

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Heldin Malmet

**CONSUMER DISPUTE RESOLUTION IN ESTONIA: A
PROPOSAL FOR REVISION AND MODIFICATION OF
GENERAL DISPUTE RESOLUTION MECHANISM**

Master's thesis

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Supervisor: Tatjana Evas Peeters, dr. jur.

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Heldin Malmet

(signature, date)

Student code: 183818 HAJM

Student e-mail address: heldinmalmet@gmail.com

Supervisor: Tatjana Evas Peeters

The paper conforms to requirements in force

(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

(name, signature, date)

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Abstract:

In 2013 EU adopted Directive 2013/11 Alternative Dispute Resolution (ADR) Directive. To enhance access to justice and promote ADR, the Directive sets quality criteria that certified ADR entities and ADR process must comply with. The Estonian Consumer Dispute Committee (CDC) is a certified consumer ADR entity in Estonia. Currently, the Ministry of Economic Affairs and Communications, evaluates whether CDC must be reformed, and Consumer Protection Act amended, as CDC has been criticised for inefficiency and limited ability of providing access to justice for consumers in Estonia.

This thesis contributes to this debate by focusing on the analysis of the out-of-court consumer dispute redress mechanism in Estonia and specifically a functioning of the CDC. The two central research questions are - whether CDC meets the quality requirements set in the ADR Directive to achieve effective and high-quality out-of-court consumer dispute redress? And whether current legislation needs to be amended?

In order to answer those research questions thesis is structured in three main chapters. Chapter 1 focuses on access to justice and quality criteria for effectiveness; Chapter 2 on application of the ADR Directive quality criteria to the Estonian CDC and Chapter 3 on the analysis of policy options and recommendations for the enhanced of consumer ADR in Estonia. The analysis is developed based the systematic, comparative legal analysis of EU and national law as well as academic literature and statistical data available.

The main argument of this thesis is that in spite of the criticism, the CDC is successful, and the major changes or revisions of the existing legislation are not necessary. The thesis, however, proposes four sets of recommendations and amendment to further enhance the efficiency of the CDC beyond the minimum requirements. These four proposals include: (1) making the CDC decisions binding; (2) introduction of a small and reasonable state fee to launch the complaint; (3) reduction of the burden on the CDC to deal with the foreign law; and finally (4) revision of the provision related to the competencies of the Secretariat of the CDC.

Keywords: Consumer dispute resolution, consumer rights, consumer law, consumer access to justice, ADR

List of abbreviations

ADR- Alternative dispute resolution

CDC- Consumer Dispute Committee

CPA-Consumer Protection Act

CPTRA-Consumer Protection and Technical Regulatory authority

EC- European Commission

EU-European Union

MS-Member State

Ministry- Ministry of Economic Affairs and Communications

INTRODUCTION

The European Union (EU) has a strong *acquis* in the area of consumer protection¹. The consumer protection law is essential element of the EU internal market that empowers citizens, for example, to purchase products and services cross-border.² The existence of consumer rights *per se* however are not sufficient to guarantee an effective protection of consumers in the EU. In addition to substantive rights, availability and access to easy, efficient and cost-reasonable dispute settlement procedures, especially in the cross-border context, are essential. To simplify and enhance consumer dispute resolution in 2013 EU has adopted Alternative Dispute Resolution (ADR) Directive.³

The ADR Directive sets up a system and procedures to encourage the use of high-quality consumer ADR entities in the EU by the consumers.⁴ This improved ADR system should help consumers to enforce private law rights⁵ easily and quickly without going to court.⁶ Estonia has formally transposed the ADR Directive through the 2016 Consumer Protection Act (CPA),⁷ and set the Consumer Dispute Committee (CDC), which started to provide out-of-court consumer redress, as one of four Estonian notified ADR entities. This transposition of the ADR Directive however, unlike in some other EU countries,⁸ did not lead to the substantial increase in the use of ADR in Estonia. Accordingly, Estonia has been criticized by experts as failing to take proactive measures

¹Almost all areas of consumer law, from advertising and marketing through contract and tort law to enforcement and redress, have been regulated by EU law. For review see e.g. Howells, G; Twigg-Flesner, C; Wilhelmsson, T (2018) *Rethinking EU Consumer Law*. (1st ed). Taylor and Francis. p 2

²National differences of procedural rules and dispute resolution bodies represent a barrier to the internal market and is one of the reasons why many consumers do not purchase goods and services from another MS and nor have confidence that potential disputes with traders could be solved in an easy, quick and inexpensive manner. See: Ionescu, M.I. (2016) *Alternative Dispute Resolution. Challenges of the Knowledge Society*. Vol 6, p 155

³Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, pg. 63. It is a directive that requires minimum harmonization, with the aim of increasing the number of high-quality ADR entities in the EU, harmonizing their policies and encouraging and improving their use.

⁴ Storskrubb, E. (2016.) *Alternative Dispute Resolution in EU: Regulatory Challenges. European Review of Private Law*, I- 2016, p 8.

⁵regardless of whether the dispute arises in relation to a domestic, cross-border, online, or offline transactions

⁶Fejös A.; Willet. C. (2016). *Consumer Access to Justice: The Role of the ADR Directive and the Member States. European Review of Private Law*, I -2016, p 34.

⁷ in which the requirements arising from the ADR Directive were introduced, entered into force on 1st of March 2016.

