


The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?


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Abstract: The consumer protection model introduced in 2013 by Directive 2013/11/EU has proven to be insufficient. The data have shown that not only consumers but also traders show little enthusiasm for resolving disputes based on the out-of-court procedures introduced by this act. This has resulted from the low awareness among consumers, as well as the limited objective and geographical scope of disputes that can be resolved by means of fast, transparent, and equitable ADR procedures. The stagnation and the so-far unexplored potential of the ADR framework, further intensified by the rapidly increasing virtualization of socio-economic life, justifies the need to implement changes in the field of out-of-court methods for consumer dispute resolution. The package of legislative proposals presented by the Commission, including the Proposal for Directive 2013/11/EU, can be assessed as a reorganization rather than a significant step towards the strengthening of the EU-wide ADR framework. Despite positive elements, such as the extension of the objective and geographical scope of the Directive, this document does not contain proposals for changes that would eliminate all the problems identified during the

10-year-long application of Directive 2013/11/EU. This, in fact, requires the adoption of solutions that have a greater impact on corporate social responsibility, including the responsibility for consumer relations, increasing the degree of readiness to apply ADR procedures as determined by the parties' high awareness, the ease of implementing and transparency of the procedures while ensuring adequate quality and bridging the significant structural gaps between ADR solutions employed by the individual Member States.

1. Introduction

The protection of consumer rights is one of the most important areas of interest for the European Union. The provisions of Directive 2013/11/EU on ADR for consumer disputes,¹ introduced in 2013, were intended to ensure a high level of protection of consumer rights by guaranteeing that disputes with traders can be resolved by independent, impartial, transparent, effective, fast, and fair out-of-court methods delivered by ADR entities. However, the dynamic socio-economic changes have rendered the adopted legislation insufficient and the proposed legal instruments ineffective. More than 10 years after the enactment of the directive that is of key importance for the consumer market, the European Commission decided to initiate a legislative process aimed at eliminating the specific problems that result mainly from the limited objective and geographical scope of disputes that can be resolved on an out-of-court basis. However, it was decided, as was the case in the original act, that a minimum harmonization model with a high degree of generality in the proposed changes on the European level should be adopted, leaving the final decision on the form of the safeguard instruments to the Member States. As a result of this, in turn, the goal of Directive 2013/11/EU may still remain unaccomplished.

The need to increase the effectiveness of the ADR procedures between consumers and traders is one of the biggest challenges faced by the proposed

¹ Directive (EU) 2013/11/ of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR; O.J.E.C. L165, 18 June 2013), 63–79 (hereinafter: Directive 2013/11/EU).

amendments² presented on October 17, 2023. The current data indicate that not only consumers but also traders show little enthusiasm in resolving disputes based on procedures introduced by Directive 2013/11/EU. However, it is not only about increasing the statistical level of participation of ADR entities in the resolution of consumer disputes. It is essential to increase the long-term involvement of consumers and traders in the out-of-court model for resolving increasingly complex disputes. The low involvement of consumer market participants is a result of low awareness, procedural difficulties, and the limited objective and subjective (geographical) scope of the regulation. In the European Commission's view, the explicit extension of the subject matter of Directive 2013/11/EU and its geographical coverage to include relations with non-EU entities is intended to ensure an amicable resolution of the greatest possible number of disputes between consumers and traders.

The article offers an analysis of the proposed changes, indicating the European Commission's reasons that have initiated the process and assessing the presented changes from the point of view of the chances of increasing the effectiveness of the application of alternative dispute resolution methods in the consumer market.

2. Why Is It Necessary to Make Amendments to Directive 2013/11/EU on ADR in Consumer Disputes?

One of the instruments implementing the policy chosen by the European Union for the protection of consumer rights in relations with traders is Directive 2013/11/EU enacted in 2013. The recitals of this EU secondary legislation indicate that it aims to create a legal framework that guarantees consumers in all EU Member States equal access to tools enabling an amicable resolution of disputes with traders.³ All this makes it necessary to consider these regulations not only as a tool for the development of alternative

² See: Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828 COM/2023/649 final (hereinafter: Proposal for Directive 2013/11/EU).

