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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

Abstract

The purpose of this article is to undertake a legal analysis of the legal process of implementing Directive 2013/11/EU into the Polish legal order and to present the legal consequences of a failure to transpose the Directive within the prescribed period. In the first part, the author presents the description of work that has been done at the EU level on the alternative resolution of consumer disputes and evaluates the proposals for specific legal solutions presented in the course of this work. The author then presents the main issues and challenges associated with the process of the transposition of Directive 2013/11/EU. In particular, the author reflects on the direct effect of Directive 2013/11/EU, in both vertical and horizontal terms. As a result, the author concludes that the failure to implement the Directive in the prescribed period initiates the State's liability to an individual for damage caused by the lack of proper implementation and imposes on the national courts the duty of applying a pro-EU interpretation of national law. In turn,

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in the light of the well-established case law of the CJEU, and given the nature of the analysed Directive, the lack of a proper implementation of Directive 2013/11/EU within the prescribed period, does not entitle the consumer to effectively assert his rights against the trader for non-fulfillment of the obligations resulting from the Directive.

Keywords: consumer, ADR, directive, implementation, direct effect.

JEL Classification: K410, K490.

1. Introduction

On 18 June 2013, there was published in the Official Journal of the European Union legislative package, which consists of: Directive of the European Parliament and of the Council 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes¹ (i.e. “the directive on ADR in consumer disputes”) and the Regulation of the European Parliament and of the Council (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes, i.e. the ODR (Online Dispute Resolution) Regulation in consumer disputes². These legal acts are linked and they complement each other³. Their aim is to improve the functioning of the retail internal market, and in particular to facilitate the process of pursuing claims by consumers, among others, via the Internet⁴. Thanks to the newly proposed system of out-of-court procedures the pursuance of these claims is to be more efficient, and the settlement of consumer disputes should become quicker and cheaper. Although the deadline for the implementation of the ADR Directive for consumer disputes expired on 9 July 2015, the Polish legislator has adopted the law on the out-of-court resolution of

¹ Official Journal of the European Union, series L 165 of 18 June 2013.

² Official Journal of the European Union, series L 165 of 18 June 2013. The provisions of ODR Regulation in consumer disputes are applied since 9 January 2016, except for: art. 2 paragraph 3 and art. 7 paragraph 1 and 5, which are applicable since 9 July 2015; and art. 5 paragraph 1 and 7, art. 6, art. 7 paragraph 7, art. 8 paragraph 3 and 4, art. 11, 16 and 17, which are applicable since 8 July 2013.

³ According to art. 288 (ex art. 249 TEC) of the Treaty on Functioning of the European Union regulations a regulation shall have general application and it shall be binding in its entirety and directly applicable in all Member States. Thus, regulation No 524/2013 unifies the law on consumer ADR in online disputes by introducing uniform standards for the protection of the weaker party (consumer) in the digital services market. The platform for online disputes is available in all official languages of the European Union at: <http://ec.europa.eu/consumers/odr/>. This platform is intended to reduce concerns about complaints when purchasing goods in a foreign e-shop and thus foster the development of cross-border trade.

⁴ Cf. the proposal EC 2011/0373 (COD) of 29 November 2011 on the implementation of ADR Directive in consumer disputes, COM (2011) 793, p. 2.

consumer disputes⁵ only on 10 January 2017. During the work on the shape of the law implementing the Directive on consumer ADR, the Council of Ministers first adopted on 31 March 2015 the assumptions for the draft law on out-of-court resolution of consumer disputes⁶, then on 14 June 2016 it submitted to the Sejm of the Republic of Poland the official draft law on the consumer ADR with merits of reason for further proceedings⁷. The aim of this study is twofold: to present the current achievements of the European Union on the issue of out-of-court methods of resolving consumer disputes and to describe the main problems and challenges related to the implementation of Directive 2013/11/EU.

2. The Purpose and the Basic Principles of the Directive on the Consumer ADR

From the point of view of the functioning of the single market in the European Union, and in particular from the perspective of the safety and security of trading in this market and the increase of the consumers' confidence in the internal market⁸, the directive on ADR in consumer matters is of great importance. For entrepreneurs themselves and for so-called ADR entities⁹, it sets forth certain standards for resolving disputes in an alternative manner to common court litigation. It also imposes a number of obligations on these two groups of entities, in particular the obligation to provide information. In drafting the legislation,

⁵ Official Journal No 1823 of 9 November 2016.

⁶ The draft guidelines to the law on out-of-court resolution of consumer disputes of 18 March 2015, developed by the President of the Office of Competition and Consumer Protection, number: DDK-076-249/14/PM/ISZK, no from the list ZC39; hereinafter: assumptions to the act of law.

⁷ The draft law on out-of-court resolution of consumer disputes of 14 June 2016 developed by the Government Legislation Centre, no from the list: UC36; hereinafter: draft law.