⁸ Ambrozova, M. (2018). *Governance and Development of ADR Methods in Slovak Republic and Estonia. Bachelor's thesis*. Tallinn University of Technology. p 6.

to support the development of ADR systems and culture.⁹ In response to this criticism Estonia¹⁰ has started the process of evaluation of the existing consumer ADR. In 2019, the Ministry of Economic Affairs and Communications (Ministry) commissioned a study¹¹ to identify the deficiencies and improve the access to justice with CDC.¹² This support study is completed, and now the Ministry is in the process of evaluation of the results in view of the decision on whether amendment to the current national legislation of the system of consumer ADR would be necessary.

This thesis contributes to this ongoing legal debate by focusing on the analysis of the existing consumer resolution mechanism in Estonia and proposing the set of practical recommendation for the improvement of the CDC. The two central research questions that this thesis addresses are - whether CDC meets the quality requirements set in the ADR Directive to achieve effective and high-quality out-of-court consumer dispute redress? And whether current legislation needs to be amended? The main argument of this thesis is that in spite of the criticism, the current system of CDC is successful, and the major changes or revisions of the existing legislation are not necessary.¹³

In order to develop the main argument and answer key research questions, thesis is structured into three main chapters. First, Chapter 1 analyses the rational and the importance of ADR's in consumers rights of access to justice under the EU law¹⁴. The principle of access to justice and its effectiveness is analysed through a set of criteria developed in international and EU law and policy.

Building on the analysis, Chapter 2 specifically focuses on the quality requirements established in the ADR Directive and assessments of application of those requirements to the proceedings of the

⁹Konkurentsivõimeline ettevõtluskeskkond aastateks 2020-2023, Ministry of Economic Affairs and Communications, 25.02.2020. p 17, reachable :

https://www.mkm.ee/sites/default/files/konkurentsivoimelise_ettevotluse_programm_2020-2023.pdf (last accessed: 11.05.2021)

¹⁰The limits of the traditional dispute resolution mechanisms for the consumer disputes have been repeatedly criticised in the academic and policy debates. Traditional court proceedings do not always offer a practical and cost-appropriate way of resolving consumer disputes. Some authors consider, that in disputes between consumers and businesses, ADR is more effective, faster, and cheaper. Therefore, consumer ADR has been seen as a useful instrument that helps consumers realize their rights of access to justice. See Ionescu, M.I. (2016) *Alternative Dispute Resolution. Challenges of the Knowledge Society*. Vol 6, p 155

¹¹ Ernst & Young. Tarbijavaidluste kohtuvälise lahendamise võimalikud mudelid Eestis. 17.12.2019. Reachable: <https://www.digar.ee/viewer/et/nlib-digar:435250/369263/page/1>, p 4 (last accessed: 11.05.2021)

¹² Resulting from this study, the Ministry started discussions with several stakeholders about possible legal changes with the aim of simplifying and fasten the complaint handling procedure in CDC. Unfortunately, the discussions are ongoing and hereby we cannot analyse the results of what solution has the Ministry found and which recommendation arising from the study the takes into consideration.

¹³ The CDC has been working as notified ADR for the past 5 years.

¹⁴ As one of the criticisms towards to CDC is consumers lack access to justice via CDC is that consumers do not trust the CDC as it does not provide the access to justice for the consumers.

CDC. These requirements¹⁵ can be considered as standards, that should hold all notified ADR entities work in certain common quality and help to improve the enforcement of consumer rights whole guaranteeing the access to justice¹⁶ at the same level throughout the EU. The main aim of the Chapter is to assess whether and to what extent CDC meets minimum quality requirements set by the ADR Directive for the certified ADR bodies and to suggest how the current requirements could be further enhanced.

The final Chapter 3 aims to provide suggestions for legislative amendments of the existing consumer ADR system in Estonia in order to advance the efficiency of CDC and to ensure that consumers can gain the best out-of-court dispute redress while maintaining legislators' objectives of simplicity, speed and low financial burden. As the directive does not impose many restrictions the effectiveness of the resolution system depends on the measures taken on the national level. The thesis makes four recommendations that help CDC strive towards better access to justice.

Thesis relies on the systematic analysis. The main methodology applied in the comparative legal analysis. The transposition of the ADR Directive to the Estonian context is analysed based on the analysis of EL primary, secondary law and case law, national law as well as academic literature and statistical data available.

¹⁵ EU considers the quality standards as a pathway to access to justice and consumer redress.

¹⁶ ADR Directive recital 37 states that the applicability of certain quality principles to ADR procedure strengthens both consumers' and traders' confidence in such procedure. By making the principles binding, the directive established a set of quality requirements which apply to all ADR procedures carried out by an ADR entity which has been notified to the Commission.

1. CONSUMER PROTECTION LAW IN EUROPEAN UNION AND ADR'S IMPORTANCE IN IT.

The central argument and the rationale of the development of the ADR is simplification and enhancement of access to justice for the consumers.¹⁷ The chapter, first discusses the main rationale of the ADR Directive and specifically the elements and the structure of the Directive that aim to enhance access to justice, second, the criteria to assess the quality of justice and access to justice are discussed, and third, those criteria are applied to the Estonian out-of-court redress systems. Accordingly, this chapter focuses on the question- whether and to what extent the Estonian CDC provides effective access to justice.