³ See: Recitals of the Directive of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

dispute resolution, but above all as an instrument to ensure the safety and certainty of trading in the single market.⁴

As a result of the dynamic digitization of the consumer market, the measures introduced in 2013 do not correspond to the changing reality, particularly the increase in consumers' use of the Internet to purchase goods and services. Therefore, on the 10th anniversary of the enforcement of this particular act adopted for consumer protection on October 17, 2023, the European Commission published the outcome of the consumer ADR framework review, adopting a package of legislative proposals including the key legislative proposal amending the current ADR Directive.⁵ The European Commission, based on its assessment, which includes, in particular, an analysis of the development and use of ADR entities and the impact of the Directive on consumers and businesses, came to the conclusion that the goals of Directive 2013/11/EU have been achieved only in part.⁶

Directive 2013/11/EU is a solution based on the recommendations of the European Commission issued in 1998 and 2001 which was intended to promote alternative dispute resolution for consumer disputes in the EU by creating approval processes and regular monitoring.⁷ A minimum harmonization model was adopted, leaving considerable flexibility to the Member States. The evaluation of the functioning of the EU act intended to protect consumers has shown that its practical application remains low. The EU institutions attribute the limited application of Directive 2013/11/EU to several obstacles. These obstacles also justify the need to amend the directive.

⁴ Karol Magoń, "Implementation of the Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes – Historical Background and Legal Consequences of a Failure to Transpose the Directive within the Prescribed Time," *Zeszyty Naukowe UEK*, no. 8 (2017): 93, <https://doi.org/10.15678/ZNUEK.2017.0968.0806>.

⁵ See: Proposal for Directive 2013/11/EU.

⁶ Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, SWD (2023) 335 final, part 2/2, p. 36 (hereafter: Commission Staff Working Document part 2/2).

⁷ Alexandre Biard, "Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK," *Journal of Consumer Policy*, no. 42 (2019): 110, <https://doi.org/10.1007/s10603-018-9394-z>.

The first obstacle is the consumers' lack of awareness of the existence of ADR-based cross-border dispute resolution procedures.⁸ The results of the European Commission's 2023 survey on consumer attitudes to cross-border trade and consumer-related issues have indicated that only 6% of consumers went to an ADR body when they were facing a conflict with a trader.⁹ However, this problem itself is not an original cause but a consequence of many other difficulties. It should be stressed that the current regulations do not define precisely enough the procedural issues to be applied in a specific case related to costs, language barriers, or lack of clarity as to the applicable law to be applied in a cross-border context. This problem is all the more important because the information about the possibility of resolving a dispute using ADR tools is usually provided in the language of the trader's country of jurisdiction while, in light of Article 11 of Directive 2013/11/EU, minimum consumer protection standards under the law of the Member State of the consumer's habitual residence should be taken into account when resolving the dispute.

The second obstacle is the low level of traders' involvement in the development and application of ADR procedures to resolve disputes with consumers. As one can read from the 2019 consumer conditions scoreboard, only 30% of EU-based retailers were willing and able to use ADR while 43% were not aware of the existence of ADR.¹⁰

All this translates into specific results for consumers. As was emphasized in the Commission services' working document summarizing the assessment report on results, the ineffective use of the operational

⁸ Joanna Page and Laurel Bonnyman, "ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU," *ERA Forum*, no. 17 (2016): 150, <https://doi.org/10.1007/s12027-016-0424-5>.

⁹ "Survey of Consumers' Attitudes Towards Cross-border Trade and Consumer-related Issues 2023," European Commission, p. 14, accessed April 10, 2024, https://commission.europa.eu/system/files/2023-03/ccs_2022_executive_summary.pdf.