⁸ As can be read in recital 15 of the preamble of the Directive on the consumer ADR: "The development within the Union of properly functioning ADR is necessary to strengthen consumers' confidence in the internal market, including in the area of online commerce, and to fulfill the potential for and opportunities of cross-border and online trade. Such development should build on existing ADR procedures in the Member States and respect their legal traditions".

⁹ The directive on ADR in consumer cases defines an ADR entity in art. 4 paragraph 1 point h, as "any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2) of this Directive". In turn, the draft law uses the term of "authorised entity" and describes it as "an entity entered in the Register (...)", which "conducts proceedings on the out-of-court settlement of consumer disputes in accordance with the procedures of such proceedings applicable at a given authorised entity, hereinafter referred to as the rules".

the EU legislator foresaw an alternative dispute resolution (hereinafter: ADR¹⁰) that would be inexpensive and fast, and a simple alternative for the common courts of law in the Member States and a universal panacea for the excessive length of court cases in many countries of the European Union¹¹. The directive in its premise is to create a uniform, comprehensive system of alternative dispute resolution for consumer disputes in all Member States. It is expected to cover all disputes in the EU market between the consumer and the trader arising from contracts concluded for the sale of goods or provision of services, including contracts concluded via the Internet and cross-border contracts¹². The system is intended to serve the consumer and to improve the consumer's unequal position in relation to traders in the goods and services market. The Directive provides the Member States with flexibility in choosing the appropriate model of ADR entities for a given Member State¹³. The institutional model provided for in the act on out-of-court resolution of consumer disputes is based on the so-called mixed approach, which assumes

¹⁰ The abbreviation "ADR" stands for alternative dispute resolution. To clarify, for the purposes of this publication, when using the concept of ADR, the author has in mind the broad definition of ADR, including all out-of-court methods of dispute resolution – negotiation, mediation, conciliation and arbitration. The concept of "ADR" has evolved over time. In the past arbitration was usually in formal EU documents not covered by the scope of ADR (so: Green Paper of 19 April 2002, (COM (02) 196 final)). This document defines the notion of "alternative dispute resolution" as "non-judicial dispute resolution procedures conducted by a neutral third party with the exception of arbitration". The view that arbitration should not qualify as an alternative method of dispute resolution has been expressed, among others, by (Rajski 2001, p. 38 ff; Szurski 2003, pp. 87–88). The opposite is expressed, among others, by (Błaszczak 2007, p. 345; Wach 2005, pp. 136–139; Weitz 2007, p. 15; Allison 2005, pp. 165–166; Carver & Vondra 2005, pp. 214–216; Strome 1989, p. 25; Cornu 1997, p. 314; Piasecki 1995, p. 258; Safjan 2002, p. 114). At present, the dominant view is that arbitration is also included in ADR. For instance, under Directive 2013/11/EU the arbitration, if the Member State decides this way, may fall within the scope of the act. In recital 20 of the Directive, it is stated that the Directive may also cover, if Member States so decide, ADR entities which impose a solution upon the parties, which however excludes the procedures conducted before the entities formed at an ad-hoc basis. Hence, the decision whether arbitration will be available or permissible in consumer disputes is to be made by each Member State. However, if a Member State permits consumer disputes to be resolved by arbitration, Directive 2013/11/EU shall apply to these arbitration proceedings as well, with the exclusion of ad-hoc arbitration proceedings.

¹¹ Cf.: justification for the draft law, p. 2 ff.

¹² A detailed justification of the choice of the mixed, so-called horizontal model, can be found in the guidelines to the act of law on out-of-court resolution of consumer disputes of 18 March 2015, pp. 14–15.

¹³ Cf.: Point 20 and 24, and so: "Where appropriate, in order to ensure full sectoral and geographical coverage as well as access to ADR, the Member States should be able to ensure the creation of an additional ADR entity that deals with disputes in respect of which no specific ADR entity is appropriate. Additional ADR entities are to provide security for the consumers and the traders by eliminating gaps in access to ADR entities".

the existence of sectoral entities and horizontal coverage¹⁴. For the most part the model is already working and requires only minor legislative changes. It will take into account the existing structures of public and private ADR entities as well as the procedures developed in their framework¹⁵. It will also provide the opportunity to create new ADR entities, assuming that both of these groups will adapt their regulations to the requirements of the Directive. This model ensures a consistency and completeness that makes it possible for the relevant and competent ADR entity to resolve every consumer dispute (within the scope of the Directive).