1.1. The ADR Directive: main rationale and principles

The Rome Treaty includes only sparse references to consumer protection.¹⁸ A role for consumer protection was seen that as implicit in general statement about living conditions¹⁹ and it formed an element in Common Agriculture Policy²⁰ and competition policy.²¹ Based on those references the EC gradually developed a consumer policy²² and started to adopt directives²³ for the approximation of matters that are directly affecting the establishment of functioning of the internal market. ²⁴ In the Amsterdam Treaty, the EC provided the proposals concerning consumer protection that would make a basis for a high level of protection. ²⁵ However, it was only the Maastricht Treaty, that provided that the Community's activities should include a contribution to

¹⁷ Konkurentsivõimeline ettevõtlikeskond aastateks 2020-2023, Ministry of Economic Affairs and Communications, 25.02.2020. p 17, reachable :

https://www.mkm.ee/sites/default/files/konkurentsivoimelise_ettevotluse_programm_2020-2023.pdf (last accessed: 11.05.2021)

¹⁸ Durovic.M (2019) International Consumer Law: What Is It All About? *Journal of Consumer Policy*. vol 42. p 126

¹⁹ The Preamble to the Rome Treaty talked of 'the constant improvement of the living and working conditions of their people' being an objective and Art. 2 made 'an accelerated raising of the standard of living' one of the Community's tasks. Treaty establishing the European Community, consolidated version 2002/C; 325/01 OJ 325/1, 25. 12.2002.

²⁰ One of whose objectives was "to ensure that supplies reach consumers at reasonable prices"; Art. 39(1) (e) TFEU. OJ C 326. 26.10.2012.

²¹ Agreements could be exempted if they contribute 'to improving the production or distribution of goods or to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefit' (Art. 101(3) TFEU) and an abuse of dominant position consisted of 'limiting production, markets or technical development to the prejudice of consumers' (Art. 102(b) TFEU).

²² Single European Act Article 100 (now Article 115 TFEU)

²³ However, none of the adopted directive aims at a comprehensive regulation of consumer contracts That is because of the limited legislative competence and principle of conferred powers. The directives regulated just selected areas which are considered politically relevant for internal market. See more: Schulte-Nölke. H: Tichy. L. (2010) Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond. European Law Published GmbH. P 1

²⁴ Supra note 1, 12

²⁵ Art. 2(15) Treaty of Amsterdam added that "account should be taken of new developments based on scientific facts". OJ C 340, 10.11.1997.

the strengthening of consumer protection²⁶, and so that consumer protection was recognised as an explicit objective of the Community with its own rights.

The ADR legislation as part of the EU consumer acquis emerged only later. First, before the adoption of the structured ADR mechanism, the EU was using soft-law instruments, recommendations.²⁷ This soft law approach to the ADR however had its limits. A study conducted in 2005 included an examination of the place of the ADR schemes and methods that were used in every MS. The study concluded that there are unique mix of schemes in EU and being not sure how a single aide of ADR system could be proposed, but states that the full national coverage of the ADR schemes is desirable.²⁸

In spite of the divergent schemes and methods in the MS, in 2013 EU has adopted ADR Directive. In the constitutional dimension the rights that are aimed with the directive are stated in there.²⁹ The main aim of the Directive.³⁰ The main aim of the ADR Directive is to help millions of consumers to enforce their contractual rights, via fast, simple and cost-effective out-of-court procedure – alternative dispute resolution schemes.³¹ It has been argued that if the consumers could only rely on formal courts, many disputes would remain unsolved.³²

²⁶ Maastricht Treaty, Art. (3)(s) OJ C 191, 29.07.1992

²⁷ Commission Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001) OJ L109/2001; Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (1998) OJ L115/31.

²⁸ Stuyck, J (2007) Commission Study on alternative means of Consumer redress other than redress through ordinary judicial proceedings, reachable:

http://www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf (last accessed 11.05.2021)

²⁹ Recital 61 of the ADR Directive stipulates, that Directive respects fundamental rights and observes the principles recognised in particular by Charter of Fundamental Rights of the EU and specifically with articles, 7,8,38 and 47.

³⁰ Directive 2013/11/EU

³¹ Directive 2013/11/EU applies only to disputes concerning contractual obligations stemming from sales or service contracts between a business and a consumer (Art. 2, para. 1).

³² Given the costs involved with litigation, in addition to the complexity of the process and time-consumption, the litigation cannot be considered the most effective measure for consumers to protect their rights, leading to a situation where consumers tend to relinquish their rights. According to a study conducted in the United Kingdom, many consumer disputes remain unresolved because being costly and time-consuming for consumers to assert their rights through legal proceedings, while the amount on which the complaint is based is rather low. However, the European Commission estimates that consumers in the European Union would save around € 22 billion a year if they were guaranteed access to an effective out-of-court dispute resolution mechanism for both domestic and cross-border complaints. See: European Commission Staff Working Paper, Impact Assessment Accompanying the document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes. Brussels, 29.11.2011, SEV (2011) 1408 final, p 84. Accessible:

<http://www.europarl.europa.eu/document/activities/cont/201204/20120425ATT43950/20120425ATT43950EN.pdf>

The key element and the focus of the ADR Directive³³ is on the ADR entities, that according to Article 1 should offer “independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedure.”³⁴ The directive aims to promote high-quality ADR entities through the criterion of a certified schemes for ADR providers.³⁵ The ADR Directive does not oblige all ADR entities to be certified, but the certified ADR providers must be listed, and the traders are required to inform consumers about the applicable ADR entity in case a dispute arises.³⁶ The general idea is to promote alternative mechanism for consumers, that would be effective to resolve the disputes without going to court in a quicker and low-cost way. ADR mechanisms are a political priority for the EU, which EU institutions are promoting together with ODR.³⁷ The ADR should not replace court procedure, but it can be a welcoming complement.