¹⁰ European Commission, *Consumer Conditions Scoreboard: Consumers at Home in the Single Market* (Luxembourg: Publications Office of the European Union, 2019), accessed April 10, 2024, https://commission.europa.eu/system/files/2020-07/consumers-conditions-scoreboard-2019_pdf_en.pdf.

instruments introduced by the ADR Directive causes consumers to lose €383 billion per year.¹¹

It should also be noted that private tools for amicable dispute resolution provided by shopping platforms (PODR) are becoming increasingly popular. These are offered by an increasing number of shopping platforms, including major players such as Amazon, Airbnb, or Ebay.¹² In 2020, 12% of consumers who had a problem with a trader used these instruments, while only 5% resorted to ADR procedures.¹³ However, the European Commission notes that these platforms, unlike the ADR schemes, are not subject to any regulatory control. In this context, the problem of ensuring transparent, fair, and equitable criteria for dispute resolution procedures with traders may emerge.¹⁴

The proposed amendment to Directive 2013/11/EU is not only a consequence of the fact that the goals which have been set for this act have not been fully accomplished or that the level of practical application of these regulations has been low. The reason for the amendment is primarily the current subjective (geographical) and objective limitation in the application of this act. According to the European Commission, these regulations have not been adapted to the ongoing digital transformation. In fact, it should be emphasized that, in light of the increasing virtualization of

¹¹ See: Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828 SWD/2023/337 final, p. 1.

¹² See: Pablo Cortés and Arno R. Lodder, “Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress,” *Maastricht Journal of European and Comparative Law* 21, no. 1 (2014): 32.

¹³ Stefaan Voet et al., “Recommendations from Academic Research Regarding Future Needs of the EU Framework of the Consumer Alternative Dispute Resolution (ADR),” accessed April 10, 2024, https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf.

¹⁴ See: Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, SWD (2023) 335 final, part 1/2, p. 16–17 (hereafter: Commission Staff Working Document part 1/2); Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Taylor & Francis, 2010), 200–4.

the social and economic life, the exchange of goods on the Internet is becoming more and more widespread, which was particularly evident during the COVID-19 pandemic. In just 10 years, the value of e-commerce has increased to EUR 518 billion, or 4 % of GDP according to 2021 data, and the share of e-commerce in retail sales is predicted to grow by one percentage point per year.¹⁵ This creates the need to ensure new and adequate measures to protect consumer rights.¹⁶

Firstly, in the light of Article 2(1) in conjunction with clause (c) and (d) of Article 4(1) of Directive 2013/11/EU, the objective scope of that act covers only disputes concerning contractual obligations arising from sales or service contracts in which the consumer has paid or agreed to pay the price.¹⁷ Moreover, under the current legislation, the scope of ADR therefore only covers disputes that are directly related to the performance of the contract.¹⁸ Presently, however, many disputes related to the development of e-commerce are related to the misleading of the consumer at the pre-contractual stage.¹⁹ This particularly concerns digital marketing, the use of deceptive interfaces, and recourse by traders to unfair market practices based on disguised advertising, fake reviews, or distorted price presentations, that is, anything that has an effect on the consumer's purchase decision-making process. As highlighted above, situations where consumers enter a target contract with the help of intermediaries acting without fees charged to the consumer fall outside the regulatory scope of Directive 2013/11/EU. Indeed, where an intermediary does not charge the consumer for the intermediation service, the applicability of the amicable dispute

¹⁵ See: Commission Staff Working Document part 1/2, p. 5.

¹⁶ See: Maria J. Schmidt-Kessen, Rafaela Nogueira, and Marta Cantero Gamito, "Success or Failure?—Effectiveness of Consumer ODR Platforms in Brazil and in the EU," *Journal of Consumer Policy* 43, no. 3 (2020): 676–9, <https://doi.org/10.1007/s10603-020-09448-y>.

¹⁷ See: Giesela Rühl, "Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market," *Journal of Consumer Policy* 38, no. 4 (2015): 448, <https://doi.org/10.1007/s10603-015-9296-2>.

¹⁸ See: Commission Staff Working Document part 1/2, p. 15.

¹⁹ According to the available data, two out of three consumers are affected by unfair market practices such as hidden advertising or fake reviews, see: "Consumer Condition Survey: Consumers at Home in the Single Market – 2021 Edition," European Commission, accessed April 10, 2024, https://commission.europa.eu/system/files/2021-03/ccs_ppt_120321_final.pdf.

resolution procedure will be solely governed by the rules of the specific ADR entity.²⁰ In the opinion of the European Commission, these areas are so important that their inclusion in the EU regulations makes it necessary to initiate an amendment procedure.

