The Fake Implementation of a Fake Consumers' ADR Directive? A Case Study on Rights' Enforcement by Regulatory Powers in Italy

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Abstract

This paper considers the ADR Directive 2013/11 within the recent EU framework which entrusts enforcement of individual rights to regulatory powers of standardization and certification, administered by public and private bodies, under the supervision of European Authorities. Such 'regulatory private law' should circumvent the difficulties in creating a European uniform law of contract. The essay moves from the CJEU decision C-75/16 as the basis of a common interpretation to consider certification of Consumer ADR entities as a general condition for application of the entire directive, included the procedural and substantive rights of the parties. The Italian model of (strict) mandatory ADR shows that the outcome of this approach, as to rules' harmonization, rights' enforcement and competition's protection, is deeply negative at least in the case of compulsory mediation. It is submitted that there is no statement in the decision that allows the mainstream interpretation. The CJEU reached its conclusions about the consumers' rights to withdraw and self-defense on constitutional grounds well different and separated from those allowing compulsory consumer mediation and the registration pre-requirement. The resulting findings seem to show that some conclusions about 'regulatory private law', namely the attitude of the new trend to ensure administrative enforcement of individual interests *sub specie* of private rights of consumers, should be reconsidered.

I. Introduction. The Regulatory Approach to the Consumer ADR Industry. The Restriction to the Field of Application and the Prejudice to the Harmonization Range of the CADR Directive

According to the Court of Justice of the European Union (CJEU) decision in case C-75/16,[1] the Directive 2013/11/EU[2] (Consumer Alternative Dispute Resolution Directive, hereafter CADR Directive) does not apply to all disputes involving consumers, but only to procedures that satisfy three cumulative conditions. The third condition is that

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[1] Case C-75/16 *Livio Menini and M. Antonia Rampanelli* v *Banco Popolare Società Cooperativa*, Judgment of 14 June 2017, available at www.eur-lex.europa.eu.

[2] 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 L165/63.

> 'the procedure must be entrusted to an ADR entity, that is to say, in accordance with Art 4(1) (h) of that directive, an entity (…) which is entered on the list drawn up in accordance with Art 20(2) of Directive 2013/11, a list which is notified to the European Commission'.

The Court declared such condition to be a 'pre-requirement' for application of the CADR Directive.[3]

However, in applying the above decision, the referring court observed that Art 7 of the Directive, which allows consumers to stay in the proceeding without lawyers' assistance, was enforced by the CJEU 'irrespective of the nature of the procedure', whenever it is initiated by a consumer. Therefore, according to the national court the rule applies also to procedures and entities that did not register according to the CADR rules.[4]

In the referred case, the Italian decreto legislativo 4 March 2010 no 28, regulated the concerned register, in alleged implementation of the Directive 2008/52/EC.[5] Contrary to Arts 7 and 9 of the CADR Directive, this last procedure requires legal assistance and provides for a punitive treatment in case of withdrawal and/or refusal of a proposed settlement. Two subsequent lower Courts' decisions followed the decision of the referring Court.[6]

This paper discusses the *legal* consequences of the registration pre-requirement and criticizes its extension to the entire field of application of the CADR Directive to the extent that the entry in such register becomes a condition

[3] CJEU case C-75/16, n 1 above, para 40. The first and second requirements are: '(i) the procedure must have been initiated by a consumer against a trader, (ii) in accordance with Art 4(1)(g) of directive 2013/11, that procedure must comply with the requirements laid own in that directive and, in particular, in that respect, be independent, impartial, transparent, effective, fast and fair (…)'.

[4] Tribunale di Verona 28 September 2017, available at https://tinyurl.com/y6g3genb (last visited 28 May 2019).

[5] European Parliament and Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial disputes [2008] OJ L136/3.

[6] Tribunale di Vasto 9 April 2018, available at www.ilcaso.it. In this case the Court accepted the redundancy of the register pre-requirement. However, according to the judge, the amount of the lawyers' fee is not so high as to hinder the parties' access to justice. Verona Court of first instance (n 4 above) extends instead the CADR rule about legal assistance to the case of assisted negotiation. As a matter of fact, according to the legge 10 November 2014 no 162, the assisted negotiation is a 'contract by which the parties commit themselves to cooperate in good faith so as to put an end to their dispute amicably with the assistance of their lawyers'. See E. Silvestri, 'Too much of a good thing: Alternative Dispute Resolution in Italy' 21 *Nederlands-Vlaams tijdschrift voor Mediation conflict management*, 74, 81 (2017). In all claims under fifty Euros, the claimant has a duty to propose an attempt for coming to an agreement. It is therefore a legal obligation to contract in good faith. However the said statute re-named this mandatory offer/ acceptance practice as a 'legal procedure' and made it mandatory. As far as parties, assisted by their lawyers, ought to seek an agreement, this is exactly the case of 'direct negotiation between the consumer and the trader' where, according to Art 2 (e), the CADR Directive, does not apply. It is not a 'mediation' either. However, being a 'procedure' and being 'mandatory', assisted negotiation became an 'ADR procedure' in Italy. See N. Scannicchio, *Accesso alla giustizia e attuazione dei diritti* (Torino: Giappichelli, 2016), 175.

(also) of the substantive and procedural rights of the consumer party. Such argument will be developed around three grounds. These are listed below in order of increasing generality. They are:

(i) The CJEU statement about the registration's requirement regards only one of the questions referred to the Court, namely the one about the vertical relationship between the two directives about 'civil and commercial' and 'consumer' Alternative Dispute Resolution (ADR). Its generalization to the other problems submitted by the referring judge (namely, the right to withdrawal and the possibility of self-defense) weakens the position made to consumer parties by the directive procedural and substantial rules. It is submitted that the Court resolved different questions by using different premises.

(ii) The reduction of the harmonization goals, up to complete failure of the directive effectiveness. Such effect may follow whenever a voluntary CADR system concurs with a mandatory one, under different rules. Both European mediation directives allow Member States to enact compulsory forms of dispute resolution. The generalization of the certification condition enables States to keep outside the CADR Directive field of application as many entities and registers, as they like. In fact, it reduces the effect of the CADR Directive to the State duty to enact a register that had already been 'suggested' by two recommendations. However, as shown by the Italian model, this asset becomes fatal to the directive effectiveness any time its own regulations compete with a mandatory ADR system, where different rules and a different register apply.[7]

(iii) Both the above-mentioned difficulties stem from the same reason, namely in the connection between the generalization of registration pre-requirements to the entire content of the directive and the full regulatory approach followed by the Commission in framing it. The Commission applied to entities the same means generally used to regulate an industry.[8] This is self-evident in the transformation of procedural and substantive positions and 'principles' in 'quality criteria' of the service (procedure) and the product (settlement) to be supplied. Following such an approach, the certification's system becomes the cornerstone for regulation of entities, access to CADR and organization of the parties' rights and duties. Such premise strongly influences the reasoning about the relationship between the two mediation directives 2008/52/EC and 2011/13/EU. This relationship is conceived as if they regulate two different industries on the same market.

[7] This point is discussed in para IV. See E. Storskrubb, 'Alternative Dispute Resolution in the EU: Regulatory Challenges' 24 *European Review of Private Law*, 7, 19-26 (2016) about the particular difference between these two forms of ADR in consumer disputes. I have dealt analytically with the structural differences that voluntary and mandatory CADR present in the most important rules of the directive procedure. See N. Scannicchio, 'Compulsory Consumer ADR and the effectiveness of the European Directive2013/11/EU. European Harmonization or Italian Colors?', in S. Leible and R. Miquel Sala eds, *Legal Integration in Europe and America* (Jena: JenaerWissenschaftliche Verlagsgesellschaft, 2018), 178-193.

[8] H. Schulte-Nölke, 'The Brave New World of EU Consumer Law –Without Consumers, or Even Without Law?' 4 *Journal of European Consumer and Market Law*, 135 (2015).

However, the transformation of substantive and procedural rules in standard features of a product that can be 'regulated' by competent agencies, moves their content and enforcement from the civil (contractual) law to administrative powers. Such 'government' of private rights had been labeled as 'regulatory private law'.[9] It was in fact already ostensible that the difficulty to reach a uniform law of contract, had led the Commission to govern economic behavior through regulations enacted and enforced by European and national authorities.[10]

Therefore the analysis of the two grounds defined above, under (i) and (ii), tries to offer insights in the *modus operandi* of such development and related merits and risks. It is submitted that the said construction does not deal with the necessity that a civil right regards a relation among individuals on the market and that its relationship to the public power is subject to the rule of law. This being a paramount topic, the conclusive paragraph is devoted to showing the specific devices by which this deprivation effect operates into the CADR Directive, as an example of a wider problem.

II. The Registration of CADR Entities in the Scholarship and in the Italian CADR Model

Before the Court's pronouncement, most legal scholars – generally the more sympathetic to the Commission effort – did not devote much interest to the registration requirement.[11] Part of this attitude was perhaps due to the fact that

[9] See H.W. Micklitz, 'The Transformation of Enforcement in European Private Law: Preliminary Considerations' 23 *European Review of Private Law*, 491-492 (2015). The whole issue four of this volume is devoted to this topic: see O. Cherednychenko, 'Editorial - Public and Private Enforcement of European Private Law: Perspectives and Challenges' 23 *European Review of Private Law*, 481, 483. See also, in critical perspective, N. Scannicchio, n 6 above, 159; Id, n 7 above, 212.

[10] On this point see H. Schulte-Nölke, n 8 above.

[11] It is clear that a pre-requirement is a restriction to the operation of rules. It implies that the scope of the rule will be limited. Therefore, under such pro-active perspective, it will be presumed that entities shall willingly satisfy all pre-requirements. This position is well and largely summarized by P. Cortés, 'The New Landscape of Consumer Redress', in Id, ed, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press, 2016), particularly 20, 34. See also C. Hodges et al, *Civil Justice Systems: Consumer ADR in Europe* (Oxford: Hart Publishing, 2012). N. Creutzfeldt, 'Implementation of the Consumer ADR Directive' 5 *Journal of European Consumer and Market Law*, 169–175 (2016), seems to suggest that Member States have a duty 'to provide ADR entities for nearly every c2b dispute'. According to M. Piers, 'Europe's Role in Alternative Dispute Resolution: Off to a Good Start?' *Journal of Dispute Resolution*, 269 (2014): 'In the Directive on Consumer ADR, the Commission *imposes* rules regarding ADR procedures (…) – and – (…) goes further, requiring that the Member States provide the option for the consumer to submit a dispute to ADR'. ibid 276-277, 301. See also, F. Tereszkiewicz, 'The EU Online Dispute Resolution Platform for Consumer Disputes: a step towards an EU Digital Single Market' 4 *judicium.it*, 1-11 (2016). All these writers raise the impression that the directive applies to almost all consumer complaints.

Case C-75/16 is now enshrined in the Judicial Training Project, co-funded by the justice programme of the European Union, *Roadmap to European Effective Justice (Re-Jus): Judicial*

many considered the CADR Directive as a signpost of the changing asset between EU and private law, as mentioned above in the paper.[12] The fact that a pre-condition, inserted among the monitoring task of the managing Authorities, might make all the concerned rights subject to the will of the authorities, ADR entities and concerned professionals, may seem striking.[13] However, in front of the solemnity of the principles and the magnitude of expectations raised by the preparatory work, one might not even notice it. This conclusion seems consistent neither with the enthusiasm shown by its supporters and declared in Arts 1 and 3 of the Directive nor with its promotion and harmonization aims. In fact, the celebrated innovation would add almost very little to the previous recommendations, namely, the duty to institute a register that might remain empty (as often had the one already considered–but not imposed – in the previous provisions).[14]

Therefore, many saw in the certification system a way to create trust in consumers and incentives for the entities (eg access to the Online Dispute Resolution, ODR, platform, increased reliability, etc). Some noted that this device might reduce the number of available entities. These authors did not tribute high priority to the nature and legal significance of the listing requirement.[15] Only among a small number of civilians and private international law experts, generally critical both with the directive and with its results, it was found the statement that the Directive is applicable *only* to disputes to be resolved '(…) through the intervention of an ADR entity (…) that is listed in accordance with Art 20(2)'.