One, minimal way to understand the requirements of the ADR Directive, suggest that the ADR Directive only requires MS to create residual consumer dispute resolution function³⁸ and establish a regulatory system for ADR entities, with which most existing bodies already comply. These changes might have a limited impact on the landscape and statistics of dispute resolution, and on delivering justice - since both consumers and businesses might not subsequently use consumer dispute resolution schemes or techniques.³⁹

Several authors have expressed their concerns about the ability of the Directive to secure a fully coherent and consistent approach supporting high quality ADR through the EU.^{40 41} This is

³³ Directive 2013/11/EU

³⁴ Directive 2013/11/EU, Article 1.

³⁵ European Commission, *Alternative Dispute Resolution for Consumer Disputes in the Single Market*, COM(2011)791 final, 29 November 2011, <http://ec.europa.eu/transparency/regdoc/rep/1/2011/EN/1-2011-791-EN-F1-1.Pdf> (last accessed 11.05.2021), at 6. The other two key objectives were coverage (ADR entities should be available for all consumer disputes), and awareness and information about ADR for consumers and traders.

³⁶ Only certified ADR entities may be included in the Online Dispute Resolution (ODR) platform Article 13(1) of Dir. 2013/11/EU. See: Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524> (last access January 2021). The ODR platform is accessible at [Online Dispute Resolution | European Commission \(europa.eu\)](https://odr.ec.europa.eu/) (last accessed 11.05.2021).

³⁷ Jeretina, U; Uzelac, A. (2015) Alternative Dispute Resolution for Consumer Cases: Are Divergences an Obstacle to Effective Access to Justice? *Central European Public Administration Review*. 12 (4). p 46.

³⁸ Directive 2013/11/EU, art 5.1. The ‘residual’ obligation is to create arrangements under which any C2B claim that is not covered by other existing consumer dispute resolution schemes can be submitted to ADR.

³⁹Hodges, C (2015) Consumer Ombudsmen: Better Regulation and Dispute Resolution. *ERA Forum* 15. p

⁴⁰Biard. A (2019) Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK *Journal of Consumer Policy*. Vol 42 (1) p 110

⁴¹All certified ADR entities must comply with several binding quality standards. The directive brings out that the entities should possess the right expertise, be independent and impartial, transparent, the procedure of the certified entity must be effective, fair, and comply with the principles of liberty and legality

explained by the fact that in many of the newer MS there are limited regulatory structures or more accurately regulators that are poorly financed so that they are not able to cope with the workload they are facing. At the same time, by contrast, some of the richer EU countries have strong and relatively well-resourced regulators.⁴²

The functions of the ADR standards can be divided to four parts. The first aims improving the credibility and legitimacy of ADR systems. They contribute to tempering the concerns expressed about the way ADR providers operate, particularly their lack of transparency and accountability. As such, quality standards can have a positive long-term effect on ADR bodies' procedural design and functioning. Secondly, they aim at enhancing consumers' and traders' trust in ADR procedures. Thirdly and relatedly, quality standards can encourage the use of ADR procedure, which, according to the EC, tends to be still below its full potential in the EU. Finally, high-quality ADR bodies are an essential component for the good functioning of other tools closely intertwined with ADR, particularly the ODR platform.⁴³

Consequent, the ADR as a system for the low-value consumer to trader contractual disputes is necessary, as the alternatives would be court proceedings, that are not used mostly because of its costly nature, it's relevant to analyse the quality of access to justice with the out-of-court mechanism. The main question is whether it's possible to measure the efficiency of consumer dispute resolution mechanism in any other way than with quality requirements set with the Directive.

The key is to determine whether the ADR entity meets successfully its goals is an evaluation of the system. The evaluations may be conducted for different reasons, but the general purpose is the same- to find out the obstacles and weaknesses and determine whether amendments would improve its usefulness. The following section evaluates the principle of access to justice for the out-of-court consumer disputes and provided of the current work of the CDC, whether the access to justice has been granted. The analysis is based on the comprehensive statistical data applicable to the Estonian out-of-court consumer redress in general and CDC in particular.

⁴²Nordic Ombudsmen, the UK's consumer Markets Authority, there are government funding's in Austria and in Germany and strong consumer groups who cooperate with government regulators.

⁴³Biard. A (2018) Monitoring Consumer ADR in the EU-a Critical Perspective. *European Review of Private Law*. p 3

1.2. Consumer's Access to justice with the ADR directive

Consumer access to justice has been in the attention of the EC already in 90s⁴⁴, where it was stated, that access to justice is one and the same time a fundamental human right and a necessary precondition for guaranteeing legal certainty at both national and Community level ⁴⁵. Cappelletti's general idea was that institutions should be able to deliver legal services for poor and less financially secured persons to secure the access to justice to everyone and that could be achieved with the out-of-court settlement system⁴⁶. It can be considered a non-discrimination principle, that is not focusing for racial and gender discrimination, but on economic discrimination.⁴⁷National consumer regimes are a mixture of regulations, private law and self-regulation. There have been attempts in many national legal systems to make courts and their procedures more consumer-friendly and to reduce the costs to the consumer of accessing the court through the introduction of small claims procedure or claims below certain monetary limits^{48 49} ADR however is available for any disputes with a trader established in the state's territory. Therefore, it can be said that ADR stands to some extent outside the core of national procedural law and has the tools to ensure consumers access to justice.

It's impossible to compel a consumer before or at the time of purchase, to agree to dispute resolution through arbitration⁵⁰, therefore small individual disputes can be resolved not with courts

⁴⁴ The study of Cappelletti and Garth in 1975 gave boost to it. It was a movement to make the legal system accessible to all citizens irrespective their income. The EU has considered or adopted measures that can be linked to each of these three waves. Cappelletti took the concept of access to justice beyond courts and included alternative dispute resolution a significant part of civil procedure. See Johnson E (1978) Thinking about Access: A preliminary Typology of Possible Strategies' in Cappelletti. M, Garth.B Access to Justice: Emerging Issues and Perspectives vol 3 See also: Hodges. C, Benöhr.I; Creutzfeldt.N. (2012) Consumer ADR In Europe. Bloomsbury Publishing, p 2

⁴⁵ Resolution on the Commission communication Action plan on Consumer Access to justice and the settlement of Consumer disputes in the internal market. COM (96)0013 – C4-0195/96, 2 December 1996 (1996) OJ C 362, p 0275.

