Alternative Dispute Resolution before Czech Trade Inspection

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Abstract: The paper focuses on the changes in the area of alternative dispute resolution in consumer protection brought by the almost approved amendment published under No. 445/0 of Act No. 634/1992 Coll., on consumer protection, as amended. The current regulation despite the commission recommendations 98/257/EC of 30 March 1998 of the European Commission does not show any satisfactorily progress in the area of alternative dispute resolution. Within the Czech Republic some consumer disputes are ruled by administrative offices such as the Czech telecommunication office, the Energy regulatory office or the Financial arbitrator. Proceedings led by these offices are regulated in Act No. 500/2004 Coll., Administrative procedure code except the proceeding before the Financial arbitrator which is regulated by Act No. 229/2002 Coll., on financial arbitrator. In accordance with Art. 36 of the Charter of Basic Human Rights and Freedoms all rulings issued of administrative offices are object of judicial review. The above mentioned amendment of Act on consumer protection establishes Czech trade inspection as the residual entity of ADR, which may sometime result in breaching mandatory professional rules in case of commercial practices provided by some professions.

Key words: Alternative Dispute Resolution · Consumer Disputes · Consumer Protection · Czech Trade Inspection

JEL Classification: K1 · K13

1 Introduction

Directive 2013/11/EU 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) was published in the Official Journal of the European Union on 18 June 2013 and should be implemented by the member states by 9 July 2015. The directive on consumer ADR should not apply to non-economic services of general interests and should not apply to health care services. The aim of the direction is to eliminate any obstacles to the functioning of the internal market and to ensure access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes arising from sales or service contracts. The tasks assigned by the EU to the Czech Republic are following: to implement Directive on consumer ADR and to adopt Regulation EU No 524/2013 of the European parliament and of the Council of 21 May 2013 on online dispute resolution.38 From April 2008 to 2010 the Ministry of trade and industry of the Czech Republic had tried to launch alternative dispute resolution (ADR). First two years of this project were considered piloting. At the end, the involving parties agreed that it would be convenient to have such an alternative entity. However, it has not been realized so far. At the moment, alternative dispute resolution (except arbitration and mediation) do not exist in the Czech Republic, but on the other hand there are specialized state offices ruling consumer cases in administrative proceeding which in fact fulfil the requirements of directive on consumer ADR39 The ADR Directive ensures that consumers have access to ADR for resolving their contractual disputes with traders. Access to ADR is ensured no matter what product or service they purchased (only disputes regarding health and higher education are excluded), whether the product or service was purchased online or offline and whether the trader is established in the consumer’s Member State or in another Member State. Member States will establish national lists of bodies offering ADR procedures (ADR bodies). All ADR bodies included in those lists will have to comply with binding quality requirements. Except ADR there is also an ODR regulation. Under the ODR Regulation, the European Commission will establish a European Online Dispute Resolution platform (ODR platform). The ODR platform is a web-based platform that is specifically designed to help consumers

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38 In relation to the Regulation, the Czech Republic should create an on-line platform for solution of domestic consumer disputes and be able to be involved in on-line European platform in all languages of European union enabling consumers to file their complaints via the complaint form located in the website (in this case European Consumer centre will be responsible for the assistance in case consumers will have some problem with submitting their complaints).

who have bought goods or services online and subsequently have a problem with that online purchase. It allows consumers to submit their contractual dispute and conduct the ADR procedure online and in any of the 23 official languages of the European Union. The ODR platform transmits disputes only to ADR bodies who are included in the national lists of ADR bodies that comply with the binding quality requirements established by the ADR Directive. It will be accessible to consumers and traders as of 15 of February 2016.40

2 Methods

In this paper there is an emphasis put on analytical method of logical deduction and on method of legal comparison. The purpose of this paper is to achieve by means of interpretation and scientific methods reliable description of current legal regulation of ADR in consumer disputes with respect to a new amendment prepared and proposed by ruling government of the Czech Republic.

