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THE FIELD OF APPLICATION OF COMMERCIAL MEDIATION

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THE FIELD OF APPLICATION OF COMMERCIAL MEDIATION

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Abstract

Currently, in many countries around the world, the mediation plays an important role in alternative dispute resolution, primarily because it allows parties to escape the terms of the dispute and find a settlement in accordance with their interests. It is not irrelevant the fact that whiles the solution of the dispute, by applying the rules of law, is rigid, the solution found through mediation is flexible, innovative and pragmatic, and thus better adapted to the interests of each party.

National[4] *and international regulations applicable to alternative means of settling disputes, often sets also the filed of application, with the expressive stipulation of exempted fields. Therefore, the freedom of parties represents the principle of law, mandatory rules are the exception.*

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[4] Where they exist. Under Romanian law, Law no. 192/2006 on mediation and the profession of mediator, which regulates a wide range of application, may be subject to mediation disputes in civil, commercial, family, criminal, consumer protection in the field, but when conflicts of rights that the parties may, in labor disputes. Law no. 192/2006 was published in the Official Gazette of Romania, Part I no. 441/2006. The Law no. 192/2006 have been amended by Law no. 370 of 26 November 2009 (published in the Official Gazette of Romania, Part I, no. 831 3 December 2009), by GO no. 13/2010 for amending and completing certain normative acts in justice to transpose Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, approved with amendments by Law no. 128/2010 (published in the Official Gazette of Romania, Part I, no. 70/30 January 2010) and by Law no. 2002/2010 on measures to accelerate the settlement process (published in the Official Gazette of Romania, Part I, no. 714 of 26 October 2010). Amendments to Law no. 192/2006 was necessary to harmonize domestic legislation with the EU, in particular with Directive 2008/52/EC of the European Parliament and Council Directive on certain aspects of mediation in civil and commercial matters, published in the Official Journal of the European Union no. L 136 / 3 of 05/24/2008.

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Mediation clauses may also be grafted onto special legislation, whose specifics will take over. So, national legislation is to be taken into account individually, within the mutual influences of substantial right, when we observe the mediation. The solutions may differ and contradict from one legal system to another, with the price legal relations security, agreed between the parties. But it is equally true that a mediation clause could not be drafted with violation, in a local or international system, of any binding, for example, a rule of exclusive jurisdictional competence.

For this reason, art. 2 of Directive 2008/52/EC, European Parliament and the Council excluded from the application of this the rights and obligations which the parties may not have under applicable law, its application to fiscal, customs or administrative matters, these are fields where Member States have regulatory exclusivity.

Keywords:
mediation, alternative dispute resolution, commercial mediation, mediation procedure

In the legal literature it was noted that areas where the mediation procedure is most often used today to resolve conflicts are commercial and labour law (mediation to conclude collective agreements at national level, branch or enterprise).

It is undisputed that the mediation, as an alternative mean for resolving commercial disputes, is a convention. From this point of view, the open field of mediation in commercial matters is extensive, so in this study we proposed to draw up a list of possible commercial mediation.

Mediation of disagreements about the conclusion of contracts

Mediation can be successfully used not only to settle the dispute itself, but also in situations of differences between the parties during a negotiation conducted precisely in order to conclude a contract.

In these situations, the mediator may assist the parties precisely just to achieve the purpose of negotiation, namely the achievement of a consensus regarding the contractual terms and signing the contract.

In Romanian law, the Order of the President of the National Authority for Energy Regulations no. 38/2007 regarding the approval of the procedure for resolving disagreements related to the conclusion of contracts between economic operators in the field of electricity, supply contracts and contracts for network connection[5] or Decision. No. 461/2006 of the President of the

[5] Published in Official Gazette of Romania, part I no. 751/2007. This legislative measure repeals the Order no. 31/2002 of the President of the National Authority for Energy Regulations for the approval of the Procedure for resolving s disagreements related to the conclusion of contracts in the field of electricity and heat energy and Order no.18/2004 the President of the

National Authority for Natural Gas Regulations regarding the approval of Methodology on mediation of pre-contractual disputes in natural gas field[6] - can be competitive segment covered examples of mediation regulations in the negotiation of a contract.