Training Ensuring Effective Redress to Fundamental Rights Violations, available at www.rejus.eu. However, notwithstanding the coordinator partner of the research being the Italian University of Trento, such report does not note the radical restriction imposed by the certification requirement to the application of the directive. See *Re-Jus Casebook, effective Justice in Consumer Protection,* 162, 169-72 (2018), available at https://tinyurl.com/yxpy7m2x (last visited 28 May 2019).

[12] See ns 4-8 above. Almost all the quoted articles contain a section about ADR, where the general impact of the CADR Directive is taken for granted.

[13] For a critical appraisal of the directive's impact see E. Silvestri, n 6 above, 88; G. Wagner, 'Private Law Enforcement Through Adr. Wonder Drug Or Snake Oil?' 51 *Common Market Law Review*, 165, 176-177 (2014); N. Scannicchio, 'La risoluzione delle controversie bancarie tra ADR obbligatoria e ADR dei consumatori' *I contratti*, 540, (2016).

[14] Commission Recommendations 98/257/EC of 17 April 1998, [2008] OJ L115/31 and 2001/310/EC of 19 April 2001, [2001] OJ L109/56. S*ee* again E. Silvestri, n 6 above, 86.

[15] This aspect is present in A. Biard, 'Monitoring Consumer ADR Quality in the EU: A Critical Perspective' 2 *European Review of Private Law*, 171 (2018), who criticizes the directive as unable to supply clear information about certified and uncertified entities. See also A. Fejős and C. Willet, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' 24 *European Review of Private Law*, 33, 34, 44; J. Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' 24 *European Review of Private Law*, 81, 95-97; R. Miquel Sala, 'ADR in Germany Following the Verbrauchertsreitbeileigungesetz', in S. Leible and R. Miquel Sala eds, *Legal Integration in Europe and America* (Jena: JenaerWissenschaftliche Verlagsgesellschaft, 2018) 298-299. Some commentators, for example, support the introduction of a duty to participate of traders. This conclusion, should not the Directive apply in a general fashion, would imply the desertion of all professionals from the compliant entities.

This was considered a 'strong, hidden restriction to application of the directive'.[16]

After the decision in the case C-75/16, the approach of the experts does not seem to have changed much. The perceived effect of the decision is that it allows Member States to set up a mandatory complaint (also) in the consumer field and confirms the freedom of withdrawal and of legal assistance in consumers' ADR. However, commentators did not insist very much upon the dependence of these two last features from a certification pre-requisite. Therefore it is often difficult to ascertain whether the limitation of the duty to complain to certified entities implies the general application of the other two selected features to any consumer dispute, or accepts that, in case of want of registration under Art 20, also the right to withdraw and to self-defense shall be excluded.[17]

The Italian model of mandatory consumer complaints follows the last alternative. Some scholar defined it as '(…) a robust, if not coercive, form of compulsory mediation that has all the markings of an arbitration process'.[18] Here, the CADR implementation decreto legislativo 6 August 2015 no 130 applies

[16] M.B.M. Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' 24 *European Review of Private Law*, 61, 71 (2016). 'Any ADR institution that does not meet one or more of these requirements falls outside the definition of an ADR entity. The result is not that such an ADR institution is illegal or that its decisions cannot bind the parties, but merely that the ADR Directive is not applicable'.

[17] The judgment did not receive much scholarly attention, even in Italy. N. Silvestri, n 6 above, 87, has commented it in English as a decision that 'does not strike one as an example of crystal-clear legal reasoning'. An extensive comment of the case is in N. Scannicchio, n 6 above.

[18] J.M. Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' 37 *North Carolina Journal of International Law and Commercial Regulation*, 981, 1004 (2012). This definition regards the first version of the Decree (decreto legislativo 4 March 2010 no 28). The Italian Constitutional Court struck down this version, n 9 above. In that edition, the parties could not withdraw from the procedure but in case of a 'justified reason'. The final version of the Decree reduced the condition to a 'first encounter' between parties, where they must intervene personally and may decide whether to initiate the procedure or refuse to continue, without justification. See however n 4 above. This Italian solution has been presented as a model that that satisfies the principle of access to justice, without sacrificing the incentive to mediate (see G. G. De Palo and R. Canessa, 'Sleeping – Comatose Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union' 16 *Cardozo Journal of Conflict Resolution*, 713, 752-753 (2014). However, Italian ADR supporters generally forget to inform the international audience that, if parties decide to continue, (and, according to many judges, even if they do not, *see* text above) the duty stands as it was in the first version. Therefore, fines, double taxation, charges of further evidence, supplementary fees and disadvantages (imposed in the subsequent trial) shall affect the *willing* parties (those who decided to continue). Albeit, the unwilling ones will be freed from the barrier to sue, without consequences. This seems a very singular way to incentive parties to mediate. See also the study of the European Parliament, Directorate-General for Internal Policies, "Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of mediations in the EU' 41-42 (2014), available at https://tinyurl.com/n30aes6 (last visited 28 May 2019). In the Menini case, the Italian Government almost falsified the content of the law, assuming that only the absence to the first mandatory meeting triggers all charges. Simple reading both versions of the Decree disproves this conclusion. See n 34 below. For an extended description of the Italian mediation system before and after the CADR Directive see N. Scannicchio, n 6 above, 1-202. For a full description in English of the implementation process in Italy, *see* Id, n 4 above, 147-219.

to voluntary mediation only. This Statute leaves the bulk of consumers' complaints under the previous compulsory system,[19] which had been devised for the civil and commercial mediation (decreto legislativo 4 March 2010 no 28, so called[20] implementation of the directive 2008/52/EC). That system relies on its own register and uses a procedure not compliant with the new directive. This arrangement should justify the conclusion that, under the European Court pre-requisite, the CADR Directive procedural rules (in particular as to legal assistance and right of withdrawal) should depend entirely on the register where the concerned ADR entity is certified.[21] As discussed above, a number of judgments rejected such conclusion. However, to the extent that this general approach seems accepted in Italy as normal CADR practice and European Institutions did not raise any objections, this paper will consider the wider construction of the certification requirement as the mainstream opinion on the CJEU ruling.[22]

It is worth stressing that many foreign studies of the Italian mandatory system presume that the content of the 'mandate' is the power of the Court either to enforce a clause of the contract or to submit parties to a preventive attempt to settle, when the judge thinks it is reasonable. However, the Italian mandatory mediation is a *statutory*, not a *judicial* one. The Decree provides the judge with a power that is supplementary and additive to the condition to sue. According to the Decree, the power of the Court arises in cases excluded from that condition. Where the Decree applies instead, the duty is dependent solely on law. The Court may send back the case to the 'legal' mediation of the Decree, either on its own motion or on party request. This is different from the 'judicial' mediation provided for by the Code of Procedure, which may resemble the model of the

[19] The Decree covers financial, banking and insurance contracts. It may however apply to any contract submitted to a consensual mediation clause. ADR is mandatory also in telecommunication, energy and gas sectors, under procedures that comply with the directive. However, the Decree influenced also those sectors. For example, both procedures admit now also complaints of the professional against consumers. See para IV and n. 48-51 below.

[20] The Italian Act of delegation for enacting the mediation Decree, recalled the legge 18 June 2009 no 69, Art 60. That law had instituted ADR procedures in the banking, financing and corporations' sectors. The same Italian Constitutional court denied that the Government was implementing the directive 2008/52/EC. The Court stated, 'The option in favor of the mandatory mediation model, undertook by the contested rules, cannot find ground in the referred provisions (…)': Corte Costituzionale 6 December 2012 no 272, *Rivista di Diritto Tributario*, 75 (2013), para 12.2. See also Italian Bar Association Council, 'Consulta chiarisce che obbligatorietà non è imposta da UE', press release 6 December 2012, available at https://tinyurl.com/yywow6ga (last visited 28 May 2019). On these bases, the CJEU declared the *non sequitur* of a request for preliminary ruling about the implementation of Directive 2008/52/EC. The referring court doubted that the mandatory obligation, as ruled in Decree 2010/28, was contrary to the freedom of access to justice. CJEU, case C-492/11 *Ciro Di Donna* v *Società imballaggi metallici Salerno S.r.l.*, Judgment of 27 June 2014, available at www.eur-lex.europa.eu.

[21] See E. Silvestri, n 6 above, 89. See N. Scannicchio, 'La risoluzione non giurisdizionale delle controversie. Rimedi alternativi o diritti senza rimedio?' *Foro italiano*, V, 570 (2017).

[22] After the CJEU decision, lawyers, ADR entities, Authorities and most national courts of first instance simply continued as if the case had never been decided. See para IV and n 33 below.

multi door courthouse.[23] The 'judicial' mediation rests under control of the Judge, lies on different rules and relies on consent. Italian judges rarely use the powers to mediate framed by the code of procedure. This habit is even more pronounced in the light of the fact that their dockets contain too many undecided case (judicial mediation requires the time of the judge). However, instead of the judicial attempt (or procedure), that presumes the actual jurisdiction of the Court, many judges use the legal duty to mediate (that is a barrier to access to the Court) as if it were a judicial attempt.

Consequently, many judges refuse to consider the party choice not to continue after the first meeting as a remedy to the barrier. Notwithstanding a clear decision of the Council of State, many courts decided that the first encounter must be a 'true encounter', as if it were ruled by the Procedural Code and were held before them. In such fashion, parties should always try at least to attempt the mediation in order to respect the procedural requirements of good faith.[24]

III. The Register Pre-Requisite in the CJEU Decision. The Uncertainty on the ADR Directives' Field of Application and the 'Law of the Registry'

One common critique to the decisionC-75/16 is that it does not resolve the main issue linked to the uncertainty of the text of the directive: to separate the range of application between the two European provisions insisting on the same matter of ADR. The certification in different registers of entities operating under each directive becomes the answer to such unresolved problem.[25] However, the

[23] See E. Silvestri, n 6 above, 81.

[24] The Italian *Consiglio di Stato* is very similar to the French *Conseil d'etat*. It is the administrative counterpart of the Italian *Corte di Cassazione* in civil law cases. It decides all final appeals from administrative courts of first instance. See Consiglio di Stato 15 November 2015 no 5230, *Diritto e Giustizia*, 58 (2015). The Council decided that this attitude is in 'front-facing collision with the letter of the law'. This judiciary attitude results in a development very similar to the approach of English courts after Milton Keynes (see J.M. Nolan-Haley, n 18 above, 999, *commenting Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA Civ. 576). Such approach is much discussed in England, under the label of mandatory mediation. In fact, it changes a voluntary choice into an obligation, by transferring to the Court the parties' power to decide whether it is reasonable or not to attempt a settlement. See Hong-Lin Yu, 'Carrot and Stick Approach in English Mediation - There Must Be Another Way' 8 *Contemporary Asia Arbitration Journal,* 81, 112 (2015).

Such British 'mandatory' mediation concerns the judges' power to apply the good faith principle to a mediation procedure that parties had already agreed, while in Italy it is the statutory rule to compel the parties, even in the case they had agreed on it in a contract. In submitting one party to the judicial risk he had chosen to avoid, under the threat of sanctions, these decisions create one of the greatest obstructions to access of justice and diffusion of ADR. That is, the fear that the same judge that imposed a failed attempt to settle, will decide the case. See J.F. Roberge and D. Quek Anderson, 'Judicial Mediation: From Debates to Renewal' 19 *Cardozo Journal of Conflict Resolution*, 613, 625-6 (2019).

[25] The confusion and contradiction in paras 1 and 2 of Art 3 create this issue. See E.

Directive rule about certification (Art 20), alike the one about mandatory participation, does not track a sharp edge. As the main aim of this paper is to show that the CJEU conclusion about the substance of the procedure has been decided on a different ground than the registration pre-requisite, Art 20 will be discussed briefly in what follows.

The fact that the provision about registration in not exactly made with black letters law is well shown by the lack of any clear reference to certification as a pre-requisite, of application of the procedure and of the rights of the parties. It is, in fact, required to the entities. Art 1 binds States to enact procedures that respect a number of basic principles. It does mention neither registers nor even entities. Arts 2 and 3 regulate the 'field of application' of the Directive. This should be the right place to enact conditions for such application.[26] However, it does not refer to any certification requirement. Here, the pre-requirement of the 'redress mechanism' is to be of 'high quality, transparent, effective and fair (...)'.