⁴⁶ Access to justice is recognised as a human right in Europe. The right to Access to justice and fair trial are guaranteed Under Article 6 of European Convention of Human Rights. Additionally, the Charter of Fundamental Rights of EU provides a right to an effective remedy and to fair trial Article 47 of Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p 391-407

⁴⁷ See Rickett, C.E.F; Telfer T.G.W (2003) International Perspectives on Consumers' Access to Justice. Cambridge University Press, p 8

⁴⁸ Small Clams Procedure has limit of 5000 euros

⁴⁹ Courts, as mainly considered medium for access to justice are often too costly to handle small claims that are typical of consumers' disputes with businesses. And courts may be not user-friendly for today's citizens and consumers do not want to waste time in lodging formal documents in court, to have to cope with unfamiliar court procedure, to attend hearings, to pay for lawyers, to risk having to pay the costs of the opponent, to have to seek for enforcement and to see companies repeating the same mistakes. See: Hodges,C.,Benöhr, I., Creutzfeldt-Banda, N. (2012) Consumer-to-business dispute resolution: the power of CADR. *ERA Forum* 13, pp 199–225

⁵⁰Case C-168/05Mostaza Claro (2006) ECR I-10421 and Case C-40/08 Telecomunicaciones SL v Cristina Rodríguez Nogueira (2009) ECR I-9579, European Convention on Human Rights, art 6 (fair trial)

but with consumer ADR system. It can be argued whether it should be expected that the access to redress⁵¹ should go through the courts and the alternative dispute resolution should be available just as an option. EC at the same time is considering ADR (and ODR⁵²) as a success story, where the burden from the courts have been reduced, while the consumers have access to high-quality ADR procedure for settling their contractual disputes with traders⁵³.

The ADR Directive makes several references to its goal of improving consumer access to dispute resolution.⁵⁴ Access to justice was associated historically with access to the judicial systems and judicial protection of individuals.⁵⁵ In reality, in spite of available procedure, consumers often find themselves unable to enforce their rights as individuals as they lack experience and power to make their desire important and understandable to businesses.⁵⁶ With the soft-law standards that the ADR Directive provides, the resolution mechanism cannot, at current level, regulate it more profoundly.⁵⁷

With the ADR Directive MS ensure that ADR procedure is available for every consumer dispute.⁵⁸ The schemes are broadly interpreted to either propose or impose a solution, as well as only bring the parties together with the aim of facilitating an amicable solution.⁵⁹

While the access to justice, includes in the consumer dispute cases, is considered to be important and recognised by MS and the European Commission, it is less clear how to measure the effectiveness or the quality of access to justice. The Council of Europe and European Commission

⁵¹ Often previously called Consumer redress is Associated with the Access to justice.

⁵² Regulation (EU) No 524/2013. *OJ L 165*, 18.6.2013, p. 1–12

⁵³ Report from the Commission to the European Parliament, the Council and the European Economic and social Committee, Brussels 25.09.2019. COM (2019) 425 Final, p 2, Reachable : <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-425-F1-EN-MAIN-PART-1.PDF>

⁵⁴ which is interpreted by the legislator as access to justice. For example, Art. 2 (3); Art. 5 (1), Recitals 4 and 6 in the Directive 2013/11.

⁵⁵ Johnson. E (1978) Thinking about Access: A preliminary Typology of Possible Strategies', in Cappalletti. M; Garth.B. Access to justice: Emerging Issues and Perspectives, vol 3, pp 8-11.

⁵⁶ Willett. C. (2007) Fairness in Consumer Contracts: The Case of Unfair Terms. Routledge Taylor and Francis. pp 43-46

⁵⁷ The free of charge or nominal fee procedure and 90-days preceding period with mostly non-binding decision. See more: Reich. N (2014) A Trojan Horse in the Access to Justice-Party Autonomy and Consumer Arbitration in conflict in the ADR Directive 2013/11/EU. ERCL. Vol 10 (2) p 277

⁵⁸ ADR Directive, Art 5. On a contrary though noting the ambiguous wording of Art. 5 suggests that to require MS to set up such entities would go against the facilitative nature of the Directive, which should only require its rules are followed if there is an ADR body. see Reich.N. (2014) Legal protection of individual and collective Consumer interests in Reich. N. and others, *European Consumer Law* (Intersentia, 2014)

⁵⁹ Directive 2013/11/EU Art. 2 (1).

have adopted a guide document that defines how to measure the quality in justice.⁶⁰ Even though the quality of justice has mostly measured in court proceeding, it is appropriate to draw parallels with the out-of-court dispute systems.

The guide document explains that the quality of justice is often taken separately from the quality of judicial decision⁶¹, but it must be interpreted together what the judicial service delivers. Measuring the quality of justice must go beyond of measuring just the outcome, as it is also important to evaluate the individual procedural steps and the accessibility to the system. As for instance, speed, as one of the criteria that consumers value when they analyse the effectiveness of a system, cannot always bring desirable outcome⁶², even though the speed in ADR proceeding is distinctive advantage over litigation. The effectiveness in any consumer protection regime is combination of the quality of the substantive rules, the extent of their enforcement but also the effectiveness of the sanctions⁶³.

