

European Regulation on Online Dispute Resolution

A Comment on Its Enforcement in Italy

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Abstract

The European single market is a symbol of European integration. Certainly, the European internal market brings great opportunities to its citizens and professionals, especially when the European legislators enact new provisions in order to boost the internal market.

In May 2013, the European legislator enacted two legislative measures, whose aim was to encourage the employment of out-of-court mechanisms in order to solve consumer disputes: the European Regulation establishing the Online Dispute Resolution interactive website and the Directive on Alternative Dispute Mechanisms. Taking its cue from the first report issued by the European Commission on the Online Dispute Resolution, this article focuses on the enforcement of the European Regulation in Italy and concludes that, due to legal incongruence, no enforcement means have been dictated in order to sanction infringements to the European Regulation carried out by Italian professionals.

Keywords: European Regulation, ODR, ADR, Italian enforcement.

1. Introduction

Cross-border consumer contracts within the internal European market can give rise to several problems, such as, for example, to which court a consumer should lodge his claim or what would be the applicable law when the parties' obligations are not executed as agreed. European Regulation 593/2008/EC on the law applicable to contractual obligations, the recast of the European Regulation (EC) 2015/2012 on jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters, as well as European Regulation 861/2007/EC on the European Small Claims, as amended by European Regulation (EC) 2015/2421, all aim at ensuring a uniform legal framework within the European single market.

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Though the goal of these European laws is to provide a common legal framework, consumers continue to renounce going to court when an agreement is infringed: the low sums involved or the court's proceedings fees, which may exceed the benefits expected by consumers, are often cited by consumers as explanations for their inactivity in carrying on with complaints.¹

In this context, it should also be kept in mind that consumers have a particular approach in consumer-to-business disputes: consumers usually focus their attention on the solution of a dispute and not on the technique involved. Taking advantage of this way of thinking, alternative dispute resolution (ADR) schemes may be considered as an effective tool and an alternative to court litigation as regards consumer disputes.

This potential benefit was pointed out in the Commission Recommendation (EC) 98/257 in 1998.² However, this recommendation has been partly disregarded by member states, leading to a different availability and coverage of ADR mechanisms between European member states. In Germany, for example, a consumer could take advantage of a wide range of out-of-court settlement schemes, while in Bulgaria, no ADR scheme was available.³

Faced with this fragmented patchwork, the European legislator decided to adopt Directive (EC) 2013/11 on ADR and European Regulation (EC) 2013/524 on ODR for consumer disputes. The former requires member states to provide for each consumer contract an out-of-court settlement mechanism that meets the directive requirements as indicated in Article 6. The latter ruled the establishment of an interactive website, the ODR platform, which would provide an entry point for consumer complaints. In order to encourage the use of this new technological tool, traders and marketplaces, active in online selling, are obliged to inform consumers about this instrument by adding its link to their websites. In order to secure the enforcement of this information duty, member states are called to dictate effective sanctionative means against its infringement.⁴

This article focuses its attention on the enforcement of the information obligation as indicated by Article 14 of European Regulation (EC) 2013/524.

This article is organized into three parts: the second part describes the ODR interactive website, as appointed by the European legislator. The third part focuses on the enforcement of Articles 14 and 18 of European Regulation (EC) 2013/524 in Italy and points out a legal incongruence and its consequences.

1 European Commission, Special Eurobarometer No. 342, 2011, p. 204, available at: http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_342_en.pdf.

2 European Commission Recommendation of 30 March 1998, (EC) 98/257, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998H0257>.

3 The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, Belgium, 2007, p. 103, available at: www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf; see C. Hodges, I. Benohr, & N. Creutzfeldt-Banda, *Consumer ADR in Europe*, 1st ed., Hart/Beck, 2012, p. 195.

4 Art. 18 Regulation 524/2013/EC "Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive."

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Finally, this article drafts the conclusion that the infringement of Article 14 of European Regulation (EC) 2013/524 has not been clearly sanctioned by the Italian legislator. This legal gap cannot be overcome by employing legal interpretation techniques because this would imply a serious violation of the principle of legality.

2. ODR Website

At first glance, the ODR website may be considered only as an entry point for consumer complaints. However, the real purpose of this interactive website is not to quantify the number of complaints submitted or to compile statistics. The goal of the ODR platform is to provide a virtual place where parties can reach an agreement to solve their dispute by identifying the appropriate ADR mechanism. Once this arrangement is reached, the second phase of the ODR procedure implies the involvement of the ADR body, chosen by the parties, in the online procedure.