Secondly, Article 2(1) of Directive 2013/11/EU clearly defines the subjective (geographical) scope of this act, covering only consumer relations with EU-based traders. However, in the European consumer market, particularly the online market, the share of non-EU-based traders has been increasing. Consumers take advantage of the lack of restrictions that the Internet offers and have been increasingly willing to conclude contracts with non-EU-based traders. Statistics clearly show that one in eight EU citizens purchases goods or services from a non-EU-based trader every year.²¹ Leaving this area outside the scope of EU law regulations can expose consumers to damages. Currently, 5–7% of the complaints lodged to the European Consumer Centres relate to non-EU-based traders.²² Therefore, the EU legislator should show a special interest in this matter. This area, seen from the perspective of the Directive goal and the overall action taken by the European Union,²³ requires that necessary actions are taken to expand the regulations of Directive 2013/11/EU to ensure that the consumer is provided with maximum protection through the access to fair and thorough dispute resolution options outside the court process.

²⁰ The European Commission cites the example of the Airbnb and Booking platforms. In the case of the former, the consumer is charged with fees, which is associated with the conclusion of a contract between the intermediary and the consumer, whereas in the case of Booking no such fees are charged at the consumer level. See: Commission Staff Working Document part 1/2, p. 16.

²¹ “Internet Purchases – Origin of Sellers (2020 Onwards),” Eurostat, accessed April 10, 2024, https://ec.europa.eu/eurostat/databrowser/view/ISOC_EC_IBOS__custom_3007818/default/table?lang=en.

²² Commission Staff Working Document part 1/2, p. 16.

²³ See: Erik Björling, “In the Procedural Surroundings of Consumer Protection: Online Dispute Resolution, the Adversarial Principle, and Tendencies toward Settlement,” *Masaryk University Journal of Law and Technology* 13, no. 2 (2019): 333, <https://doi.org/10.5817/MUJLT2019-2-7>.

3. Goals and Proposed Amendments to Directive 2013/11/EU on ADR in Consumer Disputes

The proposals to change the EU legislation on infringements of the EU consumer protection law aim to revive the hitherto untapped potential of the ADR regulations in consumer disputes. The proposed solutions, based on the method of a minimum level of harmonization of national regulations, grant the Member States a degree of flexibility in adapting the ADR framework to their internal structure, culture, consumer awareness, infrastructure, and governance of ADR entities along with the possibility of establishing mandatory participation of traders in the out-of-court dispute resolution procedure. The shape of the Proposal for Directive 2013/11/EU is based on three major assumptions.

Firstly, it includes a plan to expand the scope of the ADR framework to cover all categories of EU consumer law disputes, which, as the Commission has assumed, is to contribute to the strengthening of the single market performance in terms of consumer protection. This means that not only domestic and cross-border disputes concerning contractual obligations but also disputes arising between traders and consumers in pre-contractual situations can be resolved, regardless of whether the consumer enters into the final contract. The planned broader objective scope also includes the adaptation of the ADR framework to the possibility of resolving disputes that arise in digital markets.

The second major idea on which the Proposal for a Directive 2013/11/EU is based is the expansion of the geographical coverage of the ADR framework through a redefinition of a cross-border dispute. The purpose of this solution is to allow non-EU-based traders to voluntarily participate in ADR proceedings according to rules applicable to EU-based traders. At the same time, the European Commission proposes to impose an obligation on the Member States to appoint ADR entities responsible for resolving disputes between EU consumers and non-EU-based traders.²⁴

The third group of assumptions consists of regulations of an informative, promotional, and procedural nature relating to an ADR procedure being initiated by the consumer, which would fill the gap caused by

²⁴ Proposal for a Directive 2013/11/EU, p. 15.

the proposal to discontinue the European ODR platform.²⁵ This assumption also includes a reduction in the frequency of reporting duties imposed on ADR entities. In addition, in this group of solutions, it is proposed to impose an obligation on traders to respond to each question submitted by ADR entities on whether they agree to participate in an ADR procedure initiated at a consumer's request.