Referring to the issue of a procedural nature concerning ADR measures in the Polish legal system, it should be noted that the Polish legal system is already largely developed in the field of alternative dispute resolution – both in internal and external nature (Morawski 1993, p. 21, 2003, p. 228; Wach 2005, pp. 122–125; Gajda 2008, p. 12). In this respect, there was no need for implementing major changes¹⁶. Among the broadly defined so-called internal alternatives to the judicial pursuance of claims – namely those that are the result of already initiated proceedings in court – there should be indicated, in particular, the desire of the court to reach a settlement and conciliation proceedings (art. 10, 104, 184–186 and 223 of the Act of 17 November 1964 – Civil Procedure Code¹⁷), as well as mediation proceedings (cf. art. 10, 981, art. 103 paragraph 2, art. 1041, 1831–18315, 2021, 2591, art. 355 paragraph 2, art. 394 paragraph 1 point 101, art. 777 paragraph 1 point 21 of the Civil Procedure Code). Among the external alternatives to civil proceedings in consumer cases, the following examples are noteworthy: proceedings before permanent arbitration courts for consumers at provincial commercial inspections¹⁸, the Arbitration Court at the Polish

¹⁴ This approach assumes the coexistence of sectoral ADR entities (e.g. in the financial services sector, telecommunications, energy regulators, etc.) and the ADR entity of a horizontal nature, which would be appropriate in all consumer issues not specifically reserved for a particular sector entity. In the Polish model, the role of a horizontal entity is assigned to the Trade Inspection.

¹⁵ A characteristic feature of the mixed model is the co-existence of ADR entities of business character and ADR entities of public character. The standards of the operation of ADR entities are based both on self-regulations as well as on the provisions of commonly applicable law. For more see: Assumptions to the act of law, pp. 10–11.

¹⁶ It is important, however, that the internal regulations of individual ADR entities should be tailored to the requirements of the Directive.

¹⁷ Journal of Laws of 2014, item 101 as amended, hereinafter: Civil Procedure Code.

¹⁸ These proceedings are regulated, among others, in art. 3 point 4, art. 37 and art. 43 of the Act of 15 December 2000 on Trade Inspection (Journal of Laws of 2016, item 1059, as amended), in the Regulation of the Minister of Justice of 25 September 2001 on determining the rules of organisation and operation of permanent arbitration courts for the consumers (Journal of Laws No 113, item 1214), in the Regulation of the Prime Minister of 2 August 2001 on the lists of experts for the quality of products or services (Journal of Laws No 85, item 931).

Financial Supervision Authority¹⁹, Banking Consumer Arbitration, the Court of Arbitration at the Polish Bank Association and the Court of Arbitration at the Polish Chamber of Commerce and, lastly, complaint proceedings²⁰. Some of the external alternatives in the consumer cases are classified as civil proceedings (e.g. arbitration proceedings), while others – including negotiations – do not constitute formal procedures, but only a technique intended to bring the parties closer to agreement. These ADR measures implemented into the Polish legal system of course require certain regulations and unification. This role has been foreseen for the EU legislative package on consumer ADR and the Act of law that has been prepared on alternative methods of resolving consumer disputes. Note also that while the Directive on the consumer ADR takes precedence over other acts of law on alternative dispute resolution methods, it should be without prejudice to the provisions of the Directive of the European Parliament and of the Council 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters²¹, which establishes a framework for the systems of mediation at the Union level in the case of cross-border disputes. At the same time it does not prevent its application in relation to internal mediation systems²². Directive 2013/11/EU is to be horizontally applicable to all types of ADR proceedings, including ADR proceedings covered by Directive 2008/52/EC.

This publication focuses here exclusively on the implementation of the directive on ADR in consumer issues, leaving aside both the specific provisions of the national law as well as the analysis of the individual solutions contained in ODR Regulation. It thus refers only generally to the draft law on consumer ADR²³.

¹⁹ Established pursuant to art. 18 paragraph 1 of the Act of 21 July 2016 on financial market supervision (Journal of Laws of 2016, item 174, as amended), and acting on the basis of the Rules of the Arbitration Court at the Financial Supervision Authority annexed to Resolution No 61/2016 of the Financial Supervision Authority dated 19 January 2016.

²⁰ The mandatory complaint procedure on consumer issues is regulated in the Act of 5 August 2015 on the consideration of the complaints by the entities of the financial market and on the Commissioner for Finance (Journal of Laws of 2016, item 892), as well as, among others, in the Act of 16 July 2004 – Telecommunications Law (Journal of Laws No 171, item 1800, as amended), the Act of 12 June 2003 – the Postal Law (Journal of Laws No 130, item 1188, as amended), or in the Act of 29 August 1997 on tourist services (unified text: Journal of Laws of 2004, No 223, item 2268, as amended).

²¹ Official Journal of the European Union, series L 136 of 24 May 2008, p. 3.

²² Cf.: recital 19 of the preamble of the Directive on consumer ADR.