3 Current situation and novelties brought by the new regulation

Nowadays in the Czech Republic there are two forms of ADR regulated, namely arbitration and mediation. Arbitration is regulated in Act No. 216/1994 Coll., on arbitration and execution of arbitration judgments and mediation in the Act No. 202/2012 Coll., on mediation. However, these forms of ADR are not suitable for the solution of consumer disputes. Some specialized cases of consumer disputes are solved before state offices such as Czech telecommunication office, Energy regulatory office and Financial arbitrator.

Pursuant to Section 127 of Act No. 127/2005 Coll., on electronic communications, the Czech telecommunication office can rule consumer disputes relating to billing. The consumer can file objections within at the Czech telecommunication office, against the ruling there is an appeal that shall be filed within 15 days at the president of the council. The Energy regulatory office is according to Act No. 458/2000 of 28 November 2000, on the conditions of business and state administration in energy industries and changes to certain laws (the Energy Act) as amended, responsible for regulation in the energy sector. Pursuant to Section 17 art. 7 letter e) of Energy Act the Energy regulatory office is authorized to solve consumer disputes relating to gas, heat and electricity. Consumer disputes stemming from contracts providing financial services are ruled by a financial arbitrator in two-round proceeding. The financial arbitrator is a part of a net called FIN-NET founded in 2001 by the European Commission in order to share knowledge gained from financial disputes and also to help to solve the cross-border financial disputes within the EU. However, there is another net which is meant for out-of-union financial disputes and this net was created in 2007 and was called INFO Network.41 The proceedings before the above-mentioned state officials are regulated in the provisions of Act No. 500/2004 Coll., Administrative procedure code.

Rulings issued by all the above mentioned ADR entities are objects of the judicial revision in a civil proceeding according to Act No. 99/1963 Coll., the Civil Procedure Code.

4 Conciliation before the Czech trade inspection

With respect to the new directive on consumer ADR a residual ADR entity had to be established – Czech trade inspection, which will solve all the residual consumer cases which do not belong to the authority of the above-mentioned state offices. The conciliation shows to be most suitable for these kinds of consumer disputes. The outcome of the proceeding before the Czech trade inspection will be a private agreement. The participation of a businessman in the conciliation will be mandatory unlike the participation of a consumer who is able to terminate its participation at any time without giving any reason. In case parties will not act voluntarily according to the settlement, a court action can be brought before civil courts. Nevertheless, the agreement will not be executable, which is a big disadvantage of this kind of proceedings. Taking into account that the proceeding will last 90 days and then the agreement concluded and signed by both parties will not be executable and that the parties will have to bring an action before a court in civil proceedings, the whole procedure can be very demanding for a consumer. The distinction between the mediation and conciliation can be quite hard. Unlike the mediation the conciliation represents a more formal procedure when a conciliator is more active and intends by legal advices to reach an out-of-court settlement in the presence of both parties. The proposal can be submitted only by a consumer who has not been successful with his previous complaint at the businessman but only within one-year period from the first submission of the consumer’s complaint. The proposal


can be submitted via a form available at the Czech trade inspection website, but also it can be sent by mail or submitted personally. The system of ADR at the Czech trade inspection will be released on February 1, 2016. The cross-border disputes in online disputes resolution will be supported by the European consumer centre partly run by the Czech trade inspection. As such procedures are an alternative to resolving disputes before a court they are called Alternative Dispute Resolution (ADR). When they are carried out online, they are called Online Dispute Resolution (ODR). Resolving disputes through ADR/ODR, in general, is easier, faster and less expensive than resolving disputes before a court.

With respect to what was said before there are new duties relating to traders such as they have to adjust their general terms and conditions or other contractual documents, and their websites in case they have them according to the Section 14 of the Act on Consumer Protection in order to inform the consumers on their rights to settle their problem in an out-of-court settlement and of course on which entity is in this case responsible to solve it with all the needed information\textsuperscript{42}; traders have to participate in a conciliation in case it is started by a consumer and cannot stop their participation there unlike consumers, also they have to provide Czech trade inspection with information that later on can be used in their disfavour when imposing them with a fine as a most common manner of the resolution of the administrative proceedings. The businessman itself cannot solve the problem at the ADR entity. During the proceedings before the Czech trade inspection the prescription period does not run, the consumer can bring an action to the court until the agreement is concluded, there is no \textit{lis pendens} obstacle.