Under the first of these assumptions, the Proposal for a Directive 2013/11/EU, the scope of application of the current Article 2 of Directive 2013/11/EU has been significantly expanded. Indeed, the proposal to amend Article 2(1) of Directive 2013/11/EU assumes that the cross-border ADR framework will apply to proceedings aimed at the out-of-court resolution of disputes not only for contractual obligations, as has been the case so far, but also the violation of consumer rights at the pre-contractual stage. The extended objective scope would cover disputes arising from contractual obligations under sales and service contracts, extending the list to include disputes arising from contracts for the supply of digital content.

Furthermore, the proposal to regulate clause (b) of Article 2(1) of Directive 2013/11/EU provides for the possibility of resolving disputes relating to the infringement of consumer rights provided for in EU law in pre-contractual situations regarding unfair commercial practices and terms, breach of mandatory pre-contractual information duties, discrimination on the grounds of nationality or residence, access to services and supplies, means of legal protection with regard to non-conforming products and digital content, infringement of the right to change the supplier and the rights of passengers and travelers. As part of the minimum harmonization method in the text of the proposed Article 2(1) of Directive 2013/11/EU, the Member States would be able to reinforce the goal of the Directive by using ADR proceedings for other categories of infringements of consumer rights. This solution provides an unlimited possibility to establish broader regulation in a way that does not violate the obligations

²⁵ See: Proposal for a Regulation repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regard to the discontinuation of the European ODR Platform COM/2023/647 final (hereinafter: Proposal for a Regulation (EU) No 524/2013).

arising from the Treaty on the Functioning of the European Union,²⁶ however, it may lead to significant disproportions in the functioning and the objective scope of disputes in which ADR entities are involved in the individual EU Member States. The planned changes also result from the proposal to amend clauses (e) and (f) of Article 4(1) of Directive 2013/11/EU, modifying the existing definitions of “domestic dispute” and “cross-border dispute” by making them cover the disputes arising from “consumer rights provided for under the EU law”. According to the European Commission, the expansion of the list of disputes subject to the ADR procedure will cause their number to increase by 4.5%, i.e. by 100,000 disputes at the EU²⁷ level as compared to the current number. The proposed changes to the subjective scope that are in line with the goal indicated in Article 1 of Directive 2013/11/EU can be assessed as a natural process of evolution of the untapped potential of the ADR framework,²⁸ aiming at its revival and, at the same time, providing more extensive protection of consumer rights, determined by the trader’s consent to participate in an ADR procedure or by an obligation imposed by a decision of the individual Member States. This will contribute to the greater involvement (including financial involvement) of traders by obliging them not so much to participate in ADR proceedings but rather to obligatorily respond to each and every case found on the list of disputes and which will be addressed to them via ADR entities at the request of a consumer.

Changes to the geographical scope corresponding to the second assumption of the Proposal for a Directive 2013/11/EU will also be of key importance for increasing the frequency of application of the ADR framework and consumer protection. Indeed, the proposal to amend the concept of the “cross-border dispute” contained in the current clause (f) of Article 4(1) of Directive 2013/11/EU provides non-EU-based traders with an option to participate in disputes with consumers resident in the EU. This solution may, on the one hand, contribute to the increasing scope of consumer protection in the EU market and, on the other hand,

²⁶ Katarzyna Marak, “Transpozycja konsumenckich dyrektyw maksymalnych na przykładzie dyrektywy turystycznej 2015/2302 do polskiego porządku prawnego,” *Acta Universitatis Wratislaviensis*, no. 3977 (2019): 355, <https://doi.org/10.19195/0524-4544.329.29>.

²⁷ Proposal for a Directive 2013/11/EU, p. 10.