Article 6 of the European Convention of Human Rights provides the checklist for promoting the quality of justice.⁶⁴ The essential elements of the proceeding can be divided into seven categories:

1. The fairness of the proceeding;
2. The reasonable duration of the proceeding;
3. Transparency of the process;
4. Protection of the weaker parties;
5. Comprehensibility of the decision;
6. Right of legal assistance;
7. Legal aid;

The list brings out several requirements, that are almost the same imposed for notified entities with the Directive. So can the criteria of fairness mean to have a guarantee in the higher level of hierarchy norms to protect the independence of the judiciary powers. Publicity and transparency

⁶⁰ Measuring the quality of Justice (2016) European Commission for the Efficiency of Justice (cepej), Guide, p 15; reachable : <https://edoc.coe.int/en/efficiency-of-justice/7500-measuring-the-quality-of-justice-guide.html>.

⁶¹ CEPEJ-GT-QUAL group, working paper, “Measuring the Quality of Judicial Services”.

⁶² There is a saying: Who helps fast, helps twice.

⁶³ Howells, G; Twigg-Flesner, C; Wilhelmsson, T (2018) Rethinking EU Consumer Law. (1st ed). Taylor and Francis., p 10

⁶⁴ European Convention on Human Right: reachable: https://www.echr.coe.int/documents/convention_eng.pdf (last accessed 11.05.2021)

can interpret as medium of making sure that the transparency in the allocation for documentation but also for a person making the decision.

Legal assistance can be also interpreted as an easily accessible legal act and documentation, information desk or any information that is accessible, easy to find or relevant in the proceeding. Legal consultation and legal representation that is free of charge or with reduced price for the consumer. The cost and fees must be transparent. The timeframe and the information provided about how long the proceeding may be and that does not exceed the promised timeframe, or the expected time.

Efficiency can be also analysed through the empirical study of procedural justice. Procedural justice contains of four pillars⁶⁵.

1. being fair in processes, meaning the trust between the disputant and the process. From the parties' perspective, trust into the decision maker's expertise in the process and the decision has been explained.
2. being transparent in actions, meaningly, how well the information about the proceeding has been shared.
3. providing opportunities to voice, meaning people value the opportunity to present their own story. It is resulted from the fact the people want control over the process that leads to decision that affects them and this can be partly achieved through the opportunity to voice their case.
4. being impartial in decision making as they value neutrality in the process.

Neutrality can be fostered by an authority figure of who is impartial, transparent, consistent in applying rules and even-handling in considering the view of both parties⁶⁶. In case of people being simply economic actors whose evaluation of legal procedures is based upon the outcome, then they would evaluate their results of the ADR processes on how favourable their outcomes are, and judgements related to the rule of law will be irrelevant. Studies constantly suggest that people's

⁶⁵ Hollander-Blumoff. R; Tyler. T.R (2011) Procedural justice and the rule of law: Fostering Legitimacy in Alternative Dispute Resolution. *Journal of Dispute Resolution* vol 2011(1). p 3
: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5983&context=fss_papers

⁶⁶ Tyler. T.R.; Blader. S.L. (2003) A Four-Component Model of Procedural Justice: Defining the Meaning of a Fair Process. *Personality and Social Psychology Bulletin* New York University p 749

evaluations of legal procedures are strongly shaped by issues of procedural justice⁶⁷. ADR procedures are more informal processes for the resolution of a dispute than a lawsuit before the court.

The criteria discussed above are developed to assess the quality of justice considering the judicial proceedings, the question is still how a successful ADR can be measured and how can it provide the access to justice. There are no comparable guidelines for the ADR. However, a useful guidance is provided by the assessment criteria included in the European Commission Consumer Conditions Scoreboard. The latest evaluation has been made by the EC with the Consumer Conditions Scoreboard analysis, that decided to evaluate consumers across the Europe with three components:⁶⁸

1. knowledge and trust, as being a central for the development of efficient markets and the effective protection of consumer interests.
2. Compliance and enforcement: effective enforcement of consumer rights and of product safety legislation to build consumer trust, as well improving the business environment by preventing distortion and ensuring a level playing field for companies across the EU single market.
3. Complaint and dispute resolution: getting redress can reduce or offset consumer detriment, which can, in turn, strengthen consumers' confidence in the shopping environment. It is therefore important that consumers use the remedies available to them when they encounter problems and that their complaints are handled effectively.

The quality requirements included in the Scoreboard are almost similar as in the ADR Directive. There are some differences, but these differences are minor and it can be seen that in general principle, the access to justice, whether it is for the court system or for ADR entity can be considered being the same. At the same time the similar procedure model cannot be applied to all notified entities in Europe, as there are simply too many of them.

⁶⁷Hollander-Blumoff. R; Tyler. T.R (2011) Procedural justice and the rule of law: Fostering Legitimacy in Alternative Dispute Resolution. *Journal of Dispute Resolution* vol 2011(1).pp 2-3

⁶⁸European Commission, Consumer conditions scoreboard 2019 edition. [Consumer conditions scoreboard - 2019 edition | European Commission \(europa.eu\)](https://ec.europa.eu/consumers/odr/information_en) (last accessed 08.02.2021)

Based on the analysis above, it may be concluded, that there is no one-dimensional indicator to measure the successful ADR entity, as there are currently more than 560 notified entities in EU and the access to justice and efficiency can be only measured by case to case bases, as there is no right scale of comparison for all the out-of-court mechanisms. It is wrong to make the consumers believe, that the law is identical in substance applicable through EU. There are many factors that are directly influencing consumers and one of them is access to redress system⁶⁹. And even access to justice in its broad understanding is sufficient to ensure a consumer who fears practical difficulties in getting consumer problems sorted out, specially in cross-border situations. Consumer might rather prefer close entity to complain to, therefore the easy access might be preferred to access to justice.⁷⁰

The ADR proceeding must be seen an alternative to litigation process that gives reasonable chance of achieving fair and equitable solution, improving access to justice, overcoming the problems of costs and funding for court mechanisms and as an assistant in maintaining comparative markets⁷¹.