²³ See recital 12 of the preamble of the Directive on consumer ADR: “This Directive and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes are two interlinked and complementary legislative instruments. Regulation (EU) No 524/2013 provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality

3. The Legislative Work on Consumer ADR at the European Level

Increased interest among EU institutions in out-of-court methods of resolving consumer disputes has been observed for several years²⁴, but it was only in 2015 that the European Union adopted a comprehensive package of consumer ADR. The achievements of these years of work on the proper shape and form of the regulation clearly contributed to the current state of the EU ADR legislation. In the course of the work on the current shape of consumer ADR in the European Union, two networks dealing with cross-border consumer dispute have been created, ECC-NET and FIN-NET²⁵. Further, two European Commission's recommendations have been issued on consumer ADR²⁶ and a number of other acts developed in the form of green papers, action plans and communications have been published²⁷. Early initiatives put forth by EU institutions amounted to soft law, non-binding acts, and did little more than define desirable directions. They were vague, and the demands they included had little impact on practical redress for consumers²⁸. In general, the most significant and specific of these initiatives were two European Commission's recommendations (Hodges 2012,

ADR procedures. The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform”.

²⁴ Initially, the EU soft law represented only the minimum criteria for the use of ADR methods.

²⁵ Information on ECC-NET and FIN-NET is available at: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm (accessed: 15.10.2016) and http://ec.europa.eu/finance/fin-net/index_en.htm (accessed: 15.10.2016).

²⁶ Commission Recommendation 98/257/EC of 30 March 1998 on the rules that apply to the bodies responsible for out-of-court settlement of consumer disputes (Official Journal of the European Union 1998 L 115/31) and Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Official Journal of the European Union 2001 L 109/56).

²⁷ Green Paper of the European Commission of 16 November 1993 on consumer access to justice and resolution of consumer disputes in the single market, COM (93) 576; The action plan of the European Commission of 14 February 1996 on facilitating the access of consumers to justice and the settlement of consumer disputes in the internal market, COM (96) 13; EC Communication of 30 March 1998 on alternative dispute resolution, COM (98) 198; Green Paper of the European Commission of 19 April 2002 on alternative dispute resolution in the fields of civil and commercial law, COM (2002) 196.

²⁸ The situation changed in 2009 after the EU institutions were granted greater powers in the field of judicial cooperation in civil matters, under the Treaty of Lisbon. According to art. 81 (2) of the consolidated version of the Treaty on the Functioning of the European Union (Official Journal of the European Union 2008 C 115/47, hereinafter: TFEU): “The European Parliament and the Council adopt measures to, among others, ensure effective access to justice and the development of alternative methods of dispute resolution”. Under this article, the EU may adopt measures for the approximation of the laws and secondary legislation of the Member States in the field of ADR.

p. 13). The first of them, Recommendation 98/257/EEC issued in 1998, related to the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes²⁹. The second, Recommendation 2001/310/EC of 2001, introduced the rules on out-of-court bodies involved in the amicable resolution of consumer disputes³⁰. Ultimately, however, the European legislator decided to introduce a completely new directive to the legal order, namely Directive 2013/11/EU on ADR and the Regulation 524/2013 on ODR. The above EU achievements remain complementary to the regulations of the ADR Directive and the ODR Regulation, and the individual provisions of these acts must be interpreted in the light of the existing achievements of European Union law. Recital 19 of the preamble of the Directive on consumer ADR introduces, in addition, the primacy of this Directive in relation to other acts addressing alternative methods of dispute resolution, by stating that when two norms are in conflict, the Directive shall prevail, unless expressly provided otherwise.

4. Lack of Implementation of the Directive on Consumer ADR within the Prescribed Period – the Legal Consequences

Transposition is a crucial step in the introduction of a directive into national law and the subsequent condition of effectiveness of these regulations. The EU legislation in no way imposes the form or method of implementation, which is only limited by the aim of the directive³¹. The process of the implementation of the directive into the national legal system and its regularity is very crucial³². Indeed, until the transposition and before the expiry of the term to carry it out, the directive as an act of the EU does not have the feature of the direct applicability in the legal systems of the Member States³³. In the case of the Directive on ADR in consumer issues, the deadline to transpose the provisions is set out in art. 25 paragraph 1, where the Member States, including Poland, were required

²⁹ Recommendation of the European Commission 98/257/EC.

³⁰ Recommendation of the European Commission 2001/310/EC.

³¹ The condition for the effective application of the norms of the European Union directive in national law of the Member State is its implementation. According to art. 288 paragraph 3 of the TFEU, the act of binding the Member States by the objective of the directive and leaving to them flexibility in the choice of instruments to achieve it, is the basic premise of the structure of the EU law sources.

³² See (Lenaerts & Van Nuffel 2011, pp. 901–906).

³³ See the ECJ judgment of 5 April 1979 – *Pubblico Ministero vs Tullio Ratti*, Ref. 148/78 (Lenaerts & Van Nuffel 2011, p. 897).

to adopt and implement the statutory provisions, the secondary legislation or the administrative provisions in the period up to 9 July 2015.