²⁸ See: Commission Staff Working Document, part 2/2, p. 36.

increase the level of competitiveness of non-EU-based traders who may be more willing to participate in the ADR procedure than traders based in the EU to build their own position and confidence among consumers in the EU market, especially the digital market. Furthermore, it should be noted that the proposal to amend Article 5(1) of Directive 2013/11/EU imposes an obligation on the Member States to “facilitate access” and to “ensure” that disputes falling within the scope of the proposals to amend Directive 2013/11/EU can be submitted to an ADR entity for traders who are not based in the EU but offer goods or services, including digital content and services, to consumers resident in the EU. Undoubtedly, the extension of the geographical coverage with the obligation for the Member States to provide ADR mechanisms for non-EU-based traders will be tantamount to an increase in costs which were not assessed in the impact assessment in Proposal for a Directive 2013/11/EU referring to disputes with non-EU-based traders. It was only generally indicated that the cost of resolving one dispute could be EUR 300 and the handling of potential new 200 thousand disputes could be estimated at EUR 60 million per year. It should be added that ADR entities incurring the costs can pass them on to traders. ADR entities may not charge traders with the costs related to the initial dispute assessment by ADR entities at the consumer’s request and the questions addressed to traders in a situation where they refuse to participate in the ADR procedure, as long as it is voluntary. This is even more relevant to non-EU-based traders. In addition, the Proposal for a Directive 2013/11/EU includes an amendment to clause (d) of Article 5(2) of Directive 2013/11/EU responding to electronic dispute resolution systems by granting the parties the right to request an inspection of the ADR procedure automated outcome by a natural person. However, the Proposal for a Directive 2013/11/EU did not specify what the said inspection would consist of and what its effect would be. The power granted to the parties remains correlated with the obligation of the ADR entity to carry out the inspection, the obligation being implicit given the place of regulation of Article 5 in Directive 2013/11/EU, generating additional costs that were not taken into account in the impact assessment of the proposed amendments.

Moreover, the inconspicuous proposal to amend the current wording of clause (a) of Article 5(4) of Directive 2013/11/EU, intended for the Member

States to exclude disproportionate rules of bringing the “attempted contact” with the trader into effect by the consumer in order to discuss the complaint and resolve the problem at a stage prior to the procedure conducted by the ADR entity, poses a risk of depreciating the said attempted contact by the consumer, which should nevertheless be real and adequate and not seemingly pave the way to involve ADR entities. Nevertheless, a solution that may potentially contribute to reducing the costs incurred by ADR entities, in relation to ongoing proceedings, is the proposal to amend clause (d) of Article 5(2) of Directive 2013/11/EU enabling similar cases against the same trader to be consolidated in a single proceeding provided that the consumer has been duly informed and has not objected to this. In practice, as part of the minimum harmonization, this will mean that the Member States will have to regulate the mechanism for collective ADR proceedings²⁹ if they have not done this so far, and, as a matter of fact, they will have to do this from scratch since the Proposal for a Directive 2013/11/EU does not provide minimum solutions in this respect.

Within the last group of regulations amending Directive 2013/11/EU which correspond to the third assumption indicated in the Proposal for a Directive 2013/11/EU, a key significance lies in the abolition of information obligations imposed on traders as a group and entrusting the European Consumer Centres with the role of raising consumer awareness³⁰ of the existence of cross-border means of asserting claims through ADR procedures. Indeed, the proposed amendment includes the repeal of Article 13(3) of Directive 2013/11/EU abolishing the obligation imposed on an EU-based trader to inform the consumer of the decision to participate in a dispute resolution using ADR, with the indication of the ADR entities competent to process the dispute. However, the substitute for the proposal to abolish the said obligation is the proposal to add clause 8 to Article 5 of Directive 2013/11/EU imposing an obligation on traders to respond within

²⁹ See: Commission Staff Working Document part 1/2, p. 61.

³⁰ See: Commission Staff Working Document Subsidiarity Grid Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, SWD (2023) 334 final, p. 2.

a maximum of 20 working days³¹ to a question asked from an ADR entity about the trader's participation in a "proposed ADR proceeding."

The phrase "proposed ADR proceeding" means that it is not a matter of giving universal consent to participate in ADR proceedings or the permanent absence of it (expressed as a general objection) but of responding in each specific dispute initiated by the consumer through ADR entities. This solution seems to be a cautious step towards the mandatory but in practice it should be considered only as a change of the communication channel. In fact, it constitutes a shift from direct communication of the decision on the trader's participation in the ADR procedure to the consumer to involvement of an "intermediary," an ADR entity through which the information from the trader will finally reach the consumer. From the point of view of information and promotion and the increase in the potential for generating higher costs on the part of traders and, at the same time, ADR entities, the form of the proposed solution can be assessed unfavorably.