1.3. Estonian Consumer Dispute Committee and the access to justice

Based on the criticism⁷² in 2019 the Ministry has decided that the current consumer out-of-court dispute resolution system in Estonia must go through modification.⁷³ In order to base modifications of the existing system on the evidence, the Ministry has commissioned study to analyse why the current CDC does not meet its goals. The study, concluded by Ernst and Young⁷⁴ offered several suggestions on how to simplify the proceeding in the way that the access to justice of the consumers has been granted and the out-of-court dispute system would meet its purpose.

⁶⁹ Howells, G; Twigg-Flesner, C; Wilhelmsson, T (2018) Rethinking EU Consumer Law. (1st ed). Taylor and Francis. p 4

⁷⁰ Wilhelmsson.T (2004) The Abuse of the „Confident Consumer“ as a Justification for EC Consumer Law. *Journal of Consumer Policy*. Vol 27.p 330

⁷¹ Hodges. C (2011) The Hidden World of Consumer ADR: Redress and Behaviour. Centre for Socio-Legal Studies, Oxford, 2011. Reachable: <https://www.law.ox.ac.uk/sites/files/oxlaw/thehiddenworldofconsumeradr-conferencenote.pdf>

⁷² Tarbijavaidluste kohtuvälise laendamise võimalikud mudelid Eestis. 17.12.2019. Ernst & Young Baltic OÜ. Reachable: <https://www.digar.ee/viewer/et/nlib-digar:435250/369263/page/1> (last accessed: 11.05.2021)

⁷³ Ministry has decided to work out the strategy to improve access to CDC for consumers. Stating that the easiest way to resolve Consumer out-of-court disputes is through ADR procedure, but the system is compromised with the trust of the consumers. Konkurentsivõimeline ettevõtluskeskkond aastateks 2020-2023. p 18. Reachable: [konkurentsivoimelise ettevotluse programm 2020-2023.pdf \(mkm.ee\)](#)

⁷⁴ E & Young analysis

One of the main shortcomings identified the EY study is that consumers don't trust the proceeding of CDC. In this sub-chapter thesis analysis and compares national and EU level statistical indicators to find out that if the access to the CDC has been made difficult for the consumer and how the different analysis⁷⁵ that are concluded evaluate the current situation. The results of this analysis in this section also inform the second chapter of the thesis, where the activities of the CDC are analysed based on the quality requirements set with the ADR Directive.

1.3.1. Comparative analysis of the Consumer dispute Committee decisions

The CDC, Estonian general consumer dispute entity, is solving most of the out-of-court consumer disputes in Estonia⁷⁶. In 2019 CDC received 2375 consumer applications⁷⁷. Taking into consideration the amount of application and considering the amount of personnel handling the complaints, the Estonian CDC has succeeded relatively well when processing such a large amount of applications with 90-days' time frame. However, according to comparative statistics collected from EU MS, Estonia has received poor evaluation compared with other MS in the evaluation of trust and knowledge.⁷⁸ Surprising, more that 70% of consumers in EU trust retailers to respect their consumer right and over 60% have positive experience with the traders, therefore, the low score of Estonia's indicators are influenced of the low trust in institutions not into market conditions in general. Conceivably, most of the EU consumer who encounter problems after the purchase receive a solution with the trader, which is the most natural way of obtaining redress. Only 5.2% of the consumer decided to contact the public authority or ADR entity, which is only 5% of the consumers⁷⁹ - minority of all the consumers who have actual consumer claim. That may

⁷⁵ The statistical indicators from E&Y, Annual reports of CDC and Eurobarometer

⁷⁶ Compared with other notified entities in Estonia, there was 296 proceedings in 2020 in Insurance cases in notified entities of Insurance, Annual report of Insurance Conciliation fund and Insurance Conciliation Fund, Reachable: https://www.lkf.ee/sites/default/files/Kindlustusturg_2020.pdf?447 p 2. And in 2019 291 complaints, annual report of Insurance Conciliation 2019, https://www.lkf.ee/sites/default/files/Kindlustusturg_2020%288%29.pdf?651, Estonian Bar Association have not had any consumer disputes since becoming notified entity.

⁷⁷ The recent statistics available is from 2019. The statistics does not include the cross-border cases share with European Consumer Centres. For eight people working in the secretariat of CDC that means approximately 25 applications per month for each, which is extremely huge number of complaints to handle per person.

⁷⁸ Estonia received 52.7 point on the evaluation of consumers trust and knowledge, exceeding the neighbouring countries, Latvia and Lithuania, but gaining less than Finland. The EU average was 55.9 points. Compared to previous period, 2014-2016 the trust has slightly decreased, 1.8 points. The consumer Condition overall index is presented in appendix 8.

⁷⁹ See Appendix 5, EU consumers' complaints and satisfaction with complaint handling by recipient, 2018

raise a question of Estonian consumers, and EU consumer are just passive, or they do not take an action because of lack of trust to ADR proceeding⁸⁰.