The equivalence between 'ADR entities' and 'entities registered according to Art 20', comes out in the definitions' paragraph (Art 4). After that, the wording 'ADR entities' is repeated as a litany all along the Directive.

However, Art 20 lies in another section of the Directive. This section regulates the relationship between States, Authorities and entities. It affects the conditions for management of the ADR system. Its reading may suggest that it requires certification in order to exploit incentives and advantages set up by the Directive. Art 20 does not regard the application of the procedural and substantive right and duties of consumer and entities in the ADR proceeding.

It appears therefore a purely speculative option to decide whether the wording 'ADR entity' is used as a synonym of the lengthy wording in Art 4 (h), in order to subordinate any effect of the Directive rules to the occurrence of a registered entity. In fact, it might represent as well an elliptical *resume* of the State substantive obligation to ensure that '(...) consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms'. What seems beyond dispute is that the directive does neither forbid, nor compel to construct the certification as a general pre-requirement of application. However, at the same time, it invokes an interpretation that implements the States' main obligation. This obligation is contained in Arts 1 and 2, not in Art 20 (2).

In order to solve this dilemma it is useful to detect the reason why the European Court shared the regulatory approach of the Commission and chose to construct the registration as a general pre-requirement. As noted above, the Court divided its reasoning on the second question in two parts. In the first part, the Court had to decide whether the CADR Directive allows Member States to

Silvestri, n 6 above, 88; N. Scannicchio, ibid, paras 3-4. See also para V below.

[26] The article, on the contrary, establishes that the directive does not apply to 'disputes between traders' and 'procedures initiated by a trader against a consumer' (Arts 2.2 (d) and 2.2 (g)).

enact a duty to complain also in consumer disputes. Therefore, the Court had no need to venture in the area relative to the requirements for application of the directive. Rather, it just had to decide on the nature of the Consumer disputes' resolution to resolve that issue. Moreover, it resolved it by applying another directive. Why did the Court argument go that far as to make the certification process a pre-requisite for all the directives?[27]

The answer to this question is that the Court did not share such conclusion. It declared the registration pre-requisite a mean to preserve the ADR entities of the previous directive 2008/52/EC.

In the first question, the Court ditched any demand about the range of application of the 'civil and commercial' mediation Directive and the 'consumer' one. The cross-border range of application of the first and the national application of the second where the basis to exclude any clash between the converging Directives. However, moving on to the main issue, the Court returned to the 2008/52/EC Directive as containing the 'general framework' that operates in the CADR Directive, to justify the export of the duty to complain. As far as the two procedures rely on the same set of principles, this reasoning rises the issue of distributing competences between the entities subject to each directive, whatever their field of application in relation to the rest may be. The latter remains largely unidentified and common to both directives.[28] The safeguard of the entities already operating in the civil and commercial mediation is another requirement of the CADR Directive.[29]

The Court declared the registry pre-requisite as a mean to preserve the ADR entities created under the previous directive 2008/52/EC. The new directive realizes in some way a pre-recognition of the commercial entities created under the old one and of their registration. This allows them to (continue to) mediate also Consumer cases under the new rules. To this end, the decision uses the certification tool. However, enlisting of the ADR entity in the registry of Art 20(2) is not intended as the 'pre-requisite' of all rules of the CADR Directive 'in general'. Such enlisting is relied upon in order to relieve the bodies already operating under the 2008/52/EC Directive from the certification charges imposed to the CADR entities. Put differently, the Court ruled that different registers apply to different directives. That is the actual meaning of the statement.

This is further confirmed by the fact that, when discussing the right to legal assistance and the right to withdraw from the procedure, the CJEU left aside the registration 'pre-requirements'. The Court solved those questions on completely

[27] The German government denied the relevance of the request for preliminary ruling. It pointed out that the order for reference did not state 'whether the mediation procedure instituted by Legislative Decree no 28/2010 is in fact an "ADR procedure", taking place before an "ADR entity", as those terms are defined in Art 4(1)(g) and (h) of Directive 2013/11'. The Court, in affirming its jurisdiction, had already dealt with the point.

[28] See n 14 above.

[29] Art 3 and whereas 19-21.

different grounds. Instead, the solution proposed by the referring judge in order to submit all consumers disputes to the new directive was more straightforward. However, the Court, according to the Directive, had to preserve the Countries (and the Entities) who had relied upon the previous rules, from the burden of modifying the administrative framework that affects the recognition, liabilities and conditions of the ADR 'industry'. Therefore, it decided not to follow the national judge.[30]

However, it was not difficult to foresee that the register pre-requisite, understood in the general terms here described, could lead to a significant loss the effectiveness of Directive 2013/11/EU, the promotion and diffusion of the certified ADR entities and, consequently, the incentive of the bodies to comply with the directive and to request registration.[31] The single reasonable justification for not dealing with such difficulties is that the Court had carefully excluded that the duty to complain could threat the low costs principle and the consumer party freedom in *any consumers'* dispute.

IV. The Application of the Low Costs Rule and of Freedom of Withdrawal to Unregistered CADR Entities

In the second part of the question, after the elaborate recognition of the State power to enact a duty to complain in Consumer ADR, the Court dealt exclusively with the minimal requirements that justify such compulsory condition. As of para 51, the Court declared that the relevant problem in mandatory mediation is the detection of minimal guarantees for effective judicial protection, access to justice and effectiveness of the directive. In paras 54-61, the Court refers to *Alassini*[32] and sets out those minimal requirements. Thereinafter, it applies those principles to both the decreto legislativo 4 March 2010 no 28 and the CADR implementation act, without any reference to lists and even entities prerequisites. In particular, at para 62 the Court invites the referring judge to verify whether:

> 'in particular Art 5 of Legislative Decree no 28/2010 and Art 141 of the Consumer Code, as amended by Legislative Decree no 130/2015, does not prevent the parties from exercising their right of access to the judicial system, in accordance with the requirement of Art 1 of Directive 2013/11, in that

[30] However, in approving the Italian system because of a certification pre-requisite, the decision opened to national law the way to generalized exemption of the whole of consumer entities from the substantive requirements of the directive. In the same way allowed the submission of a large part of consumer's complaints to a national mandatory procedure, not compliant with the CADR directive.

[31] See para IV and ns 49-53 below, how such features might even generate a pressure to move the whole of the entities towards the mandatory regime, in order for gaining the economic and legal coverage guaranteed by those rules.

[32] Case C-317/08 to C-320/08 *Alassini and others* v *Telecom Italia SpA and others* [2010], available at www.eur-lex.europa.eu.

that legislation meets the requirements set out in the previous paragraph'.

This statement refers to *both* Italian acts of implementation of both directives, whatever the mediation procedure they regulate may be. It would make no sense if both proceedings were not subject to those same conditions, when initiated by consumers. Even less sense it would make if the register pre-requisite excluded such a minimal guarantee. It is in fact very clear from the submitted question – the Court's account of relevant legislation and from the defendant State observations – that the claim is subject to the first act and the entities, if ever listed, cannot pertain to any register under the second.[33] It seems clear that, in this part of the decision, the Court does not refer to the CADR Directive because the entity is 'presumed' registered. It does, because it contains those minimal principles.[34]

The Verona Judge of first instance felt concerned with the doubts expressed above. After recognizing the constitutive value of the 'list' as to the endorsement of an ADR entity according to the CADR Directive, it kept on distinguishing among the CJEU conclusions. Surprisingly, the result of such interaction is that the prohibition of the directive related to the duty of legal assistance will resist, notwithstanding the absence of a properly enlisted ADR entity. However, as the judge accepts that the CADR Directive cannot apply to unlisted bodies, she draws her conclusion from

> 'the assessment of compatibility of mandatory mediation rules with the principle of effective judicial protection laid down in Arts 6 and 13 CEDU and Art 47 of the Charter of Fundamental Rights of the European Union'.

1. Legal Assistance

In particular, according to the referred decision, the duty of legal assistance would result contrary to the fourth requirement of *Alassini*; namely, that the duty to complain in ADR either does not create costs, or limits costs to symbolic fees.

On this point, according to the national judgment, the European Court ruling

[33] According to para 62 of the decision, as quoted above, the 'legislation that should meet the requirements' for judicial protection includes the decreto legislativo no 28/2010. Moreover, the CADR register of Art 20, which by declaration of the Italian Government did not exist, may include only (voluntary) entities that respect the CADR rules about legal assistance and withdrawal. Therefore, there is nothing to be ascertained about. Finally, under the decreto legislative 6 August 2015 no 130 only voluntary bodies may access that register. These do not need to meet requirements that justify compulsory mediation.

[34] Since the beginning the decision detaches the obligation to complain, which affects the relationship between the directives, from the 'detailed rules' of consumer's protection within the CADR procedures. Also the 'Roadmap to European Effective Justice (Re-Jus)' does not register that the limitation of the rule of Art 8 (against the prohibition of legal advice) only to the complaints submitted to certified entities is not consistent with the final judgment of the referring Judge. The Judge applied the rule after expressly stating that the directive (ie its article 8) could not regulate the submitted case. See *Re-Jus casebook* n 11 above.

> 'did not mean to consider the different methods of operation provided in national law for the procedure, in this way suggesting that such requirement is '*imprescindibile*''.

In this context, by '*imprescindibile*' it is meant that the rule cannot be disposed of or derogated from by any regulation and, of course, by any regulatory list's requirement. Thus, such rule operates by its own virtue into any contract, law or regulation and, therefore, it applies to ADR entities and procedures, like those provided for by decreto legislativo no 28/2010, even if not registered under the CADR Directive.[35] It goes without saying that if the no-lawyers rule applies into a procedure for 'civil and commercial mediation' (when that procedure operates at consumer demand), the same should be applied to any consumer claim (not subject to a binding decision), where the cost effectiveness prerequisite has not been observed.

This authoritative restatement of the rule is in contradiction of the mainstream opinion about the 'constitutive' nature of registration, supported by Italian competent Authorities, on behalf of the Government, commercial ADR entities, judges, lawyers, and even consumer's associations trying to regain a lost market.[36] The source of this opinion is not in legal materials, decrees or judgments. It is in the advisory council of a private association (with many economic interests in such scientific issue) to its members. The same source underlies the administrative deliberations of *independent* competent authorities. It appears, at first view, that they intend such independency as related to their relationship with the law, rather than to their separateness from the government. Today, five years after the CADR Directive entered in force,

[35] There is of course a problem about the different level, where the low costs' rule and the freedom of lawyer rule operate. Art 8 of the CADR Directive treats the two matters in different paragraphs. As my concern in this note aims to the constitutive role of registers, I will not address this problem here. As to this last topic, it is enough to know that the low cost's principle – with lawyers or without – may operate out of the list requirement.

[36] J.M. Glover, 'Disappearing Claims and the Erosion of Substantive Law' 124 *Yale Law Journal*, 3081, 3052-3092 (2015), points out that statutory intervention on mediation and arbitration is 'trans-substantive'. It does not affect permanent qualified rights of a single group or category of citizens. Moreover, the holders of these rights will be concerned only in the event they have a reason to sue. By contrast, the ADR revolution is supported by strong groups of repeat players with a permanent interest to it. The traders, the lawyers, the ADR entities as an 'industry', a great part of the judiciary (interested both to decrease the charge of cases and to participate to arbitration procedures). Moreover, Governments have all their stake in the mediation diffusion. The legislative accent on the 'private agreement' as a (better) way to enforce rights is, by itself, a mean – sometimes even declared – to decrease the citizens' attention from the statutory nature of their rights, from their trust in the ability of the Courts to enforce them and from their interest in the funding of the justice system (ibid, at 3080); See also K.A. Sabbeth and D.C. Vladeck, 'Contracting (Out) Rights' 36 *Fordham Urban Law Journal*, 807, 803- 838 (2009). An analytical appraisal of the social forces that dominate the ADR issue is in J. Resnick, 'Diffusing Dispute: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' 124 *Yale Law Journal*, 2804-2939 (2015).