However, before dealing with the substance of the complaint, the chosen ADR body verifies if its competence requirements are met. Indeed, out-of-court settlement schemes may have a limited subject or territorial competence. The competence of the Italian Conciliareonline.it, for example, is limited to consumers or traders based in the Trentino Alto-Adige Region.

If the competence conditions are met, the ADR body begins to deal with the matter by taking advantage of the ODR online chat. Through this remote communication means, the conciliator can dialogue with the parties and ask for further documents or for technical expertise. The online chat provided by the ODR platform grants an active and effective participation in the ODR/ADR procedure, though the parties are not physically present in the same room with the conciliator. Moreover, language barriers are significantly diminished by the employment of an automatic translator tool. These technical means – online chat and automatic translator – are tools thought to grant respect of the parties' right to present their case.

The ODR procedure has been indicated and fragmented into these two stages because, as well known, under the European consumer laws, the parties can agree to refer their dispute to an out-of-court mechanism only after the dispute has arisen. According to the ODR procedure, within a 30-day deadline, parties should reach an agreement on the ADR mechanism. Otherwise, the first stage will be closed because of the parties' inactivity, even if only one of the two parties did not respect the above-mentioned deadline.

Consequently, the ODR procedure is based on the parties' common consent to solve their dispute and to employ the chosen out-of-court mechanism.

Being the ODR procedure based on mutual consent, the European legislator introduced Article 14(1) (EC) 2013/524 in order to encourage the use of this procedure. This provision requires online traders and marketplaces, established within the European Union (EU), to provide on their websites an electronic link to the ODR website. This link should be easily accessible: this means it should be

added in general terms, in the trader's impressum, in its complaint handling procedure or in another place on the professional's website, accessible in two or at most in three mouse clicks. Moreover, if the offer is made by email, the email should include the link to the ODR interactive website.

Generally and legally speaking, according to Article 288 of the Treaty on the Functioning of the European Union, a European Regulation is a legislative act that has general and direct application in all member states. Accordingly, also the information duty indicated in Article 14 of European Regulation (EC) 2013/524 should be directly implemented by the rule's recipients.

However, the Achilles' heel of every law provision is the absence of effective enforcement means and the failure to properly address and sanction infringements. In order to secure compliance with this information duty about the ODR platform, as established by the European legislator, Article 18 of European Regulation (EC) 2013/524 compels member states to lay down penalty rules applicable to violations of Article 14 of European Regulation (EC) 2013/524. Furthermore, member states should also take the necessary measures to ensure their implementation.

This provision is clear in setting goals: an example of clear and straight enforcement of the Online Dispute Regulation is provided by the Austrian law, which implemented the ADR Directive. According to paragraph 29, the missed or imprecise advice about the ODR platform is an administrative infringement and is sanctioned with a monetary penalty of EUR 750.00.⁵

In Germany, courts decided that traders active in e-commerce and who failed to provide the link to the ODR website committed an infringement of the Competition Law (Landesgericht Hamburg, Beschluss vom 07.06.2016, Az. 315 O 189/16). This decision has been followed by the Court of Mainz (**Landesgericht Mainz**, Beschluss vom 01.04.2016, Az. 11 HK O 18/16) and by the Court of Dortmund (**Landesgericht Dortmund**, Beschluss vom 28.04.2016, Az. 13 O 35/16). In this context, a very interesting sentence has been issued by the Court of Appeal of Munich (Oberlandesgericht München, Urteil vom 22.09.2016, Az. 29 U 2498/16), according to which compliance with Article 14 of European Regulation (EC) 2013/524 requires a clickable link in order to be readdressed to the ODR website. Consequently, mere information about the link text has been judged insufficient.