5 Relation to the free professions

The legal regulation implemented by the above-mentioned proposal does also relate to so called free professions realized either by natural or legal persons executing free professions, it means professions realized on the basis of various acts\textsuperscript{43} regulating specific professions such as attorneys, doctors or architects. This meaning was confirmed by a decision of the European court of justice published under the reference number C-421/121.\textsuperscript{44} This regulation means that every businessman providing services based either on the Trade Licensing Act or other acts shall provide their services in accordance with the law, which brings many duties. Since 28 of December, 2015 the businessmen are obliged to indicate the price at the beginning in the commercial communication otherwise it could be considered unfair commercial practice and to provide a receipt on provided services with the date of their provision and in case of complaint proceedings the receipt containing the day of exercising a complaint, which claims has been chosen by the consumer and what is the content of the complaint. The Act on the legal professions governs the conditions under which legal services may be provided. ADR is valid also for consumer contracts on providing legal services. According to this fact the businessmen should inform their consumers on the information relating to the alternative dispute resolution. Nevertheless, ADR entity represented by the Czech trade inspection would signify a great danger with respect to the duty of professional secrecy (non-disclosure) because the participation in out-of-court settlement is obligatory in case of a businessman. Pursuant to Section 21 of the Act on the legal profession a lawyer’s duty of professional secrecy (non-disclosure) may be waived only by his client, and, after the client’s death or termination of existence, his successor; should there be more than one legal successor the consent of all legal successors shall be necessary to waive the duty of professional secrecy (non-disclosure). Nevertheless, the Czech Bar Association chamber has already asked the Ministry of Industry to be the ADR entity for the disputes stemming from the providing of legal services according to Section 20f of the Act on consumer protection.\textsuperscript{45}

\textsuperscript{42}The Ministry of Industry and Business has to prepare a list of these ADR entities containg all the information stated in Section 20e of the Act on Consumer Protection.

\textsuperscript{43} e.g. Act No. 85/1996 Coll, on the Legal Profession, as amended


\textsuperscript{45} Official webpage of the Czech Bar Association (on-line). 2015-12-29 [cit. 2015-29-12]. Available at: \url{http://www.cak.cz/scripts/detail.php?id=15379}
6 Conclusions

The above-mentioned new regulation could bring certain reduction of workload to first-instance courts as the first-instance courts are covered in cases after the amendment of Civil procedure code. Administrative proceeding/ADR is easier than the court proceeding, in general it is quicker and based on written submissions so no physically presence of involving parties is needed. The administrative proceeding/ADR is low-cost or free-of-charge. The amendment of Act on consumer protection says that there will be no fee, at least in case of proceeding before the Czech trade inspection. Except many pros brought by the new amendment there is a certain negative fact and that is that consumer disputes belong to private law. By locating them before administrative offices the protection of private rights is transferred to state offices causing slightly imbalance in powers – executive power represented by state offices ruling private consumer disputes originally belonging into the judicial competence. Other negative fact may be considered that providing services by so called free professions is a very specific business area. On the other hand, there is hardly to be imagined that some cases will arise.

References


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Act No. 500/1994 Coll., Administrative procedure code, as amended
Act No 2/1993 Coll., Charter of Fundamental Rights and Freedoms, as amended
Act No 229/2002 Coll., on financial arbitrator
Act No. 85/1996 Coll, on the legal profession, as amended
Act No. 455/1991 Coll., Trade Licensing Act,


Failure of a Member State to fulfil obligations - Consumer protection - Unfair commercial practices - Directive 2005/29/EC - Complete harmonisation - Exclusion of the professions, dentists and physiotherapists - Restriction or prohibition of certain types of itinerant trading activities.