> 'The draft decree on institution of the specialized register of Consumer entities has not yet been decided (...) therefore the procedure for recognizing ADR entities cannot be described.'[37]

The Italian Bar Association (*Ordine degli avvocati*), it is respectfully submitted, is wrong on all its arguments.[38] The Bar was one of the strongest supporters of the mandatory nature (also) of consumer ADR. The Court declared that it might be mandatory. There is no way, now to subtract mandatory consumer complaints to the CADR Directive because national implementation applies only to 'voluntary' entities. Such argument cannot stand, not even by invoking the National non-compliance with the CADR register's implementation. Moreover, the issue that, in absence of such register, the Directive cannot apply to Consumer ADR suffers a decisive objection. On this topic both, the national and the European court did not build their reasoning on the CADR application 'pre-requisite' of registration. They drew their conclusion direct from the respect of the rights to judicial protection and access to justice. It seems all too obvious that these minimal requirements set out the balance between the protection of individual rights and the public interest (which allows mandatory procedures) in any consumer dispute. These rules cannot change according to where the ADR entity is enlisted. This is why the Tribunal of Verona declared '*imprescindibile*' the rule that consumers cannot be obliged to retain a lawyer or a legal advisor.

2. Right of Withdrawal

In the referring judge final decision, the flaw is another. It is respectfully submitted that the outcome of the referred question about legal assistance holds, on the same ground, for the freedom of withdrawal. In fact, on this point too, the European Court 'did not consider the different methods of operation provided in national law for the procedure (…)'. Moreover, on this topic, the Court did not even refer immediately to the CADR Directive provisions (as it had done before, as expression of the minimal requirement of costs). It expressly connects its statement to the principle that 'the outcome of the ADR procedure is not binding (…)' (para 57) and draws its conclusion from that same principle (para 66):

[37] See MISE, n 41 below, Section II, 6.1

[38] As noted above, this is the reading of the Italian Bar Council. See Consiglio nazionale forense (CNF), ufficio studi, *La sentenza della Corte di Giustizia Europea, scheda US 56/2017*, 10, available at https://tinyurl.com/y3ns5t4t (last visited 28 May 2019). The CNF Report suggests that the CJEU decisions does not concern any proceedings under the decreto legislativo no 28/2010, raising two central arguments. (i) The Directive implementation law regards only voluntary procedures (this is not true, see para V). Moreover, the Directive certainly applies to mandatory procedures). (ii) The implementation law sends the CADR entities to the register set up according to Art 20 of the CADR Directive. This list is different from the Ministry of Justice registry of civil and commercial entities. The report concludes triumphantly 'at this date the Ministry of Justice did not enact any register of (consumer) ADR Entities'. This, again, is not true. The register exists, but it hosts only the parithetic, voluntary, entities see n 45 below.

> 'It is necessary to take the view that such a limitation restricts the parties' right of access to the judicial system, contrary to the objective of Directive 2013/11, recalled in Article 1 thereof. *Any* withdrawal from an ADR procedure by a consumer must not have unfavorable consequences for that consumer in the context of proceedings before the courts relating to the dispute which formed, or which ought to have formed, the subject matter of that procedure'.

Only because of this general ground, the Court concludes that such consideration 'is supported' by the wording of the CADR Directive, Art 9(2) (a). In substance, the CJEU did apply the withdrawal rule directly to the non consumer and noncertified procedures of the decreto legislativo no 28/2010, as far as the complaining party is a consumer. The withdrawal's power should *a fortiori* operate into the CADR implementation law, also in mandatory procedure held before entities not registered according to Art 20.[39] Both the Advocate General and the Court (para 66), derive their conclusion immediately from Art 1. Throughout their reasoning there is no reference whatsoever to certification pre-requirements. The arguments have been framed in so large a fashion to suggest that they might apply also outside the CADR Directive, even to commercial ADR as regulated by the decreto legislativo no 28/2010.[40] It seems that at least application of Art 1 should be a condition for all other 'pre-requisites' of the CADR Directive.

3. Lawyers and Withdrawal Under Voluntary and Compulsory ADR

In this respect, there is at last one more reason for why the outcome of the Tribunale of Verona cannot stand alone as to the first detailed question (legal assistance), without necessarily have to reach the same conclusion in relation to the second (freedom of withdrawal). Regardless of whether the freedom of representation of Art 8(b) linked to cost effectiveness or not, it is shared opinion that its function is to ease and speed up the procedure, preserving it from

[39] Further decisive evidence that the withdrawal rule is independent from any list pre-requisite may be found in the General Advocate Conclusions in Case C-75/16 n 1 above. See n 35. Since the beginning of her statements about the availability of mandatory consumer complaint (para 81), the Advocate moves from the consideration that in *Alassini* a 'different' procedure was at stake. She adds, soon after (para 86), that the legislation at issue 'may jeopardize the opportunity for the parties to assert their rights effectively before a court following that procedure…' The' legislation at issue' here covers both, Italian decrees and Directives' provisions, with no reference to the extension of their field of application. The Opinion concludes therefore that 'such legislation…. does not meet the condition laid down in Art 1 *in fine* of directive 2013-11'.

[40] See Case C-75/16, n 1 above, paras 94-96. The Advocate General connects here the freedom to withdraw from the procedure to 'each of the parties... or at least the consumer'. Para 96 states that such condition 'would lose its effectiveness if it was permissible for Member States, *whilst formally recognizing the right of parties to have access to a court, to jeopardize the possibility for those parties to validly assert their rights through the judicial system'*. As a consequence '… withdrawal from the ADR procedure should not entail adverse consequences for the party who has withdrawn -*at least* if he is the consumer'.

formalities and technicalities. This is another signal that the directive declares the State power to enact compulsory mediation, but regulates only the voluntary one.

As observed above, when the mandatory alternative is chosen, things deeply change. The duty to complain is enforced by sanctions that float throughout the procedure. The effect of these provisions does not always manifest immediately and, instead, will heavily affect the parties in the subsequent lawsuit. In this framework, I am afraid that legal assistance should be most welcome, to the point of becoming another constitutional condition for effective judicial protection. In fact, the Italian *Consiglio di Stato* declared it a condition for constitutional validity of the whole decreto legislativo no 28/2010 under the right to defense clause. Likewise, in the same judgment, the right to withdraw after the 'informative' meeting represents a constitutional condition to preserve access to justice.[41] There is a strong link between access to justice and right to defense and the same link exists – reversed – between the free choice about legal assistance and the compulsory nature of the CADR. So that it may be concluded that the Directive does not want the duty of legal advice because it does not like the mandatory mediation. The Court in *Alassini* did not adjudicate on a difference between registers. Rather, on the difference between voluntary and mandatory mediation and on the general constitutional requirement that allows restrictions of the access of justice in mandatory ADR procedures.

It remains to be seen whether in a peer (b2b) procedure, alike the one of the decreto legislativo no 28/2010, access to justice may be further restricted, by increasing costs and disadvantages of the forthcoming judicial action. In this case, it seems that also the right to legal defense should be further enhanced. This circumstance, however, could not be a reason for submitting the minimal requirement established in *Alassini* for consumer's disputes to those same restrictions (and consequential enhanced protection). It is the reason, before than the law, to explain why consumer's access to justice cannot be further restricted when the duty to mediate takes her away from the protective framework of the independent Authority, to a private procedure afflicted by even harsher effect than those considered in that framework.

On the contrary, the Verona judgment, in preserving the CADR procedure only from the duty to be represented (consequential to the list requirement), left consumers alone with all those technicalities that the directive intended to avoid by making lawyers unnecessary. For instance, all sanctions remained untouched, together with the heavy effects that the party discovers and has to cope with, if he/she decides to sue. This is again in conflict with the effective judicial protection and the other conditions required in *Alassini*, apart from costs. That procedure was mandatory. However it was under the control of a public authority and there

[41] See n 20 above. These are surely the most important issues proposed by compulsory mediation. However they influence almost all of the detailed rules of procedure. See ns 8, 12-14 above.

were no sanctions in case of withdrawal.[42] As stated in the general Advocate's Opinion: '*Alassini* did not need to deal with the problem of withdrawal'.

V. The Registration Pre-Requisite, the Failure of CADR Harmonization and the Crisis of Voluntary Mediation

The Verona referring Court of first instance was bound to follow the European Court decisions. However, the judge discovered that, under the rule of the decreto legislativo no 28/2010, the 'competent Authority' did not create any 'special section' devoted to consumer matters in the general registry of entities.[43] According to the national judge, two consequences follow from this finding. First, at the time of the case Italy had neither implemented the 2013/11/EU Directive, nor instituted any list for CADR entities regulated under the decreto legislativo no 28/2010 or decreto legislativo no 130/2015. Second, the Directive could not apply to the dispute he should refer to mediation, as far as there were no entities compliant with the requirement of Art 20(2). However, the judge overruled the Registry requirement as to the refusal of legal assistance. Both conclusions have been questioned above.[44] However, what is important to underline here, is that such interpretation of the CJEU decision allows any Member State to escape all the provisions of the CADR Directive. It is enough to insert national entities into

[42] The proceeding before independent authorities in the concerned sector is the only case where mandatory CADR may increase the effectiveness of the directive. These procedures satisfy the conditions that the same founders of the access to justice movement, M. Cappelletti and B. Garth, required for the effectiveness of ADR in unbalanced relationships. See E. Storskrubb, n 7 above, 15, 19. This aspect may be easily seen in their features: (i) they are generally additive, ie their aim is not to decrease the judicial claim but to add remedies for cases which would not even arrive to any Court; (ii) their procedure is asymmetric, only the professional party may be bound to participation or to the solution; (iii) in most countries they enjoy a reserve or a prevalence against private entities (eg consumers may divert the dispute toward the Authorities, or the Authority may detach the procedure from the private entity, or the Authority may be invoked to adjudicate the issues in case of professional's refusal to agree, the Authority may ensure mass enforcement of serial violations, etc). Moreover, *Alassini* did not care of registers at all. Judgments are public. Therefore, anybody can verify that the Court made the right decision in the wrong case and on a wrong register. See N. Scannicchio, n 7 above, paras 5.2-5.3 and fns 456-457.

[43] The general register administered by the Ministry of justice does not host Consumer ADR 'entities'. It registers only consumption's mediators. However, it is certain that consumer related ADR and procedures of the decreto legislativo no 28/2010 have an entry in the general register of the Ministry of justice, even if they do not sit in a special section.

[44] I have shown above that the Court of Verona overreached the limits of the certification requirement as intended by the CJEU. According to the present submissions, the last was right in assuming that pre-existing entities did not need to follow the new certification procedure. In any case, it seems clear from the Directive that neither States nor entities are under any obligation to apply or to accept enlistment in any register. Furthermore, existing entities cannot be compelled to register under the directive. The only obligation, under the European Court decision, seems related to the necessity of a 'residual entity' that may satisfy the state obligation under Art 5. The Italian implementation decree does not supply any residual entity. As to the CADR Directive register, at the time of the judgment it had been enacted. Seen n 45 below.

a different register, not regulated by its Art 20. As noted above, the Italian legislation sends the most important consumer disputes, all consumer contracts containing a mediation clause and all claims and appeals where the Judge so requires to entities enlisted in a different registry, enabled by the previous Decree. This behavior may completely frustrate the harmonization, insofar as these uncertified entities do not need to comply with CADR requirements and, should they do, have no obligation to collect, communicate and report any information to any authority set up under the 2013/11/EU Directive. These features may affect also the ADR promotion aim and, if they operate under a mandatory complaint regime, they surely do. Both European mediation directives permit the enactment of compulsory forms of dispute resolution. However, both eminently provide for voluntary ADR proceedings.[45] The general application of the registry pre-requirement not only will avoid the costly information and management duties, but also the even more costly necessity to satisfy the substantive rules of procedure, introduced by the 'quality criteria' to not compliant/unregistered bodies. Allowing a fair withdrawal and supplying the mediator with the competence of a lawyer has a cost.[46]

By applying the 'law of the registry' where the chosen entity is inserted, Italy derogated from the CADR Directive rules on the mass of consumer contracts. Those who welcome such solution forget that, under such mandatory system, consumers do not choose.[47] It is to be pointed out that in case of mandatory ADR, consumers can ask for the directive compliant bodies enlisted in the CADR register of MISE (subject to the CADR duties of information and related costs). However, if they find one, such procedure does not satisfy the condition to sue. In most cases, consumers *must* apply to an entity certified by the Ministry of Justice registry according to the decreto legislativo no 28/2010, to satisfy it.[48] This creates a significant increase of legal expenses and judicial risks. The mandatory system procedure, moreover, provides for tax rebates and immediate execution of agreements, without exequatur.