These straight implementations of Article 14 of European Regulation (EC) 2013/524 are confirmed by the data provided by a web scraping study, commissioned by the EU and published on 13 December 2017.⁶ According to the figures published in the study, German and Austrian traders active in online commerce

5 Bundesgesetz über alternative Streitbeilegung in Verbraucherangelegenheiten (Alternative-Streitbeilegung-Gesetz – AStG) StF: BGBl. I Nr. 105/2015 (NR: GP XXV RV 697 AB 772 S. 85. BR: AB 9411 S. 844.) §29 "Nimmt ein Unternehmer in die gemäß § 19 oder Artikel 14 Abs. 1 und 2 der Verordnung (EU) Nr. 524/2013 gebotenen Informationen falsche Angaben auf oder erfüllt er die Informationspflichten gemäß § 19 oder Artikel 14 Abs. 1 und 2 der Verordnung (EU) Nr. 524/2013 nicht oder nicht vollständig, begeht er eine Verwaltungsübertretung und ist mit einer Geldstrafe bis zu 750 Euro zu bestrafen."

6 European Commission, *Online Dispute Resolution: Web-Scraping of EU Traders' Websites*, Belgium, 2017, available at: https://ec.europa.eu/info/online-dispute-resolution-1st-report-parliament_en

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show the highest compliance rate with the information duty laid down by the European Regulation, while the compliance rate of Spanish, British and Italian professionals is below average.

As will be seen in the following paragraphs, an explanation for this low compliance rate in Italy may be found in a legal gap because the Italian legislator erroneously applied sanctions for missed or imprecise information relating to the ADR schemes instead of to the ODR website. Furthermore, this legal gap cannot be solved through interpretative means.

3. The Implementation of Articles 14 and 18 of (EC) 2013/524 in Italy

The data of the ODR web scraping study pointed out a legal incongruence that occurred when the Italian legislator implemented into national law the Directive (EC) 2013/11 on the ADR schemes: at the same time, penalty rules applicable to infringements of Article 14 of European Regulation (EC) 2013/524 have been laid down.

In Italy, following the implementation of Directive (EC) 2005/29 into Italian national law via legislative decree No. 147 of 2007, the competences of the Italian Competition Authority have been broadened and currently comprise the assessment of unfair commercial practices put in place by professionals to the detriment of consumers, and the ascertainment whether a professional violates the discrimination prohibition based on nationality or place of residence, as provided by law No. 161 of 2014. Moreover, the Italian Competition Authority is called to ensure that the rights granted to consumers by Directive (EC) 2011/83 are implemented by Italy-based traders.

In this legal context, it would make sense to expand the competence of the Italian Competition Authority also to infringements of Article 14 of European Regulation (EC) 2013/524 committed by professionals based in Italy.

However, this point is unclear. This lack of clarity is due to a legal incongruence, occurred when the Italian legislator implemented Directive (EC) 2013/11 into the national law through legislative decree No. 130 of 2015, which amended legislative decree No. 206 of 2005, commonly known as the 'Italian Consumer Code'.

Therefore, two articles of the Italian legislative decree No. 130 of 2015 are going to be considered: Article 141-decies § 4 and § 6 and Article 141-sexies §§ 1, 2 and 3. The terms of Article 141-decies § 4 amended Article 139 of the Consumer Code by extending the competence of consumer associations. Reading together Articles 139 and 66 of the Italian Consumer Code, a consumer association can validly lodge a report to the Italian Competition Authority listing those traders not complying with Article 14 of European Regulation (EC) 2013/524. Indeed, the competence of the Italian Competition Authority has been broadened by Article 141-decies § 6, so that the authority is called to sanction the infringements indicated by Article 141-sexies §§ 1, 2 and 3.

This is the point where the legal incongruence becomes evident: Article 141-sexies §§ 1, 2 and 3 implements into national law Article 13 of Directive (EC) 2013/11, which reads as follows:

Member States shall ensure that traders established on their territories inform consumers about the alternative dispute resolution entity or alternative dispute resolution entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant alternative dispute resolution entity or alternative dispute resolution entities.

This information should be made available to consumers in an easy and accessible way on the trader's website. Article 141-sexies §§ 1, 2 and 3 makes no mention of the duty to advise consumers about the ODR platform by providing the link to its website, though Article 14 §§ 2 and 3 of European Regulation (EC) 2013/524 reads as follows:

Traders established within the Union engaging in online sales or service contracts, which are committed or obliged to use one or more alternative dispute resolution entities to resolve disputes with consumers, shall inform consumers about the existence of the online dispute resolution platform and the possibility of using the online dispute resolution platform for resolving their disputes [...] and paragraphs 1 and 2 of this Article shall be without prejudice to Article 13 of Directive (EC) 2013/11 and the provisions on consumer information on out-of-court redress procedures contained in other Union legal acts, which shall apply in addition to this Article.