One might rather propose to extend the current Article 13(1) of Directive 2013/11/EU to also cover traders who do not commit or are not obliged by a decision of the Member States to participate in ADR proceedings by imposing an obligation to communicate information on ADR entities and the position on their participation in these proceedings.³² The public information obligation could be assessed as part of the corporate social responsibility development process, creating an opportunity for traders who would assess their involvement in ADR procedures on the *ex-ante* basis, that is, before a dispute arose, with the obligation to provide information in this respect, to attach more importance to considering their participation in ADR procedures than they would *ex post* in private correspondence and

³¹ The Committee on Internal Market and Consumer Protection <Committee> presented an amendment to the Proposal for a Directive 2013/11/EU to make the trader obliged to respond within a maximum of 15 working days, optionally extendible to a maximum of 20 working days in case of complex disputes or as a result of exceptional circumstances such as a period of increased activity or an external crisis, accessed April 10, https://www.europarl.europa.eu/doceo/document/A-9-2024-0060-AM-001-057_PL.pdf.

³² The Committee on Internal Market and Consumer Protection <Committee> presented an amendment to the proposal to amend Article 13(2) of Directive 2013/11/EU by expanding the information obligation so that it covers invoices issued by the trader, accessed April 10, 2024, https://www.europarl.europa.eu/doceo/document/A-9-2024-0060-AM-001-057_PL.pdf.

in response to a question addressed to them by ADR entities. Furthermore, it would provide a broad “advertising medium” for publicizing the existence of ADR procedures not only to consumers but also to emerging traders who had to make a general decision on whether to participate in ADR procedures without incurring fixed costs.

The proposed solutions of the Proposal for a Directive 2013/11/EU therefore duplicate the existing obligation expressed in Article 13(3) of Directive 2013/11/EU, only changing the form of communication, in a way that does not guarantee material benefits related to a greater degree of the traders’ involvement, increased consumer protection or even a static increase in the number of proceedings, except for the undoubted increase in costs. The introduction of an obligation to respond in an individual and specific dispute and to decide on an *ex-post* basis whether to participate in an ADR procedure in private correspondence with the ADR entity and in the comfortable secrecy of one’s office may, in practice, make it easier to take a refusal decision rather than a public declaration determining the trader’s image in an ADR procedure that has been insufficiently promoted as a corporate social responsibility tool.

There is no doubt that, depending on the number of questions asked, the costs of this solution for traders will be much higher than the costs of the current solutions. In the impact assessment of the Proposal for a Directive 2013/11/EU, the Commission estimates that the trader response cost, including preparation, processing, and dispatch, will be about EUR 20 as compared to a one-off cost of about EUR 310 resulting from the current solution and informing consumers about entities and participation in the ADR procedure.³³ This solution also implies an increase in the operating costs of ADR entities. However, the broadening of the scope of the obligations of ADR entities related, i.a., to directing questions to traders would be compensated by the proposal to amend clause (a) of Article 7(2) of Directive 2013/11/EU to reduce the frequency of reporting duties imposed on ADR entities from one to two years.

The solution exempting traders from information obligations also has repercussions, as it creates an information and promotion gap in the awareness of consumers, which, under Article 14(2) of Proposal for a Directive

³³ Proposal for a Directive 2013/11/EU, p. 12.

2013/11/EU, would be filled by European Consumer Centres responsible for ADR contact points designated in the Member States. Under Article 14(3) and (4) of the Proposal for a Directive 2013/11/EU, the European Consumer Centres would aid consumers in the broad area of promotion and dissemination of knowledge about ADR procedures, providing assistance in accessing ADR entities. The question is whether their coverage and promotional resources will be sufficient to regularly raise the level of consumers' awareness of ADR procedures, replacing and, above all, expanding the reach of the existing promotional medium that traders have been obliged to employ.