In accordance with the principle of a direct effect of EU law, a failure to implement of the Directive in a timely manner may constitute the basis for individuals to invoke the provisions of the directives as the source of their rights in proceedings before the courts of Member States³⁴. However, the mere breach of the duty to implement the Directive is not a sufficient condition for the occurrence of direct effect³⁵. CJEU formulated such additional terms and conditions in its judgment in *Ursula Becker vs Finanzamt Münster-Innenstadt*³⁶. In light of this ruling, the condition of the direct effect of specific provisions of Directive 2013/11/EU – in addition to the defective implementation itself – is so-called “sufficient precision and unconditionality” of such provisions and the creation by these provisions of the law on which individuals may rely. Therefore, in order to state that the consumer could effectively rely on Poland’s failure to implement in proper time Directive 2013/11/EU, it must first be examined whether the provision on which the consumer bases his or her demand is unconditional and sufficiently precise. In this regard, to the extent that Directive 2013/11/EU requires the Member States to establish a coherent and complete system of ADR entities and to guarantee consumers ADR procedures of adequate quality, it does not use the so-called “leeway of decision”, which means that the Directive is in this regard sufficiently precise and unconditional³⁷. The latter condition, i.e. conferring to

³⁴ See ECJ judgment of 11 July 2002 – *Marks & Spencer plc vs Commissioners of Customs & Excise* (case no C-62/00); judgment of 26 February 1986 – *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* (case no 152/84); judgment of 19 January 1982 – *Ursula Becker vs Finanzamt Münster–Innenstadt* (case no 8/81).

³⁵ ECJ judgment of 22 May 2003 – *Connect Austria Gesellschaft für Telekommunikation GmbH vs Telekom-Control-Kommission* (case no C-462/99).

³⁶ In paragraph 25 of the judgment 8/81, the ECJ held, *inter alia*: “(...) in any case where the provisions of the Directive seem to be, as to their subject matter, unconditional and sufficiently precise and implementing provisions have not been adopted within the prescribed period, the provisions of the Directive may be relied upon in connection with any national rule incompatible with the Directive, or in the extent to which the provisions of the Directive define the rights of individuals in cases against the Member State”.

³⁷ In its judgment of 18 October 2001 on *Riksskatteverket vs Soghra Gharehveran* (case no C-441/99) the ECJ stated: “Just like a private person should be able to rely on the right which is vested with him or her on the basis of precise and unconditional provision of the directive, if such a provision is severable from the other provisions of the same directive, not having the same level of precision or unconditionality, this person should be able to rely on the provisions conferring on him or her in a precise and unconditional way the status of a beneficiary of the directive if only the discretion left to the Member State in relation to the other provisions of the directive, whose non-implementation was the only obstacle to the effective exercise of the rights granted to a private person by the directive, has been fully utilized”.

the individuals the rights in the directive, in fact, determines the extent of the occurrence of a direct effect. In this regard, it is necessary to subject the respective provisions of the directive to a thorough analysis.

In examining the question of the legal consequences of the failure to implement Directive 2013/11/EU within the prescribed period (before 10 January 2017), two important questions arise: whether in the situation of the lack of implementation in proper time of the provisions of the directive, can the consumer rely directly on the rules of the directive and claim damages against Poland arising from the non-implementation of Directive 2013/11/EU within the prescribed time (what is known as a vertical claim), and whether the consumer would be able, in the light of existing rules and the adopted case law of the CJEU to effectively demand from a given trader the payment of compensation due to non-implementation of certain obligations under the Directive 2013/11/EU. An example of such an obligation is the obligation to provide information on the applicable ADR procedures (a horizontal claim).

In this case, the failure to implement the provisions of Directive 2013/11/EU to the Polish legal system in a timely manner renders the Directive less effective and, consequently, deprived consumers – from 9 July 2015 to 10 January 2017 – of the rights the Directive conferred on them. The issue of the liability of the state vis-à-vis the individual for a breach of EU law was determined by the CJEU in its judgment of 19 November 1991 in the joint cases C-6/90 and C-9/90 – *Andrea Francovich, Danila Bonifaci and others v Italy*³⁸. In the light of these rulings, a Member State which has violated the obligation of implementation cannot, in a case against individuals, rely on the failure of its obligations under the Directive. Moreover, in each case when the provisions of the directive are, in terms of their content, unconditional and sufficiently precise, in the absence of the secondary legislation being issued within the prescribed period, it is possible to rely on such provisions against any national rules that are incompatible with the Directive, and also in the event when they define the rights which individuals may rely upon against the state³⁹. However, the Member State is not liable for any infringement of law, only for an eligible violation which is sufficiently serious⁴⁰. Accordingly, three conditions must be fulfilled in order to deem that

³⁸ The case arose against the background of Directive 80/987, which aimed at providing employees a Community minimum of protection in the event of insolvency of their employer. The Italian Republic failed to implement the statutory provisions, the secondary legislation and the administrative provisions necessary to comply with the directive within a period which expired on 23 October 1983.