Actually, legislative decree No. 130 of 2015 includes a general reference to other information duties about out-of-court resolution schemes foreseen in other legislative acts and to their application (Art. 141-sexies § 4 of legislative decree No. 130 of 2015). This generic provision would have been useful if recalled in Article 141-decies § 6. However, this has not been done by the Italian legislator, thus determining the legal incongruence.

Legally speaking, according to the implementation of Directive (EC) 2013/11 through legislative decree No. 130 of 2015, the Italian Competition Authority finds itself to be competent in sanctioning infringements on a failure to inform about out-of-court settlement schemes, voluntarily adhered to by traders. Ironically, the authority has no legal authority to fine those professionals who omitted or provided imprecise information about the ODR website. This appears to be evident in three decisions issued in 2017, in the online trading cases *Iphoneme*, *Triveo* and *Pneus*.⁷ In these three decisions and in the more recent *Girada* case,

7 See *Italian Competition Authority v. Iphoneme*, decision n. 26673; see also *Italian Competition Authority v. Triveo*, decision n. 26877; see also *Italian Competition Authority v. Pneus online Trading*, decision n. 26674.

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the Italian Authority, during the ascertainment procedure of unfair commercial practices, pointed out the infringement of Article 14 of European Regulation (EC) 2013/524. However, the mentioned professionals were not sanctioned for this lack of compliance with a European Regulation provision.⁸ The Italian Competition Authority accepted the traders' commitments addressed to correct the unfair commercial practices and to add a link to the ODR platform on their website along with the necessary information.

From the above-mentioned decisions, there is a European law that requires compliance from traders, but in Italy, there are no effective enforcement means.

This legal gap cannot be overcome through interpretative techniques because in Italy, Article 1 § 551 of Law No. 311 of 2004 expressly states that measures related to European legislative provisions can be challenged by employing the remedies established by Law No. 689 of 1981. "I provvedimenti amministrativi relativi alle misure comunitarie sono impugnabili con i rimedi previsti dalla legge 24 novembre 1981, n. 689." Accordingly, the failed compliance with a European provision contained in a European Regulation is an administrative offence and is consequently subject to the guarantees provided by Law No. 689 of 1981.

3.1 Administrative Offences in Italy: Law No. 689 of 1981 and Its Guarantees

In a constitutional state, no sanction may be inflicted without an underlying reason, and in any case, the fundamental guarantees should be granted.⁹ In Italy, general provisions about the administrative offences were laid down by Law No. 689 of 1981. The first 12 articles of Law No. 689 of 1981 repeat those law principles that guarantee the fundamental constitutional rights of a citizen, such as the principle of legality, the principle of non-retroactivity and the prohibition of analogy reasoning in *malam partem*.¹⁰ Accordingly, the principle of legality implies that an administrative offence and its pecuniary sanctions should be based only on a prior enactment of a prohibition that is expressed with adequate precision and clarity. Consequently, the employment of the analogy reasoning in *malam partem* is not allowed, because this would mean to ascribe a new administrative offence that is not clearly proscribed by a legal provision. Indeed, the problem of guaranteeing the legal rights of a citizen or professionals sanctioned for administrative offences exists to the same extent as the penalties for civil or criminal offences. For this reason, a citizen or a professional should be granted those fundamental guarantees whenever a pecuniary sanction is inflicted.

According to the first 12 articles of Law No. 689 of 1981, by determining the amount of the fine, the Italian Competition Authority is legally bound to respect four criteria: the offence's seriousness, the trader's activity in cancelling or diminishing the consequences of the infringement, the trader and the economic condition of the trader. Therefore, according to Article 27 § 7 of the Consumer Code and Article 8, § 7 of Legislative decree No. 145 of 2007, the Italian Competition Authority may not only impose fines which can range up to 5 million Euros but

8 See *Italian Competition Authority v. Girada*, decision n. 27056.

9 R. Riz, *Lineamenti di diritto penale parte generale*, 4th ed., Cedam, Padova, 2002, p. 57.

10 F. Mantovani, *Diritto penale, parte generale*, 3rd ed., Cedam, Padova, 1992, p. 974.

may also settle with professionals to end the administrative procedure when they agree to specific commitments for correcting the ascertained violations. This is possible under the condition that the authority has evaluated the professional engagements as suitable to eliminate the practices which determined the administrative offence. At least, according to Article 27 of the Italian Consumer Code, the Italian Competition Authority, faced with an ascertained incorrect practice, can also apply moral suasion to persuade the professional to remove the controversial practice. However, this moral suasion activity without enforcement has limited impact on an uncooperative professional.

