provision of an ADR procedure as a condition for the admissibility of legal proceedings may affect the principle of effective judicial protection.²⁵ The Court of Justice, by virtue of this principle, admits that fundamental rights, since

‘fundamental rights do not constitute unfettered prerogatives and may

²⁵ On these issues, see: Joined Cases C-317, C-318, C-319 and C-320/08 *Alassini v Telecom Italia Spa*, [2010] ECR I-2213.

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' (point 54).

In the legislation submitted to the Court of Justice, this proportionality with regard to the purpose can be ensured, *inter alia*, by the non-binding nature of the ADR procedure and by the fact that the limitation and expiry periods remain suspended during the ADR procedure. Furthermore, it is necessary that the ADR procedure drawn up by the internal legislator does not entail a substantial delay for the filing of a judicial action and does not generate substantial costs for the parties.

IV. The Principle of the Physiological ADR in Italian-European Law

Although, *prima facie*, the recent orientation of the Court of Justice seems to contrast with that expressed by the Italian Constitutional Court in the aforementioned ruling of 24 October-6 December 2012 no 272, the analysis of the respective motivations reveals a common argumentative path. In fact, both Courts propose a systematic and axiologically oriented interpretation of the Italian-European discipline; both Courts operate a balancing of the principles involved, inspired by the principle of proportionality, in order to implement the values that form the legal system. The two rulings on the compulsory nature of ADR procedures, on the other hand, are opposed, because there are several questions to each of the Courts: the Court of Justice assessed the compliance of the internal standard with respect to the two directives mentioned, in light of the European law; the Italian Constitutional Court has assessed the conformity of the particular legislative act of transposition, the 'decreto legislativo', with respect to the 'enabling act' issued by the Italian Parliament, in light of Arts 76 and 77 of the Constitution and of European law. Both rulings, however, contribute to the correct interpretation of the entire Italian-European discipline of ADR systems and seem to place themselves, in a relationship of continuity, in the correct spirit of 'loyal collaboration between the Courts'. In fact, as substantially affirmed by the Italian Constitutional Court (and shared by the Court of Justice), European law does not impose any obligation on Member States to make ADR procedures mandatory; consequently, the choice on the obligation of these procedures must be adopted by a legislative act of the Parliament and, in the case of delegation to the Government, this choice must be made explicit in the 'enabling act'. Moreover, as substantially stated by the Court of Justice, once the State has opted for the mandatory ADR procedure for some disputes between

professionals and consumers, it is necessary to assess, proportionately, whether this choice reasonably limits the fundamental right of access to justice.

The guidelines expressed by the Courts in the rulings analysed are relevant from many points of view, although, as mentioned in the previous paragraph, they do not solve all the problems of coordinating the various transposing legislations.

In the Italian-European legal systems, the principle of the 'physiological alternative resolution of disputes' has been affirmed and this emerges, among other things, also from these rulings: the 'alternative' composition (in reconciliation or decision-making) of disputes is a value, but the fundamental principles involved from time to time, expressive of higher values, must always be respected. The reference, primarily, is to Arts 6 and 13 of the European Convention on Human Rights, Art 47 of the Charter of Fundamental Rights of the European Union, and Arts 24 and 111 of the Constitution. In order to resolve the normative antinomies that have been taken into account, however, it is indispensable to also keep in mind the principle of 'effective protection of the weak contractor' and the principle of substantial equality: the first considers the best protection for the consumer; the second one excludes unreasonably deteriorating treatments for different categories of consumers.

The jurisprudential guidelines described so far also contribute to the ongoing debate on the identification of the general principles applicable to any system for negotiating settlement of disputes as well as the careful balancing of the parties' interests, especially when weak contractors are involved. The principle of 'physiological alternative dispute resolution', if correctly understood, constitutes a useful reference parameter for identification of the applicable discipline.

V. Concluding Findings: The Problems of Coordination Remain Unresolved

On the matter brought to the Court of Justice,²⁶ however, in the Italian doctrine²⁷ some additional doubt was raised regarding the (mere) question on the compulsory nature of the procedure. In brief, it has been observed that the problem of the incompatibility of domestic law with the Directive on consumer ADR does not lie so much in the mandatory nature of the procedure. The problem is in the fact that the application of decreto legislativo no 28 imposes

²⁶ It is worth mentioning that the Tribunale di Verona 28 September 2017, *Il Foro italiano*, I, 328 (2018), with a note by A.M. Mancaloni, 'Mediazione obbligatoria nelle controversie dei consumatori: le ricadute di Corte giust. causa C-75/16', in application of the principles indicated by the Court of Justice, considered that 'the consumer can appeal to the body of mediation without the assistance of the lawyer and may, after the first meeting, withdraw even in the absence of a justified reason without suffering detrimental consequences'. *Contra* Tribunale di Vasto 9 April 2018, available at www.dejure.it, considers the assistance of the lawyer to be necessary, arguing both from the textual provision of the provision and the particularly low cost of such assistance.

²⁷ N. Scannicchio, n 13 above, 555.

rules that are very different from those imposed to protect the consumer. In fact, decreto legislativo no 28 does not refer at all to the subject of consumption and, therefore, does not consider the specific needs of consumer protection or, in effect, of the market. The consequence is that, in Italy, the discipline is not uniform. In general, consumers can make use of the ADR models referred to in the Directive on consumer ADR, with all the protections foreseen, and, even if they do not opt for ADR, they can still go to court. On the other hand, in the banking, financial, and insurance sectors, consumers can use (even or only?) the ADR models provided by the decreto legislativo no 28. These models, however, have a different structure, a different function and, therefore, different rules. Under decreto legislativo no 28, these consumers, before referring to a judge, must have gone through the ADR procedure, because the latter is a condition for obtaining the judicial request. However, if that were the case, what would be the use of the Consumer Code in the banking, financial and insurance sectors? The aforementioned doctrine called for the Court of Justice to answer these questions, too; the recent ruling, however, does not take a position on the point.

These aspects lead to a critical consideration of the recent sentence issued by the Court of Justice. Even in Italy (as in many other jurisdictions), an articulated ADR system has been consolidated. The reference, in addition to the legislative provisions already cited, can be made to the decreto legge no 132 of 2014, entitled 'Urgent measures for the de-disciplinization and other measures to define the backlog in civil trials'. A process of 'dejudicialization' is currently underway, aimed at encouraging systems that allow for the resolution of disputes without contacting the judicial authorities. The functions of all the current obligatory procedures for out-of-court dispute resolution must be compared with the objectives of the Directive on consumer ADR. Without a doubt, the latter aims to promote new forms of ADR, but takes into account, first of all, the need to protect the weak contractor, in application of Arts 2 and 3 of the Constitution. Therefore, if it is accepted that mediation is mandatory for consumers in the banking, financial and insurance sectors, these consumers, like all others, must also be granted the protections provided for in the Directive on consumer ADR.