³⁹ See: judgment of 19 January 1982 in the case no 8/81 *Becker Rec.* p. 53, point 24 and 25.

⁴⁰ The CJEU has formulated the following guidelines to assess the seriousness of an infringement: (1) the national court should take into account the clarity and the precision of the

the individuals have the right to compensation for damages directly on the basis of EU law. First, the result intended by the Directive should include granting to individuals certain rights. Second, it should be possible to determine the content of those rights on the basis of the provisions of the Directive. Third, there should be a direct causal link between the breach of the obligation incumbent on the Member State and the damage sustained by the injured parties⁴¹.

It should be now considered whether a hypothetical liability of Poland vis-à-vis a particular consumer could arise in case of errors in the implementation of the Directive 2013/11/EU. As regards the first condition, many provisions of the Directive confer a number of rights aimed at protecting the interests of the consumers and specify in detail the scope of such powers⁴². A failure to implement these provisions in line with the objective set out in the directive into the national law may be a reason to limit the consumers' access to information which is essential from the point of view of the decisions related to concluding particular transactions. Therefore, in such a case, the first of the conditions would be fulfilled. The second premise, namely as concerns the direct causal link between the failure to implement Directive 2013/11/EU and damage to

rule infringed, and if the EU law gives to the Member States certain discretion, the key issue is how seriously and significantly the limits of the discretion have been exceeded; (2) to deem a certain breach serious, it is not necessary for the Member State to act with intended fault or negligence; (3) there is no need for an early recognition by the CJEU that there has been a failure by a Member State of its obligations under the Treaty; (4) the manifestation of a serious breach of EU law is a failure to issue an act of law which ensures the effectiveness of the provisions of the directive in the national legal order; (5) the manifestation of a serious breach is a situation in which a Member State does not take any measures necessary to achieve the result envisaged by the directive within the prescribed time. See: paragraphs 27–28 of the ECJ judgment of 8 October 1996 – *Dillenkofer and others vs Federal Republic of Germany*, case no C-178/94 and paragraphs 36–41 of the ECJ judgment of 18 January 2001 – *Sweden vs Stockholm Lindöpark AB and Stockholm Lindöpark AB vs Sweden*, case no C-150/99.

⁴¹ Remedying the damage caused by the Member State should take place within the framework of the national tort law. In addition, the substantive and the formal conditions in terms of remedying the damage, as defined in the legislation of the individual countries, cannot be less favourable than those governing similar domestic claims and they must not be determined in a manner that causes the compensation to be practically impossible or excessively difficult to obtain. See paragraphs 67–73 of the ECJ judgment of 5 March 1996 – *Brasserie du Pêcheur SA vs Federal Republic of Germany*, case no C-46/93.

⁴² In particular art. 2 paragraph 3 (quality requirements), art. 5 paragraphs 1–7 (availability of ADR entities and of ADR procedures), art. 7 paragraphs 1–2 (transparency), art. 8 (effectiveness), art. 9 paragraphs 1–3 (fair treatment), art. 10 paragraphs 1–2 (voluntariness), art. 11 paragraph 1 (legality), art. 12 paragraph 1 (impact on limitation period), art. 13 paragraphs 1–3 (traders' obligations to provide information), art. 14 paragraphs 1–2 (assistance provided to consumers), art. 15 paragraphs 1–4 (disclosure requirements of ADR entities), art. 18 paragraph 1 (appointment of competent authority).

the consumer, should be examined each time in the specific facts of the case. However, the damage in such a case will cover both the actual financial loss (*damnum emergens*) as well as lost benefits (*lucrum cesans*). Undoubtedly, the lack of implementation of Directive 2013/11/EU within the prescribed period – from 9 July 2015 to 10 January 2017 – may result in the consumer being deprived of or being restricted in his rights vis-à-vis the entrepreneur, which can, in turn, inflict a measurable loss or damage, e.g. due to the lack of the possibility to use fast, low-cost out-of-court means of pursuing one's consumer rights and the need to incur additional costs associated with prolonged litigation. In this case, Poland could be required to remedy the damage caused to the consumer by its failure to implement Directive 2013/11/EU, but only if particular damages were caused between 9 July 2015 and 10 January 2017.