Mediation of multi-party commercial cases regarding complex contracts

Complex multi-party contracts are involving achieving of mediation in specific ways, different from the situation of contracts signed between two parties. In these cases, the interests that must converge are more complex, as well as technical issues that must be understood by the mediators, and for this reason, in general, mediation takes different forms in this area. Often, it appears almost as a continuous assistance of the mediator, since the beginning of the contract until the end of it, thereby ensuring a high degree of expertise to the person ensuring assistance to the parties providing in the project.

We consider the so-called „Dispute boards" (Rosu, (2010): 422), committees of mediators, who are appointed by parties at the conclusion of a contract, and which are seeking to conduct the relations between the parties throughout the contract so that if there would be a dispute, they are already informed about all involved elements and can effectively and quickly assist the parties in mediation that they need at that time.

Mediation of cases in society law

In corporate relations, mediation can take effect under the same reservation, that of compliance with public policy (Catana, (2007): 67).

National Authority for Energy Regulations for the approval of the Procedure of resolving the disagreements regarding the conception of users to electric lines of public interest and the issue of location approvals.

But, through a recent decision, the High Court of Cassation and Justice retained the Law regarding electricity no. 13/2007 (Published in Official Gazette of Romania., part I, no.51 from 23rd of January 2007, modified by Governmental Decision no. 172/2008 Published in Official Gazette of Romania., part I, no.787 from 25th of November 2008, republish in Official Gazette, no.864 from 22nd of December 2008), regulates the activities of good use of energetic resources, granting ANRE the possibility to amicable solution of disagreements regarding the conclusion of contracts of supply of electricity and connection to the network of energetic system, completed regarding the solution procedures, though Order no. 38/2007 of this national authority. Expansion of previsions of Law 13/2007 and of the above mentioned order regarding individual users, is outside the purpose of legislative measure for which it was drawn. See High Court of Cassation and Justice, Commercial Department, decision no. 1495 from 6th of May 2008, available on-line: http://www.scj.ro/SE%20rezumate%202008/SE-1495-2008.htm.

[6] Published in Official Gazette of Romania, part I no. 461/2006.

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Corporate life can often cause divergences since the moment of establishing the commercial company, these can be designed but also in relation to changes in the life of a company regarding the changing of ownership structure, regarding the functioning of the commercial company, on rights and obligations of shareholders or of the governing bodies of the company, regarding the determination of responsibility of individuals within it.

Regarding the functioning of society, a series of decisions, as decisions of general assemblies of shareholders, the special meetings of shareholders of a particular category, of general meetings of holders of debentures, or the decision of the Board of the auditing committee may give rise to litigation that it is recommended to be resolved in a confidential conditions and non within the courts of law.

Given the fact that only in the case of withdrawal, exclusion and dissolution, the parties do not intend to maintain the existence of the commercial company, all other types of cases fall within the category of situations in which mediation is intended, as a means of solution of the cases tends to maintain commercial relations between the parties (C. Leaua, Metodele alternative de solutionare a disputelor (ADR), cu privire speciala asupra medierii, in Revista „Dreptul" nr. 3/(2006): 132).

On the other hand, if a dispute reaches the court for resolution, it can never replace the will of the parties, but only cancel illegal documents, and therefore, by way of a court parties will not ever really address what generated the dispute, namely the divergence of views. Therefore, mediation in this area can have a very high efficiency; it can lead to build such a decision in order to satisfy the interests of all parties.

But even in the case of exclusion and withdrawal, a number of issues such as assets, such as shareholder rights are excluded or who withdraws is beneficial to be resolved through mediation, the latter being a negotiation situation in which mediator's assistance can support the building of a mutually acceptable solution[7] (Piperea, (2009): 20).