By this way, the pre-requirement generalization creates a legal barrier that supplies strong economic incentives to the not included private bodies. It puts at disadvantage the (European) voluntary CADR entities in favor of the (national)

[45] It is worth stressing that in the ELI/ENCJ statement of 5 September 2018 on *The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute,* recognizes that 'Mandatory ADR does, however, bring with it certain complexities… .' that are beyond the scope of their project on (voluntary) mediation and merit a specific approach. Therefore they 'recommends that the whole issue of making ADR processes mandatory should be considered further in a future project'.

[46] See ns 2 and 8 above, the above consideration is common to all the quoted Authors.

[47] See eg G. De Palo and R. Canessa, n 18 above. See also E. Silvestri, n 6 above, 89, considers the above attitude a 'sensible' solution. However, she does not take position about its consequences on the application of the rules about legal assistance and right of withdrawal.

[48] Decreto legislativo no 28/2010, Arts 1(e), 2 *bis*(5) and 16(1). See ns 4 and 15 above, about the detrimental effects of deserting or abandoning the procedure.

mandatory ones. Finally, such arrangement forces consumers to waive the protection of the directive and generates, by itself, a global loss of their effectiveness. Verona's Court of first instance is right in assuming Italy's default of the Directive. However, it is astray as to pertinence of the infringement to the institution of a register.

Subsequent developments evidence the submitted conclusion. Since 2015 the Italian Ministry of economic development (MISE), which provides for registration and monitoring of CADR entities as the competent Authority and the contact point, began to institute the CADR register of *voluntary* ADR entities.[49]

This is the only list of Consumer ADR entities that might operate in the same fields covered by the decreto legislativo no 28/2010for commercial and civil mediation. However, this register can contain only the famous (or infamous) 'parithetic' entities (ie entities created by agreements between consumers' associations and single or associated traders). By law, such entities should satisfy all the safeguards provided for by the Consumer ADR directive (I will lay merciful hands on the administrative procedure for the assessment of the features required by Art 20).[50] These entities cover now about ten percent of Consumer

[49] MISE (General Direction for Market, competition and Consumers, Division XI), decreto direttoriale 21 December 2015 that implements the registry of Art 20(2). To this register may apply:

a) parithetic negotiations' entities, for sectors where either there is no regulatory agency, or the same Agency does not maintain a register.

b) Other entities 'not enlisted in the register of ADR entities in Consumer matters, regulated by Art 16(2)(4) of decreto legislativo 4 March 2010 no 28'. This is the 'fake' section of consumer entities, which ought to have been enacted in the Ministry of Justice Registry, recalled by the Verona decision (see para III, n 31 above). This entry contains now the 'orphan' entities created by the Commerce Chambers to operate under the 2013/11 Directive implementation law. A second MISE decreto direttoriale 1 February 2017, extends the deadline for application to 30 June 2017. The resulting list may be found here, at https://tinyurl.com/yy8q2ajn (last visited 28 May 2019).

At the moment, apart from entities set up by the chambers of commerce, there are only three ADR bodies in this register. All were instituted by agreement between consumers' associations and big corporations and all bring the name of the related corporation (NetComm, Trenitalia, Poste Italiane). The majority of the parithetic entities remains outside the CADR registry, likely because of the management costs implied by the massive monitoring and information duties consequent to registration. Moreover, the CADR implementation law admits to the register only entities, which practice *voluntary* procedures, whereas many such entities operated in the protected sectors, where the procedure was already mandatory (communications, Banks, Energy, water supply etc). Sectoral competent authorities (see below) have recognized some of them.

[50] The MISE register for directive compliant entities reflects such confusion. However some entities already certified under the previous decreto legislativo 28/2010, applied to the CADR registers of some Competent Authorities. Therefore, we find in the Commission ODR entries a number of entities (Intesa, ADR Center and Academia) registered also in the previous Decree's registry for mandatory procedures. Also the entities of many Italian commerce chambers applied to both registers. All these bodies prepared a second consumer procedure that complies with the CADR directive. However, their web site does not clearly instruct the user about which regulations refer to what directive. Finally, the mandatory procedure is in some way neutralized from the punitive framework of the Decree. This remains a problem of the complainer/defendant, in case his/her complaint falls under the mandatory condition. Therefore the consumer shall deal with the intricacies of two interwoven Decrees, where may happen that the Competent

ADR cases. After the directive, they are swiftly losing traction.[51] They compete in the same fields with the entities enlisted in the general register of civil and commercial mediation (where the consumer section is still missing) under the decreto legislativo no 28/2010.[52] These 'civil' entities can satisfy the preliminary condition to sue, ask an indemnity for the first meeting when the parties refuse the attempt to agree and take advantage of the punitive consequences that settlements' refusal imposes to parties. They can operate in all fields, may accept all claims (from consumer and professionals) and do not need to satisfy any CADR requirement (application, monitoring and control is ensured by prerequisites laid down in a Decree of the Ministry of justice, at conditions different from the decreto legislativo no 130/2015). In fact, the request of preliminary ruling was advanced because the application of the described procedure to consumer complaints, does not allow freedom of withdrawal and obliges parties to retain legal assistance. Therefore, the so-called 'promotion' of ADR compliant entities by the mere manoeuver on a register causes a global disincentive for the economic standing, the attraction of the public and the legal strength of the agreements of the voluntary entities which comply with the directive. So far, only a few voluntary entities applied to the CADR register. Most parithetic bodies remained outside the 2011/13/EU directive. The number of claims presented to such bodies – both registered and unregistered – decreased swiftly after the decreto legislativo no 28/2010 entered in force and further after he CADR Directive implementation law.[53]

One striking, but foreseeable, by-product of such impairment of the consensual procedure is the steady passage of entities from the voluntary to the mandatory privileged model. The Bank of Italy (ABF) and the CONSOB (ACF) have long established their ADR bodies in order to protect consumers. These

authority for the register of the voluntary procedures admits or, as point of contact, sends to the EU Commission, a number of entities that practice a mandatory one.

[51] Istituto Scientifico per l'arbitrato la mediazione e il diritto commerciale (ISDACI), *Tenth Report on Diffusion of Alternative Justice in Italy*, 2017, available at https://tinyurl.com/y2w504j3 (last visited 28 May 2019). According to ISDACI (a joint center of the Union of Chambers of Commerce, the Milan Commerce Chamber and the Arbitration Chamber of Milan) the number of complaints in ADR was 275.000 in 2017, with a steady decrease (four per cent) of mandatory complaints and a slight increase in voluntary procedures. It is to be stressed that the ten per cent of voluntary ADR comprises both Professional's and Consumer's ADR. On the other hand, banking, Insurance and Financial procedures are all mandatory. They cover almost the thirty per cent of the ADR complaints and treat, in a substantial amount, Consumer's complaints.

[52] See n 34 above.

[53] Apart from the Autorità per le garanzie nelle comunicazioni (AGCOM), that attracts the bulk of consumer complaints of lesser amount, the most important Entity of Italian CADR is the Bank of Italy ADR Body, ABF. It attracts almost the twenty percent of claims of the whole ADR sector. The ABF Procedure is adjudicative. It is mandatory for professionals. The decision is not binding. It is supported only by reputational sanctions. The ABF site mentions all Companies that did not comply with the decision. In 2011, only two companies were on the list. In 2016 and 2017, seventy four professionals did not comply. In 2018, there were four hundred and one mentions (see https://tinyurl.com/y2hh2mch (last visited 28 May 2019)).

received voluntary complaints and required the mandatory participation of professionals. Both bodies were, however, transferred to the mandatory system by the decreto legislativo no 28/2010. Despite these provisions, both have resisted the consequent changes in their procedure. It is not yet clear whether the appeal before the ABF meets the condition of admissibility or not. In the second case, pursuant to the Decree, the complaint to ABF does not allow access to the court. In the first, withdrawal from the attempt or failure to appear should result in fines and penalties. However, the respective regulations do not refer to this issue.

The implementation of the CADR Directive changed this state of the art. The decreto legislativo no 130/2015 indicated that the Bank of Italy is the competent authority in the sector. Following this requirement, the Bank has recently amended the regulations about management and procedure of the controlled entity (ABF), in order to comply with the CADR Directive.

However, in the reorganization process, the Bank lost contact with the main legal problem raised by the implementation law. As noted above, this law (decreto legislativo no 130/2015) applies only to entities that conduct voluntary procedures Art 7 of this act, on the other hand, expressly saved the rule (Art 5, decreto legislativo no 28/2010) which submits complaints to ABF and ACF to the condition of admissibility. Therefore, strangely enough, the competent authority for voluntary mediation in the banking sector hosts an entity (its own) which carries out a mandatory mediation, pursuant to the decree on voluntary procedures. Moreover, the Bank of Italy did not set up any register, as ordered by both Art 20 of the Directive and Art 141(10) of the national Decree. The Bank acknowledges only its own entity as complying with the Directive.[54]

The evolution of the ADR entities and procedures in the Communication and Energy market supplies anothersignificant example of such decline of voluntary mediation. In this area, a number of voluntary bodies received the ability to meet the condition of acceptability attributed to the Co-Re-Com, the entity of the Communication's Authority.[55] However, the implementing law

[54] See Banca d'Italia, 'Consultazioni, Modifiche alle disposizioni sull'arbitro finanziario', available at https://tinyurl.com/y4gh3uzy; https://tinyurl.com/y68ulba3 (last visited 28 May 2019). Moreover, the Bank of Italy did not set up any register, as ordered by both Article 20 of the Directive and Art 141(10) of the national Decree. The Bank acknowledges only its own entity, as complying with the directive. See https://tinyurl.com/yyqrxj97 (last visited 28 May 2019).

The ABF model is at odds with the Italian law, not instead with the Directive. This last, in fact, admits mandatory consumer mediation if the procedure complies with its requirements and the ABF does. Therefore, at the moment it is the only entity which conducts a mandatory procedure recognized under the CADR Directive. What is at odds with the Directive is all the rest of the CADR in the banking sector, controlled by the Bank of Italy.

[55] AGCOM, Resolution 24 April 2018 no 203, *Regulation on the procedures for resolving disputes between users and electronic communications operators*, Art 3, available at https://tinyurl.com/y5r6ccqy (last visited 28 May 2019). One might cast some doubt that voluntary mediation, even if carried out by a body that complies with the directive, can satisfy the condition for claiming in court, when such function is reserved by law to the sectoral competent Authority. The argument in *Alassini* was that the duty to complain in front of the Authority increases its

quoted above reserves its scope and registers to 'voluntary' procedures. It is therefore rather strange that the register of the competent sectoral Authority infringes the provision requiring verification of conformity to the directive in question. According to the MISE, it certifies as 'voluntary' procedures that, by definition of the same Authority, satisfy a compulsory condition.As a result, in the final part of the report, required by Art 20, para 6, MISE (the Italian Point of contact), submitted to the Commission that:

> 'The use of ADR in consumption disputes is mandatory in all cases operated by a joint negotiating body (company /consumers)'.[56]

This statement is very surprising for an ADR procedure that, in the words of the implementation law: 'applies to *voluntary procedures* for alternative dispute resolution'. It is also surprising that the quoted sentence comes from the same competent Authority that regulates such 'voluntary' procedures and hosts the register of the related 'voluntary' entities. There is not a word about such significant legal consequence in Art 141-*ter* (which regulates these negotiations), or elsewhere in the consumer code. The alternative explanation is that the Ministry for economic development has become a primary source of law and exercises its power in its reports. This, however, should be at odds with the Italian Constitution.