The horizontal effect of the directive is a bit more problematic⁴³. The Court in principle rejects the horizontal direct effect of directives⁴⁴, i.e. referring to the relationship between the individuals themselves, namely the possibility of pursuing the rights due to one individual to another individual on the basis of the provision of the directive. However, this opinion is criticised by some representatives of the doctrine⁴⁵. The above opinion has been made clear by the Court in the case of *Paola Faccini Dori vs Recreb Srl*. The ECJ stated there that: “a directive is binding only in relation to each Member State to which it is addressed and has been established in order to prevent a State from taking advantage of its own failure to comply with Community law. It would be unacceptable if a State, when required by Community legislature to adopt certain rules intended to govern the State's relations or those of State entities with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefit of those rights. The effect of extending that principle to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. It follows that, in the absence of measures of transposition

⁴³ The vertical effect of the directives is clearly indicated in the jurisprudence of the ECJ. In its judgment of 26 February 1986 – *M. H. Marshall vs Southampton and South-West Hampshire Area Health Authority* (case no 152/84) the ECJ stated: “With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to article 189 of the EEC Treaty, the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to «each Member State to which it is addressed». It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person”.

⁴⁴ The ECJ judgment of 4 December 1997 – *Verband deutscher Daihatsu-Händler eV vs Daihatsu Deutschland GmbH* (case no C-97/96).

⁴⁵ See (Biernat 2006, pp. 285–286).

within the prescribed time-limit, an individual may not rely on a directive in order to claim a right against another individual and enforce such a right in a national court⁴⁶. Therefore, it should be assumed that, in general, consumers will not be able to rely on the provisions of Directive 2013/11/EU against the trader; and hence they will not be able to effectively assert their rights before a national court against a trader who has failed to respect its obligations under the Directive. Note, however, that in the light of several judgments⁴⁷, the CJEU has allowed for an incidental occurrence of the horizontal effect, even if, in the light of Directive 2013/11/EU, the cases referred to in these rulings will not apply.

Despite the lack of horizontal effect of the Directive, the failure to implement Directive 2013/11/EU before 10 January 2017 brings down specific legal consequences in private law relations between consumers and entrepreneurs. In its rulings, the CJEU has formulated principles which amount to guidelines addressed to the national courts as to how they should proceed when improper implementation of a directive is found⁴⁸. These principles should be applied accordingly also when there has been a failure to implement Directive 2013/11/EU within the prescribed period. The following three measures should be taken. First, the national courts should, in case of disputes on the basis of a failure to properly implement the Directive on consumer ADR till 10 January 2017, interpret the national law in the most consistent manner with the Directive. That is, they should apply such an interpretation which ensures that the objectives envisaged by the Directive are reached as fully as possible⁴⁹. Second, in the event of a conflict with the national law, in a situation in which the result prescribed by the Directive cannot be achieved, the Member States should make amends for the damage incurred by the individuals due to errors in the transposition of the Directive, on condition of the fulfillment of other premises in case of incurring such damage. Third, when necessary, the national court should address the CJEU with a request

⁴⁶ The ECJ judgment of 14 July 1994 – *Paola Faccini Dori vs Recreb Srl* (case no C-91/92).

⁴⁷ See the ECJ judgment of 30 April 1996 – *CIA Security International SA vs Signalson SA and Securitel SPRL* (case no C-194/94); the ECJ judgment of 28 January 1999 – *Österreichische Unilever GmbH vs Smithkline Beecham Markenartikel GmbH* (case no C-77/1997).

⁴⁸ See (Szpunar 2004, p. 57).

⁴⁹ This is referred to as “pro-EU” interpretation of national law, which, however, is subject to restrictions – it may not impose on national courts the duty of interpretation which is contrary to law. It also is limited by the general principles of law which form part of EU law, including the principles of legal certainty and non-retroactivity of law. Cf. also the ECJ judgment of 10 April 1984 – *Sabine von Colson and Elisabeth Kamann vs Land Nordrhein-Westfalen* (case no 14/83); the ECJ judgment of 8 October 1987 – *Kolpinghuis Nijmegen BV* (case no 80/86) and the ECJ judgment of 15 April 2008 – *Impact vs Minister for Agriculture and Food, and Others* (case no C-268/06).

for a preliminary ruling on the interpretation of the Directive in accordance with art. 267 TFEU⁵⁰.

5. Conclusions

The work done by the European Union on guaranteeing consumers an adequate quality of alternative dispute resolution shows that this issue is of utmost importance for the proper functioning of the internal market. Unfortunately, Poland did not comply with the deadline of Directive's implementation and pass proper law until 10 January 2017, which was considerably beyond the prescribed implementation period⁵¹. The failure to transpose this Directive⁵² within the prescribed period was important for several reasons⁵³. First, after additional conditions have occurred, Directive 2013/11/EU becomes directly applicable on the strength of the principle of direct effect. Second, due to the occurrence of the direct effect of directives, the rights of individuals (consumers) arise, resulting from the directive itself, which can be enforced by those individuals before the national courts. Third, the doctrine of compensatory liability lays down the right

⁵⁰ It should be emphasised that addressing the CJEU for a preliminary ruling is not the court's duty but a right. Moreover, this right should not be a reason to withdraw from the particular procedures, which should be respected by the court under the domestic law when withdrawing from the application of the national provision which it considers contrary to the Constitution. For more on this topic, see paragraphs 53–56: the ECJ judgment of 19 January 2010 – *Seda Küçükdeveci vs Swedex GmbH & Co. KG KG* (case no C-555/07).