Keeping in mind this legal framework about the administrative offences in Italy, the employment of analogy reasoning in order to sanction infringements to Article 14 of European Regulation (EC) 2013/524 would clearly break the principle of legality. Therefore, no sanction is clearly foreseen for the infringement of this information duty because, as has been seen, Article 141-decies § 6 did not recall Article 141-sexies § 4.

It should be possible to find another legal basis on which the information duty as designated by art.14 of European Regulation (EC) 2013/524 can be understood. The example of the German Courts could be followed, which judged the omission of the link to the ODR platform as an infringement of the Competition Law.

In Italy, Article 49 § 1 of the Consumer Code lists all of the information a trader engaging in online sales or services should provide a consumer with. Again, there is no specific reference to the information duty about the ODR link. Article 49 § 1 lett. v of the Consumer Code repeats the duty of a professional to inform the consumer about the ADR scheme it adhered to. It is clear that the rule refers to an extrajudicial complaint mechanism to which a trader is subjected to. When a complaint arises, a consumer can take advantage of the trader's complaint handling procedure that may foresee an out-of-court-dispute settlement mechanism.

However, the ODR platform provides a virtual place where the parties can reach an agreement to solve their dispute: this implies an action of the parties in order to identify the appropriate ADR body to which the dispute should be submitted and to keep active during the whole ODR procedure. Because of this main difference, Article 49 § 1 lett. v cannot be assumed as a legal basis for backing a pecuniary fine for failed compliance with Article 14 of European Regulation (EC) 2013/524.

No legal grounds can be found in Article 33 of the Consumer Code that lists misleading or unfair clauses, either. Again, the Italian legislator expressly specified that obstacles to the recourse of an ADR scheme by a consumer would be presumed as an unfair term. No mention of the ODR website is made.

It is clear that interpretative techniques do not help to overcome the legal gap caused by an imprecise legislative act. Accordingly, every attempt to find another legal basis on which to ground the Italian Competition Authority to oversee compliance with the information duty, as indicated by Article 14 (EC) 2013/524, is questionable for two reasons: the Italian rules do not allow broad interpretation, and an extensive or analogical interpretation could lead to the infringement of the principle of legality, as set out by Law No. 689 of 1981.

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4. Conclusion

Consumers are not particularly concerned about the technique involved to solve their disputes with a trader because what matters is the resolution of the dispute.

The goal of the introduced ODR interactive website was not only to provide a common entry point for consumers' claims but also to make available a virtual place where the parties can reach an agreement to solve their dispute by taking advantage of an out-of-court settlement scheme. The employment of this tool would mean a change in consumer habits: they should be aware of complaint handling procedures, be more active and pay attention to deadlines when the chosen out-of-court scheme foresees one. Consequently, pieces of legislation whose aim is to shape the habits of a society should include effective means of enforcement.

As was seen in Section 2, member states were called to design sanctionative measures in case of failed compliance with Article 14 of (EC) 2013/524. Austria, for example, dictated a clear rule, while German courts provided a constant jurisprudence on this topic.

As has been seen in Section 3, in Italy, a legal gap occurred because Article 141-sexies § 4 has not been recalled by Article 141-decies § 6. This oversight has an absurd consequence, *id est*; the Italian Competition Authority can sanction those professionals who omitted to inform a consumer about the availability of an ADR mechanism they voluntarily adhered to, while failure to comply with Article 14 of European Regulation (EC) 2013/524 is not expressly sanctioned.

Moreover, as illustrated in Section 3.1, this legal incongruence cannot be overcome through interpretative techniques because the infringement of a European Regulation provision is an administrative offence and for this reason subject to the guarantees laid down by Law No. 689 of 1981.

In conclusion, even if the Italian Competition Authority is willing to employ moral suasion to induce traders engaging in online sales and services to comply with the information obligation as set out by Article 14 of European Regulation (EC) 2013/524, a reluctant trader would not comply because the risk to be fined is low. Actually, only an amendment from the Italian legislator can correct this legal incongruence.