VI. Back to the Directive. Management of the Entities and (Horizontal) Rules of the Contract

The considerations provided above also suggest an approach to Directive 2013/11/EU that, without prejudice to the objective pursued by the Court, makes it possible to overcome the antinomy between the administrative dimension of certification and the substantive value of the principles.

If such considerations and the facts from which they derive may hold some merits, they open an alternative that appears promising for the harmonization of consumer ADR. This approach cannot only lead to greater protection of consumers' interest in the cooperative dimension, but also improve the effectiveness of the directive, promoting an easier passage of all consumption's entities to the 'certified' principles of the CADR Directive.

It seems self-evident that this Directive contains two different sets of rules split in two different parts. On the one hand, there are organization and

power to control the sector. Therefore, it also increases the effectiveness of the rights established by the directives on electronic communications (not by those on mediation). The argument does not hold any longer if the authority can delegate its task, without delegating also its powers, to a private entity. See n 37 above.

[56] MISE, 'Prima Relazione sullo sviluppo e sul funzionamento degli Organismi attivi nella risoluzione delle controversie extragiudiziali in materia di consumo', available at https://tinyurl.com/yy8q2ajn (last visited 28 May 2019).

management provisions. These rules set up the system of entities and competent authorities as well as their powers and duties about registration and monitoring. The same also ensure the flow of information between the actors. On the other hand, there are rules that affect the respective position of parties between each of them and toward the ADR entity.[57] The Court itself clearly separated the problems of competence, linked to the regulation of the state power to enable mandatory procedures, from the specific questions that such procedures raise once they have been enacted.

The described separation may well be translated into the divide between those rules of the directive that originate the obligations of the Member States towards the Union, the entities and their citizens (which pertain to their vertical relationship), as opposed to those that concern the horizontal relationship between parties (and between them and the entities). The certification procedure belongs to the first group; the dispute's procedure to the second.

Most rules about legality, efficiency, equity and the like, as connected to the directive effectiveness and individual judicial protection, constitute public order rules, whose infringement nullifies any decision of any entity whatsoever, be that registered or not. This is especially true for the orders about lawyers and freedom of withdrawal. These provisions regard the individual position of the parties. They might not have horizontal direct effect, as far as their satisfaction requires the member countries' action. However, should citizens have or not a right to the enactment of some registers, they certainly have a right to the implementation of the substantive 'principles' about effective judicial protection.[58] In the national statutory systems, the liberty to choose about lawyers and withdrawal from the ADR procedure remains a 'right', whose infringement might well originate an action for damages under the *Francovich* jurisprudence. These rights should become subject to second tier regulatory decisions that distribute entities in multiple registers. This frustrates any harmonization effort.

Finally, apart from its structure, in the Directive there is positive reference to support the conclusion that the horizontal relation treatment cannot be jeopardized by a list. Recital 18 of the directive states that:

[57] Broadly speaking, the system management set of rules is grouped in Arts 13-25; Arts 8-12 regulate the individual position of the parties. Arts 6 and 7 have a mixed content.

[58] I have dealt with the issue of horizontal effect long time ago, see N. Scannicchio, 'European Law as a source of national Private Law', in N. Lipari ed, *Trattato di diritto privato europeo* (Padova: CEDAM, 2nd ed, 2003), I, 215-232. The conceptual and positive framework of such effects does not seem to have changed very much. According to Hartkamp, the proposal submitted above would realize a 'horizontal indirect effect', where the rules about lawyers and withdrawal would operate as a shield. See A. S. Hartkamp, 'Horizontal Effects of EU Law', in A.S. Hartkamp et al eds, *The Influence of EU Law on National Private Law* (Deventer: Kluwer, 2014), 58. See also C. Timmermans, 'Horizontal Direct/Indirect Effect or Direct/Indirect Horizontal Effect: What's in a Name?' 3-4 *European Review of Private Law,* 677-681, 673-686 (2016). Recently, D. Gallo, 'La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali', in E. Moavero Milanesi and G. Piccirilli eds, *Attuare il diritto dell'Unione Europea in Italia* (Bari: Cacucci, 2018), 17.

> 'This Directive should be without prejudice to Directive 2008/52/EC (…), which already sets out a framework for systems of mediation at Union level for cross-border disputes, without preventing the application of that Directive to internal mediation systems. *This Directive is intended to apply horizontally to all types of ADR procedures, including to ADR procedures covered by Directive 2008/52/EC.*'

I cannot see either how or why the European Parliament could refer to the horizontal relations in 'all types of ADR procedures (…) including ADR procedures covered by the directive 2008/52/EC', by presuming that this horizontal effect suffered the condition of a list still to be enacted by regulators: a list that moreover could not affect 'vertically' another directive. The recital refers to 'all ADR procedures', included those of other directives, provided with another different register or even without any. The recital and the directive refer also to procedures that work outside their field of application, to confirm that it applies, for example, also to '(…) redress procedures contained in other Union legal acts which shall apply in addition' to Art 13 of the CADR Directive.[59] There is no need whatsoever to modify the 'vertical' regulatory framework of Directive 2008/52/EC and change its pre-requisites and its registers, in order to apply 'horizontally' the consumers' rights on legal assistance and withdrawal to its procedures, when a dispute is initiated by a consumer. The first task is completely left to the internal law and to free choice of the Member States and their entities. However, the second is not.[60]

VII. Regulatory Enforcement of Individual Rights and the Rule of Law

A number of years have passed since a growing number of scholars began raising the question about the limits beyond which the rule of law may be stretched, in order for meeting the growing need to increase the range, financial dimension and ease of application of administrative powers of regulation. It seems that this task requires expanding the powers and decreasing the controls of European and national government executive branches, authorities, agencies and even private associations and bodies supporting them.[61]The threshold of the rule of law, as a fundamental defense of democracy, was further narrowed by the increase and crisis of the sovereign debt and by the need to cope with the consequences of globalization.[62] Under the wave of privatization and liberalization the control of

[59] Art 3, para 3.

[60] According to E. Storskrubb, n 7 above, 25 such conclusion is so obvious as to exclude any further discussion.

[61] A trend already well developed and furtherly theorized in the famous Commission of the European Union, *European Governance: A White Paper*, COM (2001) 428 final, 25 July 2001, available at https://tinyurl.com/zoas5ez (last visited 28 May 2019).

[62] M. Storme, 'Debt and democracy: 'United States then, Europe now?' 49 *Common Market*

legality moved from the exercise of public services for the protection of named individual interests (education, wellbeing, information, communication, energy etc), towards general as well generic interest's matrices, grouped under the anonymous matrix of financial growth, economic development and market innovation, under supervision of regulatory Authorities as guardians of competition.[63]

During this time, the democratic accountability of such decision-making has raised the interest of many scholars. The exercise of sovereign power was re-labeled, while interesting debates arose about the differences between the classic idea of 'government' and the concept of 'governance' of economic and social activities.[64] However, there is no sign that the state of the relationship among

Law Review, 1833–1840 (2012), quoting the Nobel Prize lecture of T.J. Sargent. On the object matter of Storme's editorial see, CJEU, Case C-370/12 *Thomas Pringle* v *Government of Ireland*, Judgment of 27 November 2012, EU:C:2012:756 available at www.eur-lex.europa.eu. See also B. de Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle' 50 *Common Market Law Review*, 805–848 (2013). In Italy, the decline of law had been registered since the end of the last century. See R. Bin, 'Lavoro e costituzione: le radici comuni di una crisi', in G. Balandi and G. Cazzetta eds, *Diritto e lavoro nell'Italia repubblicana* (Milano: Giuffrè, 2009), 279. As to the Italian legal scholars' predilection in building a new season of 'individual common rights' (based on further State regulation and further debt), in the middle of the shift from the 'community' to the 'Inter-governmental' perspective in European policy, see recently, G. Di Plinio, 'Il finto 'effetto Marx'. Resistibile ascesa, deriva keynesiana e irresistibile declino del marxismo giuridico italiano' *federalismi.it*, 21 November 2018, 2-12.

[63] On the origin, development and effect of such evolution under the economic and legal point of view see A. Supiot, 'A legal perspective on the economic crisis of 2008' 149 *International Labor Review*, 151 (2009); P.F. Kjaer, 'European crises of legally-constituted public power: From the 'law of corporatism' to the 'law of governance' ' 23 *European Law Journal*, 417–430, paras 4-5 (2017), available at https://tinyurl.com/yxdly2so (last visited 28 May 2019).

[64] P.F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Oxford: Hart Publishing, 2010). Appreciation of such governance varies from the suggestion it should be 'good' (see R. Grzeszczak, *Challenges of Good Governance in the European Union* (Nomos: Baden-Baden, 2016) to the consideration of its impermeability to judicial review, with the annexed suggestion to abandon the vocabulary of representative democracy. See E. Korkea-aho, *Adjudicating New Governance. Deliberative Democracy in the European Union* (London: Routledge, 2015). As a matter of fact, when it is considered that after all, for about two thousand five hundred years, civil law has been the primary mean for 'governance' of economic and social individual relationships, all these reviews seem to be directed to substituting law with administrative discretion in the performance of such task. As a consequence, such a construction assumes the aim to social, economic or otherwise defined 'efficiency' as a substitute to the rule of law, for the legitimation of public power's exercise. *See* in fact K. Isaksel, *Europe's Functional Constitution. A Theory of Constitutionalism Beyond the State* (Oxford: Oxford University Press, 2016). The Author proposes a third constitutional pillar 'good administration/efficient government' (under the rule of law, administration is good if it follows the law). *See* also the review by K. Tuori to the book by W. Schroeder ed, *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016) in 6 *Common Market Law Review*, 1898 (2017) about the substitution of the one with the other: 'The macroeconomic constitution is not about the activities of individual economic subjects but about macroeconomic objectives and aggregate values, as well as actions of Member States and EU institutions'. He concludes that: 'the Eurozone crisis produced a massive rule-work, but this can hardly be deemed conducive to strengthening the EU as a Rechtsgemeinschaft or reinforcing the rule of law sub-principle of legality'.

'law, legislation and liberty' suffered any changes, since the description it received in the past century by Buchanan:

> 'most Americans feel that individual liberty has been reduced. Regulations and controls have become ubiquitous, and, once installed, these seem impossible to remove or even to modify, despite widespread citizen complaint'.[65]

Only the concerned continent should be changed.

Meanwhile, in the effort to circumvent the difficulty in reaching a uniform law of contract, through directives and regulations, the Member States of the EU continue to entrust Authorities of ambiguous nature with the establishment, regulation and protection of consumers and citizens' rights. However, these entities share a unanimous feature. They are bound to consider those rights as the 'quality' of a product or a service. Moreover the content of these rights must be ascertained as a result of cost/benefit assessment of relevant public interests or of sectoral 'policies'. Finally their (uniform) enforcement, or even existence, must be subjected to the needs of 'governance' and, consequently, depend on the 'regulated' behavior of the participants to the concerned 'industry'.[66]

This is the point where the danger that public debts create to democratic processes meets the present work. The implementation of the CADR Directive shows that it is precisely the regulatory approach of the Commission that transfers the entire regime of mediation from the domain of the law (or contract) to that of the administrative regulation of the market. In this way, the content and distribution of rights moves from the realm of the rule of law, and ultimately of the democratic legislative process, to that of discretionary decisions by delegated, second level, authorities charged with the (public) interest to reduce the states' expenditure. This means that, such authorities hold the power to subvert the order outlined above, through the manoeuver on the scope of an unclear directive and the discretionary space created by the inscription in lists of various origins.[67]

From the point of view of legislative techniques in civil law systems, the problem generated by the massive use of the regulatory function in this area is twofold. Firstly, such reconstruction of the conflict of individual interest and of their regulation and resolution as the object of a 'business', presumes an analogous idea of the rights, of the judiciary system and of the law itself.[68] In fact, also the judiciary enforcement of rights must be considered as an 'industry'. A public or

[65] J.M. Buchanan and R.E. Wagner, *Democracy in deficit* (New York: Academic Press 1977), 192. See M. Storme, n 62 above.

[66] See H. Schulte-Nölke, n 8 above, 137-138.

[67] See para IV above.