[7] This author shows that, through "a pact of shareholders we can oversee quick solution modalities for these situations that offer the advantage that are commonly accepted, in a moment in which shareholders are not stressed by collateral influences, accepting thus the solution of cases with the Court of Justice, and avoiding the problems that occur in such a "resolution". Thus, is excluded also the possibility that one of the shareholders requests more then the price of the shares or social parts owned for the reason that ha was the one that involved most in the business, and worked in the activity of the company. Even if sometimes there are not express clauses for the amicable resolution of shareholders disputes, through all solutions that provide for any other problems, a shareholders pact can except *ab initio* the apparition of tensioned situations between shareholders, because of the fact that those have already established a resolution for a situation, that, under other circumstances, is referred only to those already involved. Regarding the explanation of the concept of shareholders pact, see the above mentioned author and the above mentioned paperwork, p. 16.

However, corporate relations involve also the contact with a number of confidential information, especially in situations where conflict between members or managers is generated by certain suspicions of unfair competition activities, which determine the need to adjust the mediator to the need to observe confidentiality of certain data.

Also, in situations where companies are faced with the impossibility of making decisions because of differences of opinions members or shareholders which do not permit meeting of majorities or unanimity of vote according to constitution documents, mediation appears to be the only solution that may avoid dissolution of company. This is a form of mediation; mediation is more close to the mediation in the phase of contractual negotiation than of dispute mediation itself (Piperea, (2009): 20).

Scope of mediation in the insolvency field

For the purpose of insolvency prevention, may be used also alternative means of dispute resolution. All non-judicial means of dispute resolution, fro, the pure and simple transaction, to mediation, conciliation and arbitration, are based on agreement between the parties, *i.e.* the debtor and its creditors. This will agreement can not be conceived out of confidence that the parties must prove so that the conclusion of such contracts for an amicable settlement of the dispute of debtor with its creditors represents an earning debtor itself, trust is what missing to the debtor in a state of reaching financial difficulty (Piperea, (2008): 214).

Differences may arise though if insolvency related remedies are sought — example misfeasance claims against directors, preference claims, claims to set aside transfers at undervalue, etc., and steps may have to be taken to ensure appropriate authority to settle is provided by the court or creditors' committee.

In addition, it is often the case that insolvency will bring the parties to mediation earlier in the dispute than might otherwise be the case, given what may be limited costs available in the insolvent party and the need to bring matters to a speedy resolution when there is no prospect of ongoing business relationships.

In many cases, mediation is ideally suited to insolvency cases where, for example claims made need to be settled quickly and where creditors, having already lost money, want to find ways of reaching resolutions cost effectively.

The arrival of a third party professional administrator into the insolvent entity does bring to the problem a new set of eyes and an independence which is not necessarily there pre insolvency. Most insolvency practitioners and office holders (example liquidators or administrators) are very experienced negotiators and well as able to see and separate the trees in the wood, but, they are not all trained as mediators and can find the use of an independent mediator of value.

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However much they may be independent of the insolvent company they represent, they can still be seen to be fighting its cause and inevitably perhaps drawn to one side only of the dispute.

There does not seem to be any type of dispute found within the insolvency field which is not suitable to be resolved through mediation - even fraud claims are successfully mediated - although sometimes you have to allow some time to elapse after the fraud for feelings to settle.

The only type of dispute that would not be suitable for possible resolution through mediation would be one where the office holder needs a ruling from the court so that a precedent is set which will enable other similar or identical case to be resolved.

In the UK the courts have made it clear that they support the use of mediation in appropriate cases.

Although mediation is not generally yet as advanced in the civil law countries as it is in the UK, increasingly it is being used in insolvency matters.

The French insolvency regime specifically provides for the use of "conciliation" whereby conciliators have a role in assisting a company in financial difficulties to work out a plan with its creditors. They deploy many of a mediator's skills and also have an obligation of confidentiality.

France has two amicable proceedings for enterprises facing difficulties: the "procedure de conciliation"[8] and the "mandatory ad hoc"[9], appointed by the court. Both proceedings have the purpose to allow amicable and confidential negotiation of the debt issues. Conciliation lasts usually 4 months, whereas the "mandatory ad hoc" may have a longer lifetime. The CEO of the company continues to fulfil all the duties of his office. The conciliator assists him in seeking an arrangement with the creditors and negotiating it. An order to stay enforcement measures against the company up to two years might be ordered by the court. It appears that in the majority of the cases where one or other of these processes has been used, the indebted companies have been rescued and showed a lasting recovery of business.