The effect of the Proposal for a Regulation (EU) No 524/2013 which states in Article 2(1) that “the ODR platform shall cease to function” is a proposal to amend Article 20(8) of Directive 2013/11/EU expressed in the Proposal for a Directive 2013/11/EU. It gives the European Commission an assignment to develop and maintain an interactive digital tool to find general information on consumer protection measures and links to ADR entities' websites, filling the gap after the expiry of the ODR platform. The Commission's assignment under proposed Article 14(2) of the Proposal for a Directive 2013/11/EU would be carried out based on information provided by the Member States including the name and contact details of the established ADR contact points. In addition, the Proposal for a Directive 2013/11/EU includes a proposal to amend clauses (a) and (b) of Article 5(2) of Directive 2013/11/EU by imposing an obligation on the Member States to ensure that consumers can submit complaints and required supporting documents on-line in a traceable manner. Apart from the electronic form, the proposal includes an obligation for the Member States to ensure that consumers with limited digital skills are able to submit and access documents in a non-digital form upon request. Under the proposal to amend clause (b) of Article 5(2) of Directive 2013/11/EU, the Member States would be obliged to offer digital ADR proceedings using easily accessible and inclusive tools. In practice, taking the decision to end the ODR platform will be tantamount to dispersing and diversifying ADR tools,³⁴

³⁴ See: Commission Recommendation of 17.10.2023 on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations, C (2023) 7019 final.

which is of significance in the context of seeking to increase the number of cross-border proceedings, if only by unifying them in the minds of consumers while eliminating a Community-wide instrument whose potential has not been properly exploited.

4. Conclusions

The need to introduce changes in the EU regulations with regard to out-of-court methods for consumer dispute resolution in light of the presented justification and the problems identified in it which demonstrate the stagnation and hitherto untapped potential of the ADR framework is evident. The justification for the need to revise Directive 2013/11/EU is reflected in the main assumptions on which the Proposal for a Directive 2013/11/EU is based, which are intended in the Commission's view to strengthen the EU ADR framework rather than reorganize it.³⁵ A brief analysis of the proposed changes does not, however, warrant the thesis that the Proposal for a Directive 2013/11/EU will lead to their strengthening and the complete elimination of the problems accompanying the 10-year duration of Directive 2013/11/EU. Leaving aside the positive solution of extending the objective and geographical scope of Directive 2013/11/EU by covering disputes arising from the infringement of "consumer rights provided for in EU law," the indicator for the strengthening of the EU ADR framework should not be solely the statistics of the number of disputes initiated by consumers, which will probably increase as a result of the proposed amendments. The prospect of abolishing information obligations imposed on traders by the proposal to repeal Article 13(3) of Directive 2013/11/EU may raise the low consumer awareness of ADR procedures, the growing deficit of which may be non-convincingly and sufficiently compensated by the information policy of ADR contact points. Therefore it is not a solution that comes with the potential of making consumers and traders more involved.

The package of legislative proposals presented by the Commission, including the Proposal for Directive 2013/11/EU, can then be assessed as a reorganization rather than a significant step towards the strengthening of the EU-wide ADR framework. This, in fact, requires the adoption of solutions that have a greater impact on corporate social responsibility, including

³⁵ Commission Staff Working Document part 2/2, p. 6.

the sphere of responsibility for consumer relations, increasing the degree of readiness to use ADR procedures as determined by the parties' high awareness, the ease of implementing and transparency of the procedures while ensuring adequate quality and bridging the significant structural gaps between ADR solutions employed in the individual Member States.³⁶ In this case, it is not enough to impose an obligation on the Member States to ensure that national ADR entities act in good faith.³⁷ The fundamental issue affecting the perception of the Proposal for a Directive 2013/11/EU in terms of reorganizing the current ADR-related regulations is therefore the inadequate level of minimum harmonization characterized by a high degree of generality, which seems to have a too narrow regulatory effect on the solutions that would be expected to eliminate the existing problems associated with Directive 2013/11/EU. It grants the Member States too much flexibility in ensuring the useful effect of the goals set out in the provisions of the Proposal for a Directive 2013/11/EU and the effectiveness of the provisions of Directive 2013/11/EU, to be able to practically strengthen the actual consumer protection level, maximizing the potential of the EU ADR framework.

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³⁶ See: Biard, "Impact of Directive," 136.

³⁷ See: Article 14 (2) of the Proposal for a Directive 2013/11/EU.

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