[68] This, again, is self-evident in the way mediation has become an instrument for budgetary policy. It has been moved from its main objective of resolving disputes by consent, to that of reducing State expenses by force. This move brings the by-product of hiding the State's inadequacy in performing its own duties toward the citizens.

private good or service (decisions and procedures) provided to users (parties and their lawyers), whose object is the lengthy and costly resolution of conflicts between them. This approach introduces also the idea – which especially the most assiduous supporters of the 'industry' use to justify its social utility – that those users should pay an appropriate share.[69] This objective may be accomplished by increasing the related costs and risks. However, the same objective is more easily performed either by adopting the supermarket 'self-service' method (ADR), or by making the service subject to standards and certification directly entrusted to the concerned producers (standardization). In this way, not only the market, but also the law that governs it, comes to be 'privatized'.

In the second place when under the private regulatory law label it is said that such regulatory action performs an administrative enforcement of (quasi) private rights, the breadth of such transformation is under-estimated. Regulatory enforcement moves the content of subjective, substantive and procedural rights out of the sphere of assessments about compatibility of the administrative action with the law (legitimacy). Such assessment now regards the conformity of the administrative action to the public interest (opportunity), to the proper policy and to the system efficiency as determined by the regulators. This, in turn, implies the sacrifice of fundamental rights to any 'general' need, fuelled from time to time by budgetary constraints or by congruity with various political choices. Rights, in other words, must leave way to policy-legitimated interests, which can be changed according to the regulators' necessities. The label 'regulatory private law' substantially describes the actual shift from individual rights to administrative interests as the object of enforcement of European law and national implementing provisions.[70]

In principle, there is no difficulty in supplying private rights with administrative

[69] See eg G. De Palo and R. Canessa, n 18 above, 726. If we look at the relationship between the global costs of imposed ADR and the total decrease of the State expense for the Judiciary, the whole operation should be considered the charge of a tax. Instead of paying globally for the services of justice, some citizens (the actual users) will pay a specific sum for mediation. See J.M. Buchanan, *Public Finance in Democratic Process: Fiscal Institutions and Individual Choice* (Chapel Hill: University of North Carolina Press, 1987), chapter 10. He treats this kind of regulations as fiscal tricks. Notably, the theory of such illusions was developed by Italian scholars in Italy, where Buchanan found it.

[70] This is clear in the same definition of such object. It is in fact framed as 'A body of regulatory conduct of business rules of EU origin, to be observed by businesses when dealing with their (potential) clients (…) – that – (…) do not belong to the realm of traditional private law – and – is subject to public enforcement (…) It 'concerns the relationship between a particular business and an administrative agency (…) sets standards of behaviour in the relationship between a business and its (potential) client (…) [and] (…) also aim to protect the latter (…)' See O. Cherednychenko, n 9 above, 486 and the Authors quoted in ns 8-10 above. There is nothing of private or 'quasi private' in such definition, apart from the insistence of the regulation on the 'behaviour' of professionals and their (potential) clients. What is missing is precisely any 'private' right and, therefore, the eventuality of forcing such position as a duty of the parties. What remains is either a claim (?) toward the administrative agency to enforce such administrative obligation by its 'order' or, alternatively, the possibility to 'persuade' them to respect a 'behaviour', not a right.

enforcement under a policy choice, when the legislator thinks it is the case. However, it should be recognized that, in this case, the enforcement does no longer regard a law and/or a right. Rather, it becomes merely a claim concerning the correct operation of the administrative decisions' procedure. The problem, therefore, arises when such a process begins to 'substitute' rights.

In fact, in translating from ADR to rights and judgments, such regulatory approach, forgets some qualities of these intangible entities. As stated above, their content and management come to be considered the 'product' and the 'service' of the (administration of) justice industry. However, the lack of these qualities, as recently restated, renders such approach 'untenable' in a liberal democracy based on the rule of law.[71]

In the ADR case, the false premise underpinning the constitutive quality of registration stems from the inference that access to justice is simply an 'individual' interest and judicial decisions serve a private interest of the parties: therefore both should be submitted to the 'public' interest to decrease litigation frequency, times and costs, as far as a public body recognizes such a necessity.

However, this is neither the exclusive nor the paramount function of this interest. Trials and procedures do not serve at all only claimants and defendants. This may be all that ADR entities and competent authorities look at and are interested in. On the contrary, access to justice is constructed as an individual prerogative in the name of general interests too.[72] In addition, these interests hold much greater weight than the public utility of lesser spending in litigation.

Such inference forgets that the right of access to justice rests on the same foundation and social utility that sustains the legitimacy and constituency of economic freedom and market efficiency, as pursued by the same mandatory mediation's supporters: the individual freedom of choice as a means to the general development of the entire society. By access to justice, law exploits the self-interest of parties in order to reach its own ends: the enforcement of rights' economic value and the legal order of society as general interests. The single difference between the economic and the legal aspect of such foundation is that market efficiency and competition support such freedom as the material prerequisite of economic value. The rule of law[73] and access of justice support the entitlements to that value and make it subject to a democratic process. That

[71] *R. (UNISON)* v *Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 409 *per* Lord Reed, para 67. See M. Elliott 'The rule of law and access to justice: some home truths' 77 *The Cambridge Law Journal*, 5-8 (2018), for a comment.

[72] The following arguments have been discussed in depth in my previous works on this topic. See N. Scannicchio, n 6 above, 157-167, 194; Id, n 7 above, 173. However, in these pages I have re-framed them up according to the statements of Lord Reed in *Unison* (n 69 above), where those concepts were expressed with great force and clarity. I strongly suggest reading them directly from the source, at paras 64-75.

[73] Alternatively, if preferred the *Rechtsgemeinschaft* or the *Rechtsstaat* principle. The difference is not relevant here, as the aspect that concerns this paper is the legality control over administrative action.

is, they establish its legitimacy.

'Public' interests may and must be entrusted into public (or even private) bodies, agencies and entities, in order to ensure a common advantage (and must be implemented through discretionary power compatible with such objective). Access to justice, however, is not simply a 'public interest'. It is a something that all citizens must be granted with. In other words, it is a right, which everybody is individually entitled to as a person, not only as a member of the public. Put differently, access to justice is a common and general interest, whose protection is due to each individual. That, the fact that, in the name of a paramount general interest, the power to file a case in court lies with all and each individual constitutes the reason why it is a 'fundamental' right.[74]

Moreover, the public interest in the reduction of disputes and public expenses does not compete solely with the general interest underlying the due process. As it appears crystal clear in the authors that built our western civilization,[75] it also concurs with the general interest underlying all the substantial rights conferred by the law; as well as with those established by consumer protection directives, often with rules defined as of public order by the CJEU. In fact, all those prerogatives – such as the right of withdrawal, the replacement of goods bought, compensation for damages, the extent of interest on credit, etc – do not lie with individuals exclusively for their pleasure to fuel conflicts and protect their utility. They do, because through them the law also protects the underlying general interests. Those same directives, in fact, invariably invoke those same interests (whether they affect competition, market innovation, environmental protection, or – as in the Italian consumer code – the 'fundamental' nature of some consumer rights related to personal conditions). Indeed, it is precisely the effective protection of these general interests to come into play when the rules of mediation create

[74] Rule of law and access to justice may be required to be in equilibrium with the public interest to budget reduction. However, they remain fundamental rights that stand on a different level than the public interest and cannot be subject to discretionary options. As stated in the General Advocate *opinion* such equilibrium cannot match the imbalance created by a provision that, after compelling the party to attempt a settlement, does not allow them to retire without sensible, punitive consequences. To defend such arrangement as a correction of a fundamental right in the name of a public interest is too difficult. In fact, the CJEU refused. However, the certification pre-requirement left the entire question to national governments and authorities.

[75] It should be quite useless to quote here a chain of writers that – limiting the object to Economics, Sociology and Law – goes from Adam Smith to Hayek and Coase, from Veblen to Weber and Simmel, from Gladstone to Rudden and Calabresi. The link between the entitlement to individual rights and the achievement of general interests is in the same idea that connects the recognition of citizens' freedoms to the wealth of the nations. The history and development of such connections is very well shown in F. Wieacker, 'Sulle costanti della civiltà giuridica europea' *Rivista trimestrale di diritto pubblico*, 13 (1986). The recent specification of the same connections is clearly described by G. Ingham, *Capitalism* (Cambridge: Polity Press, 2008). However, it is not necessary to read all classics to see this link in civil law. It is enough to ask why an individual claim against an invalid contract can, all over the (democratic) world, generally be advanced by 'anybody' (provided he/she owns a relevant interest) and why this rule applies also when voidness of the contract stems from the infringement of a rule of 'public order'.

barriers to access to justice.[76] It is, therefore, with their effectiveness, rather than with efficiency of mediation, that the advantages in disputes' resolution costs and speed ought to be compared. Otherwise, the advantages of mediation will accrue from the sacrifice of all the rest.It remains to be seen whether the reduction of the Ministry of justice budget may balance the loss of all general interests protected by law in the whole of B2C contracts.

1. The Enforcement of Rights Without Private Law. One Step in the Future, or Fifty Years Backward?

It is written into European Treaties that directives bind Member States to achieve the results the Union purports into their internal law. Such proposition, in consumer directives, generally resulted in enacting some consumer rights, provided with sufficient remedies.[77] It was with the purpose of ensuring fast and uniform implementation of European law that *Van Gend en Loos* transformed the State obligations into the rights of citizens, leaving in their hands to obtain through judicial remedies what the Commission's administrative enforcement of directives could never have reached.[78]

Three years ago, the half century of that decision was celebrated.[79] In that occasion it was also celebrated the decisive role played by an Italian Professor of civil law, who had been appointed to the *international* European Court by mere chance. In the ceremony, Prof Trabucchi's *referendaire* unveiled that, after the decision had been released, Prof Trabucchi rushed into the translation offices of

[76] See F. Whilman, *Private Enforcement of EU Law Before National Courts* (Cheltenham: Elgar Publishing, 2015), chapters 10-11.

[77] If the register pre-requisite of application, referred to in the opening statements of the CJEU decision, is intended as a general condition of all the rules of the directive, there are no rights or remedies conceded to consumer by this directive, either immediate or depending on a State action. There is no right to question the State for not enabling complying ADR entities, because only the entities have a right to be inserted in a registry; there is no right to application of the *substance* of the directive because Arts 8-12 apply only to registered entities. There is no right to enforce the 'guarantee to complain before an entity provided with the prescribed requirements'. In fact this 'outcome' of the directive does not rely on the directive, the Law of the State or even either the law of contract. It lies in the hands of regulatory agencies, Administrative entities and their management of lists and procedures. There are no 'subjective rights', but individual interest to be enforced before administrative tribunals by authorities and ADR entities. So far their decision, In Italy, is to deprive consumers of the quality requirement, compelling them to complain before not compliant entities, if they want to protect their access to justice. The only obligation of the member state is to set up one residual entity and, even for that, one must rely upon the powers and will of a Ministry.

[78] N. Scannicchio, 'Le Fonti del diritto privato europeo', in N. Lipari ed, *Trattato di diritto privato europeo* (Padova: CEDAM, 2st ed, 2003), I, 136. More recently, M. Cremona 'The judgment, Framing the argument', in A. Tizzano, J. Kokott and S. Prechal eds, *Van Gen den Loos,* 1963-2013, Actes du Colloque, (Luxembourg: Office des publications de l'Union européenne, 2013), 23, concludes that the decision '… laid the foundation not only for its own doctrines of individual rights and direct effect but also opened the way for the creative use in the future of the preliminary ruling procedure to develop Community law through the 'vigilance of individuals'.

[79] *Van Gend en Loos* n 78 above.

the Court.[80] He was very angry and, when requested, he questioned the office as to why in the Italian translation they had referred to 'individual rights'. He asked to change the translation, by referring to *diritti soggettivi* (subjective rights).