Romanian Doctrine signalled the possibility of resolving disputes by mediation in this field, such a possibility is not contrary to law, with the mention that mediation would not replace the proceedings of insolvency, but also could fit into it, and these could be run concurrently. The solution is required, as art. 2. Paragraph (4) of Law no. 192/2006 amended, does not prohibit mediation in this matter, and paragraphs (5) of the same article gives the parties the possibility that, regarding the rights on which they may require, to introduce " in

[8] Articles L 611-2 à 611-15 of the Code of Commerce are available since July 2005. Conciliation procedure is available to any trading or craft business which experiences legal, economic or financial difficulties, present or foreseen, and which is not in "cessation de payment" (i.e. unable to meet its due and outstanding liabilities with its available assets) for more than 45 days.

[9] Articles L 611-3 and R 611-18 to R 611.20 of the Code du Commerce.

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any convention a clause mediation " also we believe that, given the fact that the receiver can, under the conditions specified in Art. 20 paragraph (1). Letter m) of Law no. 85/2006 to make the "transactions conclusion", with the assumption of mutual concessions, these can be reached with the participation of a mediator, even the plan of organization, accepted by the conditions specified in Art. 94 paragraph (A) of that Law, is by its source, the result of negotiations between debtors and creditors and can also provide implementation of transactions.

Romanian law does not mention that there were regulations that aim to preventing bankruptcy. From this perspective, it was underlined the need to revise the legal framework for the debtor, whose company is in remediable crisis, and to create the opportunity to ask its creditors a chance to recover, through a mechanism and an external procedure of insolvency even outside the court. Thus, in theory, it was shown that the legal reorganization could be replaced with equivalent measures such as preventive composition, which does not require a court decision declaring insolvency, but a contract between the debtor and the majority of its creditors, concluded and executed under the mediation of a specialist in insolvency, contract whose failure should lead to bankruptcy.

The debtor is obliged to restructure its company in order to recover, through measures related to the change of management, liquidity of some assets, refocus on the market, refinancing or diversification of financing sources, assuming some additional costs to shareholders or cooptation of investors to ensure the financing sources for recovery, etc.. Creditors agreed to a range of facilities for the benefit of the debtor, in order to promote recovery, such as suspension of prosecution or disruption, freeze of interest and penalties, or even waiving penalties, debt rescheduling, and continuing supply of utilities etc

Sure there might it may be objected that creditors can not be forced to grant those facilities, but, however, viewed from another perspective, we may not identify their interest in avoiding adverse consequences of their debtor's insolvency. There are companies that focus, in addition to the interests of managers, shareholders and their employees, these companies are customer or major contributors of creditors, for which the insolvency or disappearance of these customers, suppliers and taxpayers could affect in a very significant way the creditors.

Responding to criticism of the Romanian legislative framework, criticism regarding the inexistence of the treatment measures of business difficulties, the legislature drafted the law no. 381/2009 concerning the introduction of preventive composition and mandate of the ad-hoc14.

The law applies to legal persons - debtors - who hold a company in financial difficulty, without being in insolvency state. The aim of the new provision is "to safeguard the company in difficulty, to continue its business, to

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retain the jobs and coverage of claims against the debtor, through renegotiation procedures of their debts or conditions, or by signing an arrangement."

The law defines an ad hoc mandate as "a confidential procedure, initiated at the request of the debtor, by an ad hoc representative, appointed by the court, negotiate with creditors to achieve an agreement between one or more of them and the debtor to overcome the difficulty state is which the latter is. "

Regarding preventive arrangement, the new regulations provide that it is a contract between the debtor, on the one hand, and creditors that hold at least two thirds of the value of claims accepted and uncontested, on the other hand, the debtor proposes a business plan for the company and coverage of such claims against it, and the debtor's creditors agree to support efforts to overcome the difficulty in which the debtor company is."

These two procedures to safeguard a company in financial difficulty can only be applied by the courts, the bankruptcy judge or, where appropriate, by the court president, ad hoc the attorney, or the conciliator.