⁵¹ The legal consequences of a failure to implement may apply to the State Treasury as well as private entities – natural and legal persons, entrepreneurs, consumers and ADR entities.

⁵² According to the ECJ judgment of 12 July 2005 – the *EC Commission vs France* (case no C-304/02): Defectiveness of the implementation can consist in: a complete lack of or a delay of the implementation, which, in turn, makes the directive ineffective because the goals it assumes cannot be achieved; a partial lack of implementation of a directive (incomplete implementation) due to a failure to regulate all the issues required by the provisions of the directive; incompatibility of the provisions of the national law with the provisions of a directive or treaty; ineffective implementation of a directive due to the lack of effectiveness of its norms on the territory of a Member State that results from the inability to ensure compliance with the implemented provisions in the internal (domestic) act of law.

⁵³ According to the ECJ judgment of 11 April 1978 – the *EC Commission vs the Italian Republic* (case no 100/77), also before the deadline for the transposition of a directive, the Member States are obliged to refrain from actions which could cause the implementation of its objectives to fail, which follows from the interpretation of art. 4 paragraph 3 passage 2 of the Treaty on European Union and art. 288 passage 3 of TFEU. Moreover, the Member State, in the event of non-compliance with the deadline for the transposition of a directive (as well as in the event of a failure to comply with implementation duty) may not cite internal difficulties or national internal rules, or even the specifics of its constitutional system, to justify the delay.

to claim compensation from a Member State (Mik 2000, p. 500). This means, in spite of the late implementation of the Directive, that consumers in Poland are indirectly protected by the possibility of claiming compensation from the Member State for damage suffered. This partial compensation of consumer damage is the direct result of EU case law. Without such a mechanism of consumer protection, each consumer in a given Member State would lack protection and be exposed to unfair practices on the part of the state.

In Poland, despite the progress that has been made, the mechanisms of amicable settlement of disputes remain underdeveloped, uncommon and unknown among the consumers. Practice nonetheless shows that out-of-court dispute settlement is an effective and inexpensive method by which consumers may assert their rights. This applies especially to petty cases which, when settled by the courts of law, have a number of drawbacks, such as excessive length of proceedings, high costs, formalised procedures, etc. The proper implementation of Directive 2013/11/EU has now begun to bring about effective protection of consumer rights in Poland. The country should strive in the future to provide consumers with the widest possible access to ADR resources, helping swing the pendulum from theoretical rights to factual ones. It is also important to encourage and inform consumers about the use of cheaper and faster methods of enforcing their rights. A consumer who feels aversion to ADR will always be willing to choose a common court despite its manifold drawbacks. Such behaviour is attributable mainly to a lack of trust in ADR. Building trust in ADR entities is a priority for Poland to support the development of ADR methods among consumers in the near future.

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Implementacja dyrektywy 2013/11/UE w sprawie alternatywnych metod rozstrzygania sporów konsumenckich – rys historyczny oraz konsekwencje prawne braku transpozycji w terminie

(Streszczenie)

Celem artykułu jest przeprowadzenie analizy prawnej procesu implementacji dyrektywy 2013/11/UE do polskiego porządku prawnego oraz przedstawienie konsekwencji prawnych braku transpozycji dyrektywy w terminie. W pierwszej części autor prezentuje rys historyczny prac na poziomie Unii Europejskiej nad alternatywnymi sposobami rozwiązywania sporów konsumenckich oraz dokonuje oceny propozycji określonych rozwiązań prawnych przedstawianych w toku tych prac. Następnie przedstawione są główne problemy i wyzwania związane z procesem transpozycji postanowień dyrektywy 2013/11/UE. W szczególności prowadzone są rozważania na temat bezpośredniej skuteczności dyrektywy 2013/11/UE w ujęciu wertykalnym oraz horyzontalnym. Autor dochodzi do wniosku, że brak terminowej implementacji dyrektywy w sprawie konsumenckiego ADR aktualizuje odpowiedzialność odszkodowawczą państwa w stosunku do jednostki za szkodę wyrządzoną brakiem implementacji oraz nakłada na sądy krajowe obowiązek stosowania tzw. prounijnej wykładani prawa krajowego. Natomiast w świetle ugruntowanego orzecznictwa TSUE oraz mając na uwadze charakter przedmiotowej dyrektywy, brak prawidłowej implementacji dyrektywy 2013/11/UE w terminie nie uprawnia konsumenta do skutecznego dochodzenia swoich praw przeciwko przedsiębiorcy z tytułu braku realizacji obowiązków płynących z dyrektywy.

Słowa kluczowe: konsument, ADR, dyrektywa, implementacja, bezpośredni skutek.