When answered that the terms where 'equivalent' Prof Trabucchi became even angrier (if possible).[81] He made clear that in Italy 'regulations' existed (administrative law and administrative Courts). These may affect all 'individual rights', in such a way that these 'rights'(legitimate interests) may be enforced only as far as any 'public body' deems them to be compatible with any 'public interest', detected as relevant at their discretion. On the contrary, 'subjective rights' must be enforced within the civil courts and their entitlement cannot be so easily encumbered by 'regulations'.[82] The mainstream opinion, that generalizes the certification as a pre-condition of the CADR directive rules on consumers' procedural and substantive rights, implies that the same Court that pronounced *Van Gend en Loos* to subtract the economic rights of European citizens to State discretion, should have submitted their 'subjective rights' and their judicial protection to administrative action, under the control of regulatory agencies and administrative bodies.[83]

The fate to be subject to such administrative dominance of the 'public good', that judge Trabucchi would avoid to Italy would be now common to all European countries by will of their institutions.[84]

The Union is steadily moving from the establishment and enforcement of individual rights to regulation, standardization and certification of qualities and outcomes of products, services and processes. Since it was clear that the attempt to build an European law of contract was doomed to fail, in the higher levels of the EU institutions spread the opinion that, in order to free economic activities from the necessity to deal with a wide number of national civil law rules, the reform of contract law was a too hard and lengthy effort. Therefore, recent directives pursue the said goal of leveling market conditions adopting standardization and certification procedures. These sub-law rules generally will be set up by public and often private bodies, that will provide to their monitoring and enforcement

[80] P. Gori, *Souvenirs d'un survivant,* ibid 34.

[81] I have met him personally, therefore I took the freedom to add some realism to what, according to Prof. Gori, ibid, happened '*au sein du cabinet*' of Prof Trabucchi.

[82] See on the point J. Ziller*, Les réactions des milieux institutionnels, nationaux et scientifiques de l'époque*, ibid 34, 44-45.

[83] N. Scannicchio, n 78 above. Recently the fifty years of that decision were celebrated in *Van Gen den Loos* n 78 above, 23. M. Cremona, ibid, concludes that the decision ' (…) laid the foundation not only for its own doctrines of individual rights and direct effect but also opened the way for the creative use in the future of the preliminary ruling procedure to develop Community law through the vigilance of individuals'.

[84] See P. Gori, n 80 above, 34, on the role of Prof Trabucchi in the making of the decision. See n 91 below, how the final outcome of the abandonment of his approach is that the 'rights' recognized to consumers by eg the unfair practices directive, may be enforced only by competent authorities, whose decisions may be consequently attacked only before administrative courts (where there is no mediation and the average cost of entry is around five thousand pounds).

under the control of eminent Authorities.

Such trend towards 'less law and more enforcement' is clearly visible in recent directives affecting private law and has been well described.[85] However, what has been considered above suggests that, as far as 'more enforcement' is concerned, such executory outcome should still be speculated upon.

One fundamental pre-condition for welcoming the regulatory approach to private law, in the word of their supporters, is that 'the quest for effective remedies has gained priority and overcomes any doubts about systemic coherence'.[86] In other words, for a number of reasons, the theory presumes that administrative enforcement of 'private rights' increases their effectiveness and the spread of European law. However, as far as the rule of law fades into the efficiency of the regulatory power, its validity will be measured towards the objectives of the regulator, rather than in reference to rights. In fact, enforcement does no longer relate to 'legal' compatibility, but to 'efficient' governance and results. This implies the presumption that such regulator is bound by definition to pursue an identified interest, that he is impartial and fully informed and that he knows what actions efficiency commands in a given situation.

There are many doubts, that this is always the case.[87] As noted above, such process of administrative enforcement changes the nature of its object from being a right to becoming an interest subject to opportunity assessment, so as to raise the question about 'what' interests, at the end, is enforced (ie those interest of the user or those of the authority?). This further complicates the legality control, because the 'law' that governs the regulatory powers rarely contains a precise definition of the individual rights that limit their discretion. These agencies possess strong and specific prerogatives, bordered by 'general frameworks', general clauses and very large ends and 'principles' of public interests. They become rule makers, enforcers and judges of their same regulations, to the extent that the rule of law that should control regulators' powers vanishes into those they have established

[85] See H. Schulte-Nölke, n 8 above, 137-138.

[86] G. Bellantuono 'Public and Private Enforcement of European Private Law in the Energy and Telecommunications Sectors' 4 *European Review of Private Law*, 664, 649-688 (2015). See also n 66 above.

[87] See eg J.M. Buchanan, *The limits of liberty* (Chicago, London: University of. Chicago, 1975), 101. With particular reference to the EU regulatory framework see S. Whittaker 'Distinctive features of the New Consumer Contract Law' 133 *Law Quarterly Review*, 47, 47-72 (2017); and T. Arvind and L. Sirton, *The Curious Origin of Judicial Review*, ibid, 91. Both submit that the 'new' role of such administrative action determines further expansion of public action at the expense of individual rights. About the economic and social incentives that structurally produce a bias of regulators towards regulated see D. Carpenter and D. Moss, *Preventing Regulatory Capture: Special Interest Influence And How To Limit It* (Cambridge: Cambridge University Press, 2013); L. Zingales and R.C. MacCormack, *Preventing economists' capture,* ibid, 124, observe that 'Regulatory capture is so pervasive precisely because it is driven by standard economic incentives, which push even the most well-intentioned regulators to cater to the interest of the regulated. These incentives are built in their positions'.

for themselves.[88]

In the framework of 'traditional' private law of *Van Gend en Loos*, either effectiveness or efficient decision making of administrators must rely first on compatibility with rights and law. According to Prof Trabucchi, regulations did not entail more enforcement of individual rights of citizens (consumers). They just empowered public bodies to encumber those rights and, by that, to falsify competition. Accordingly, it has been observed that

> 'Whether this vanishing connection entails any drawbacks, for example, on the ground that traditional common law principles help identify the boundaries of public powers, is an open question (…)'.[89]

Such an open question regards the historical, legal and social foundation of European legal civilization and its future.[90] In depth reflection should be devoted to 'close' it, before welcoming the evolution, just because it is a 'transformation' and, therefore, it is 'new'.

However, leaving to economic and behavioral sciences such theoretical realm, it seems certain that the 'less law', in the ADR sector under examination, did not produce at all 'more enforcement', either in consumer contracts or in CADR proceedings. Under the Directive and the supposed EU Court's trust in certificates, the Italian way to mandatory consumer mediation did almost completely supersede the CADR Directive commitments, by submitting the greater part of consumer disputes to not compliant ADR procedures. This happened under the benevolent eyes of all Italian regulators, without any observations of the European Authorities. The 'rights' to transparency, efficiency, neutrality, independence, etc, re-dimensioned to evaluation criteria of the 'quality of the product' by the supervisory authorities, became prey to administrative decisions, also with regard to access to justice and right to defense.

In considering the aggregate effect of the Directive and of the commented CJEU decision, it is legitimate the doubt whether such regulatory trend may co-exist with private right's enforcement and European law uniformity. The judges of *Van Gend en Loos* were convinced that, in many occasions and in the right hands, law and subjective rights, enforced by European citizens, could be the most efficient mean to reach uniformity and development. Under the present regulatory framework is well visible the particular interest of national governments to preserve the equilibrium of their balance sheet, of their own ADR market and entities, of their own policy of the Judiciary and even of their mercantilist attitude to consider competition as an option (for their friends). It may even be suspected

[88] ECHR, (App no 18640/10, 18647/10, 18663/10, 18668/10 et 18698/10) *Grande Stevens et al v Italy*, 4 March 2004. See M. Gargantini, 'Public Enforcement of Market Abuse Bans' 1 *Journal of Financial Regulation*, 149, 149-158 (2015).

[89] G. Bellantuono, n 86 above.

[90] See F. Wieacker, n 75 above, 8-15.

– with great loss of the Union image – that the vagueness of the certification pre-requisite reflects the common interest of Member States to subtract themselves and their 'industries' to any infringement procedure. It should be added that this is not at all the sole occasion where European regulators disregarded effectiveness of a European directive.[91] The source of the effective European rights in consumer

[91] The Unfair Commercial Practices Directive states, at Art 11, that Member States should give consumers the power to: a) take legal action against unfair commercial practices and/or (b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings… .

This is a horizontal, full harmonization Directive, whose specific object is a contractual relation to be concluded, agreed upon or even executed. It seems therefore obvious that such action or 'appropriate' legal proceedings should come from a party and produce a remedy for the infringed rights.

Art 27 of the Italian Consumer Code empowered the antitrust regulatory Authority (AGCM) for enforcing Art 11 of the Directive. AGCM can suspend, forbid or vary the unfair practices and may issue fines and sanctions. It has exclusive competence on the matter and may act on its own motion, or at the request of interested subjects. However, both legal opinion and Court decisions, recognize the Authority is not a properly 'administrative' body (administration is the entity it is 'independent' from). Even less it is a 'Jurisdiction', where a civil action or administrative review can be lodged. Hence, even if there were one remedy, it would not be 'appropriate' to repair infringements of a contract. The AGCM regulation of such 'proceeding', does not contemplate powers to initiate complaints or legal activities of any kind. The interested party may 'request an intervention' by the Authority (AGCM Del. 1 April 2015, no 25411, G.U. 23 April 2015, n 94). Such request, as may be deduced from the Authority instructions, is not considered neither a suit nor a complaint, but as a simple notice. In fact, such instructions advise that 'after sending a 'notice' to the authority, no further communication will follow, but in the case of the eventual opening of an inquiry… '. (https://tinyurl.com/y4qzaucl (last visited 28 May 2019)).

The regulation empowers the Authority to proceed against the concerned professional. However, there are no provisions about the standing of the requiring party. The consumer is entitled to receive a 'communication' when the proceeding initiates. Moreover, such duty of communication may be disposed of by publication of the inquiry in the Authority Bulletins (Italian parties are famous for daily consulting the ACGM Bulletin at sunrise). Finally, the Authority did empower itself to *non sequitur* if the professional dismissed the practice by himself (or accepting the Authority's moral suasion), if the practice diffusion was either minimal or occasional, if the practice does not fall within the scope of its present priorities. No relief or damages is due to the 'reclaiming consumer', in any case either. The Italian civil code does not contain any remedy specific to 'unfair practices'. The only remedy is either the general *actio doli* or the alike general remedy of pre-contractual liability.

It seems clear that the Authority regulations cover exclusively the behavior of firms on the market (ie its traditional field of competence). There is no sign of consumer protection and relief in contractual relationships. National Authorities, requested the majority of the few CGUE decisions about unfair practices. However, whether the reason for this evolution is the proficiency of the regulatory control or the absolute lack of national civil remedies, remains to be seen. In the Italian electronic communications sector, the infamous case of contract clauses reducing to four weeks the monthly length of the subscription is still pending before administrative Courts. The case originated by the order of the sectoral authority, which in 2017 inhibited the practice, fined the providers and imposed restitution to consumers. Presently, the Administrative Courts annulled the fine and suspended the restitution. Neither the extensive regulatory effort, nor the subsequent enactment of a dedicated provision of law (legge no 192 of 2017, Art 19, S 15) obtained from the concerned firms any re-payment. The single executed provision against the practice was, at the end of 2018, the injunction, ordered by a civil law Court, to dismiss the unfair practice. Many professionals had in fact maintained the illegal clauses in their contracts. See Tribunale di

and contractual matters, still lies in the judgments of the European and national Courts that should be decreased. It is the case to recall that the entire mandatory artifact aiming to avoid claims and judgments, is founded on a single judgment in a single claim. Scholars, Governments and Commissions invoked *Alassini* in some thousands of papers: a judgment is being used – with great interpretative freedom – to assert the needless quality of all others. If Mr *Alassini* had one euro for everyone who used *his own* decision, he would be the richest Italian ever to have lost a case. This being the proof, if necessary, that such decision, as all others, is not the 'resolution of a private dispute'. It contains the law of the matter, which equally applies to everybody in general, individually.

Milano, ordinanza 4 June 2018, available at https://tinyurl.com/y5fdz9ef ((last visited 28 May 2019). Along the whole proceeding the professionals based their main defense on the exclusive competence of administrative Courts and Authorities. The Milano court felt the duty to reassure the opposing professionals that in Italy still exists the civil law of contract. However, it refused to concede restitution as an *interim* measure.