As noted, ad hoc representative and conciliator institution, as they are introduced by Law no. 381/2009, are distinct from that of the mediator or if conciliator operating under Law no. 192/2006 regarding the mediation and the profession of mediator. We note that both ad hoc representative and conciliator are chosen among insolvency practitioners, licensed under the law, and not among the authorized mediators. Option of legislature is natural, if we take into account the specific area in question.

However, we believe that there is no impediment so that the parties (debtor in difficulty and creditors) to use the services of a authorised mediator in the two procedures, even if the term with reference to the object ad-hoc (intermediation of a conclusion of an agreement between the debtor and one or more of his creditors) and to some of the roles of conciliator (arrangements for the amicable settlement of any dispute between the debtor and creditors or between creditors - art. 16 letter. c) of Law no. 381/2009), we might conclude that these procedures are incompatible, as ad-hoc representative or conciliator duties overlap with those of the mediator.

In our view, the incompatibility is only apparent. First, there is no legislative provision that would prohibit the use of the services of a mediator in these procedures. Secondly, we must take into account the fact that insolvency practitioners are not necessarily good negotiators by nature of their profession. Or, it is clear that the chances of success of these attempts to safeguard the company in difficulty, depend, for the most part, by the skills and techniques that ad-hoc mandatory or conciliator have in respect of overcome disputes.

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Mediation in the field of consumer protection

A special area is the application of mediation in conflicts relating to consumer protection.

Thus, any conflict arising from the infringement of rights covered by national or European legislation relating to consumer protection, likely to cause their injury, may be subject to mediation in general terms of the application procedure (Florescu & Bordea, 2010: 73).

Undoubtedly, consumers are faced with considerable difficulties regarding the settlement of disputes, especially when purchasing goods and services from another state. This situation had forced the European Commission to organize and support the cross-border cooperation between consumer associations.

At EU level, in the last decade, the amicable settlement of consumer disputes has seen a great development; this evolution is primarily due to the two recommendations[10] that the European Union has adopted in late 1990, recommendations that structures the procedure and organizes the out-of-court settlement of consumer disputes resolution.

The European Commission is behind the organization of two European networks of organizations that share the objective of facilitating the consumers' access to alternative ways of extrajudicial procedures for dispute settlement, where the trader is established in another Member State than their consumer resides. They pursue the same objective, but operate in different ways.

Thus, the European extrajudicial network "ECC Net" - European Consumer Centers Network is a structure that provides support and information to consumers, composed of national contact points in each member state and Norway and Iceland. Each operates as a contact point for information exchange about 400 bodies that they consider two recommendations comply with the Commission on principles applicable to bodies responsible for resolving disputes about matters.

On January 1, 2008, Romania[11] joined the ECC Net network to support the citizens of EU regarding the cross-border shopping.

As regards the existing EU instruments, namely Recommendation 1998/257 and Recommendation 2001/310, the report "Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through

[10] Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer dispute, published in the Official Journal no. L. 115 of 17 April 1998, p. 31 and Recommendation 2001/310/EC of 4 April 2001 on principles for out-of-court bodies involved in the consensual resolution of consumer disputes, published in Official Journal no. L. 109 of 19 April 2001, p. 56

[11] ECC Romania is co financed by the European Commission and the Romanian Government through the National Authority for Consumer Protection. ECC Romania is logistically supported by the Association for Consumer Protection in Romania (Romania PCA).

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Ordinary Judicial Proceedings" conducted at the request of the European Commission show that the principles of independence and impartiality of the third parties involved in the mediation / arbitration systems set out in those instruments are not respected even in the CEE-Net database.

For this purpose, the Economic and Social Council considers that the existing recommendations on the alternative dispute resolution systems should become binding legal instruments.

The extent of consumer access to alternative mechanisms for the settlement of disputes and small claims may lead to a prompt, fair, efficient and relatively low cost of consumer protection issues.

In parallel with this whole quasi-legislative activity, the European Union provides financial support for certain initiatives, particularly in terms of resolving consumer disputes online.

Thus, the Commission has been financially involved in the launch of ECODIR (Electronic Consumer Dispute Resolution), an electronic platform for dispute settlement.

Responding to EU requirements, the mediation - as an alternative means of dispute resolution can be used too in the Romanian law for settling disputes between traders and consumers.

According to article 16 paragraph (2) of the Government Ordinance no. 21/1992 on consumer protection[12], "the solving of payment request for moral prejudices or damages related to the remediation or replacement of defective products or inadequate services requested by consumers or economic operators belongs to the jurisdiction of the competent court or competent mediation body."

According to article 2 (2) of Law no. 192/2006 on mediation and mediation as a profession, the dispute resolution is possible through a mediator "if the consumer claims that there is a prejudice as a result of the purchase of faulty goods or services, or non-compliance with contractual terms or the provided guarantees, the existence of abusive clauses comprised in the contracts between consumers and economic operators[13] or other rights violations under domestic or European Union law on the consumer protection."

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[12] Published in the Official Gazette of Romania, Part I, no. 292 of 28 August 1992, republished in the Official Gazette of Romania, Part I, no. 208 of 28 March 2007 and amended by Law no. 363 of 21 December 2007 on combating unfair traders practice with customers and regulatory harmonization procedure with the European legislation on consumer protection, published in the Official Gazette of Romania, Part I, no. 899/28 December 2007, legislation which in turn was modified by OUG no. 174/2008, published in the Official Gazette of Romania, Part I, no. 795 of 27 November 2008.

[13] See Law no. 193 of 6 November 2000 on unfair terms in the contracts concluded between traders and consumers, published in the Official Gazette of Romania, Part I, no. 560 of November 10, 2000, last amended by Law no. 161/2010, published in the Official Gazette of Romania, Part I, no. 497 of July 19, 2010.

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Mediating disputes in banking field

Another area of application of mediation, closely related to previously examined, is the customer relationship with financial institutions - banks.

Systems through which the cross-border financial transactions are much more complex than the national funds transfer systems because involves one or more intermediate institutions, networks using different compensation from countries that still have different currencies, including operations exchange.

The European Community is constantly concerned about improving cross-border payments but also the protection of the consumers of these services, so, in order to ensure the same conditions for cross-border services and services and to stimulate national and cross-border investments, the Directive 97/5/ EC of the European Parliament and the Council on cross-border credit transfers[14] was adopted, abrogated by Directive 2007/64/EC.

Our country has applied the provisions of Directive 97/5/EC of the European Parliament and Council on cross-border credit transfers by adopting the Government Ordinance no. 6 / 2004[15] on cross-border transfers, which was recently repealed by Emergency Ordinance no. 113/2009[16]. This last ordinance has already undergone a change during 2010[17], this change aims primarily to ensure users' right to seek out-of-court dispute resolution procedures.

This regulation provides that "the National Bank of Romania shall ensure the application of out-of-court procedures for the adequate and effective resolution of complaints brought before the payment service users who consider themselves harmed by the payment service providers operating on Romanian territory. The users of payment service may use these procedures to solve the complaints on a voluntary basis" (article 179).

To this end, in the structure of the National Bank "shall be created a specialized compartment to ensure the mediation of disputes arising between the categories of service providers provided at article 2[18] and the users of

[14] The Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 ¬ regulating the cross-border credit transfers was published in the Official Journal no. L 043 of 14 February 1997, p. 25, Directive, which, according to article 93 of Directive 2007/64/EC on payment services in the domestic market and amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC, 2006/48/EC and repealing the Directive 97/5/EC (published in Official Journal no. L 319, 05.12.2007, p. 1), was repealed on November 1, 2009.

[15] Published in the Official Gazette of Romania, Part I, no. 82 of 30 January 2004, approved by Law no. 119/2004, published in the Official Gazette of Romania, Part I, no. 357 of 23 April 2004.

[16] Published in the Official Gazette of Romania, Part I, no. 685 of October 12, 2009.

[17] See OUG no. 61/2010 for amending Government Emergency Ordinance no. 113/2009 regarding the payment services, adopted with amendments by Law no. 197/2010, published in the Official Gazette of Romania, Part I, no. 724 of October 24, 2010

[18] Article 2 of the OUG no. 113/2009 provides that the ordinance's provisions "shall apply to services rendered by the following categories of payment service providers:

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payment services according to the regulations issued by the National Bank of Romania[19]."

Please note, however, that such a structure does not exclude the possibility for interested parties to approach the National Authority for Consumer Protection or the court.

According to article 178 of the Emergency Ordinance No. 113/2009[20], in order to ensure compliance with this ordinance by payment service providers, the consumers and other parties, including consumer associations, may refer the National Authority for Consumer Protection, and the users – legal persons - may refer the Financial Guard of cases of failure of payment service providers to the provisions of Titles III and IV of this law or to initiate legal action against the payment service providers who violated the provisions of this regulation.

Where appropriate, the National Authority for Consumer Protection, respectively the Financial Guard, shall inform the applicant, in reply to it, the existence of extra-judicial dispute resolution procedures.

In order to solve any disputes amicably and without prejudice to the rights of consumers and users-legal persons to take legal action against payment service providers who violated the provisions of the said regulation or their right to notify the National Authority for Protection Consumers, respectively the Financial Guard, the consumers and the legal users can call out-of-law dispute settlement procedures.

At this point, it is not clear to which alternative structures will be the consumer – natural or legal person - directed, when ANPC, respectively the Financial Guard, shall meet their obligation to provide information to consumers, obligation imposed by the provisions of OUG no. 113/2009, article 178 (as amended), as long as the structure of BNR specialized compartment that should be in charge of mediating disputes does not exist yet.

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credit institutions within the meaning of art. 7 para. (A) section 10 letter. a) Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments by Law no. 227/2007, as amended and supplemented;

institutions issuing electronic money within the meaning of art. 7 para. (A) section 10 letter. b) of Government Emergency Ordinance no. 99/2006, approved with amendments by Law no. 227/2007, as amended and supplemented;

giro postal service providers providing payment services under the applicable national legal framework;

Payment institutions under this ordinance;

The European Central Bank and National Central Banks when not acting in their capacity as monetary or otherwise involving the exercise of public authority;

"Member States or their regional or local authorities, when not acting in their capacity as public authorities".

[19] Article 179 para. (1) of OUG no. 113/2009.

[20] As amended by OUG no. 61/2010 for amending the Government Emergency Ordinance no. 113/2009 regarding the payment services.

We believe that there is no impediment that the parties to the agreement for the providing of payment services to use the services of a mediator, which operates under Law no. 192/2006, an authorized mediator specialized in such disputes who can support the parties in reaching an amicable settlement.

However, we can see that this manner does not provide the purpose of the Directive mentioned above, much less of the Directive 2008/48 / EC of the European Parliament and the Council. The reason behind such assertions is that always an authorized mediator shall provide this service for a fee, so that the consumer is not only protected, but is exposed to additional costs.

If the interested parties assume these expenses, such dispute mediation is possible, however, the existence of the specialized BNR compartment does not eliminate the rights of the payment service provider and the beneficiary to request the assistance of a mediator, someone who, by their competence, integrity, impartiality, is enjoying their confidence.

Similarly, any consumer, other than a signatory of an agreement for payment services providing, has the possibility to approach a mediator to settle the dispute amicably. We note that at this moment does not exist mediators specialized in certain types of litigation, so choice possibilities of the parties are more difficult.

In an effort to transpose the Directive 2007/64/EC, the initiatives for the organization of structures for the alternative dispute resolution continue.

Furthermore, at European level was adopted on 23 April 2008 the Directive 2008/48 / EC of the European Parliament and the Council on credit agreements for consumers and repealing the Directive 87/102/EEC of the Council[21], which in its art. 24 provides the obligation of Member States to ensure the availability of adequate and effective procedures for out-of-court consumer dispute resolution regarding the credit agreements with recourse to, where appropriate, existing bodies. At the same time, the Directive requires Member States to encourage these bodies to cooperate in order to also solve the cross-border disputes concerning credit agreements.

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