Another, local survey conducted in 2019 by the Estonian Institute of Economic Research⁸¹, show similar outcome. The statistical indicators show that 19% of the consumers have problems with the trader after conclusion consumer contract.⁸² While facing a problem, almost all consumers, 98%, contacted the trader concerning this problem and out of them only 23% of the consumer needed to contact CPTRA.⁸³ The evaluation for the service received while contacting CPRA is rather good, as 74% of the people found provided service really or rather good.⁸⁴ We can conclude that there is a significant difference between the national surveys and the survey conducted by the EU,⁸⁵ but the conclusion able to understand, that consumer's in general do not tend to take action when then have problem concerning the purchase.⁸⁶

When analysing whether consumers tend to complain after experiencing a problem with buying or using goods and services as well how satisfied consumers are with the way these complaints are handled, there can be seen that the average in the EU is 59,5 points, receiving a slight decrease compared with the previous period of - 0,9 points. Estonia took a place in the end of the scale receiving just 52,2 points and facing a decrease of -3.8 points with the previous period.

Therefore, it can be assumed, that, Estonia does not stand in a good position in the scale of trust in redress mechanisms. In 2019, Estonia scored a second lowest position among 28 EU member states⁸⁷, and third lowest position when the trust to the ADR mechanism was analysed. At the same time Denmark⁸⁸ being in the third position of the EU countries, of the highest trust in the ADR

⁸⁰ Perhaps, it's due consumers do not seek redress because of the same value of the claims and the cost and formalities of the courts, see more: Fejos A. Willet. C. (2016) Consumer Access to Justice: The Role of the ADR Directive and the Member States, p 34

⁸¹ Survey of Current situation of Consumer Protection in Estonia; Estonian Institute of Economic Research, 2019: reachable: <https://ekyl.ee/uudised/valmis-uuring-tarbijakaitse-olukorrast-eestis/> Strangely, the 2019 survey is not reachable from the Ministry's web page, though the analysis of the previous are reachable <https://www.mkm.ee/et/uudised-pressiinfo/analusid-ja-uuringud> , p 10

⁸² Therefore, in can concluded, that more than 80% of the consumers do not have difficulties with the retailers.

⁸³ P 17.

⁸⁴ Please make acquainted with Appendix 6.

⁸⁵ Unfortunately, the reasons of such differences in the studies is impossible to say, as there is no information provided of the background of the researches.

⁸⁶ That can also be related with rather passive behaviour of Estonians, coming from the

⁸⁷ Consumer Conditions Scoreboard 2019, P 89 , reachable: https://ec.europa.eu/info/sites/default/files/consumers-conditions-scoreboard-2019_pdf_en.pdf

⁸⁸ Denmark has been considered as a best example as ADR mechanism according to Ernst & Young analysis.

mechanisms⁸⁹. The same standard is supported with the national statistics⁹⁰, where the statistics of trust in national institutions show that the trust in 2019 has decreased in consumer protection field compared with other institutions -2,6%⁹¹. CDC conducts annually a survey to find out the expectations⁹² of the parties who have had a dispute and 70% of the respondents were rather satisfied or very satisfied with the proceeding. 40% of the respondents thought that the proceeding could be quicker even though the average time handling the complaints was 46 days⁹³. Local consumer survey supports the CDC surveys and therefore it is not understandable, why the E&Y has analysed just EU comparable statistics, but has left the several local, rather comprehensive analysis unconsidered.

Hereby, it is important to analyse the statistical indicators also from traders' side. The EU statistics provide again much lower result, indication that only 18% of the retailers in Estonia are aware of the existence of the ADR systems and also willing to use the ADR mechanisms, where as 82% of the retailers either have a knowledge about the ADR entities but are not willing to use them or are not aware of the existence of such possibilities⁹⁴. Surprisingly 5 % out of them said that no ADR's are available in the sector they are operation, which cannot be true, as CDC is a general ADR that provides a coverage for all economic sectors.

It is relevant to compare the results with the statistical indicators that the CDC has provided and compare it with the criticism of the Erns & Young research to see if the suggested legislative amendments would bring more benefits for the consumers.

In 2019,⁹⁵ consumers submitted 2375 applications to the CDC. The number of applications submitted 2018⁹⁶ was 3383 and in 2017⁹⁷ accordingly 3168. In 2019 the CDC made 612 decisions.

⁸⁹ Consumer Conditions Scoreboard 2019, p 87

⁹⁰ The statistical result is not comparable, but the trend can be taken into consideration.

⁹¹ the trust of institutions has changed on average by -2.6%, incl. To a statistically significant extent ($\pm 3\%$ or more) has increased confidence in three institutions - the Unemployment Insurance Fund, the court and the Consumer Protection Board. Reachable: https://www.siseministerium.ee/sites/default/files/siseturvalisuse_institutsioonide_usaldusvaarsus_ii.pdf, p 3

⁹² the questionnaire has been sent to the consumer and traders at the end of the CDC proceeding and the question to answer is: How do you evaluate the comprehensibility and simplicity of the CDC proceeding.

⁹³ 2013/11/EU (ADR Directive) gives 90 days' timeframe for the notified out of court entities.

⁹⁴ Consumer Conditions Scoreboard, p 53.

⁹⁵ Annual Report of Consumer Dispute Committee 2019: https://komisjon.ee/sites/default/files/komisjoni_2019_tegevuse_aruanne.pdf

⁹⁶ Annual Report of Consumer Dispute Committee, 2016: https://komisjon.ee/sites/default/files/tvk_aastaaruanne_2018.pdf

⁹⁷ Annual report of Consumer Dispute Committee, 2017: Reachable : https://komisjon.ee/sites/default/files/tvk_2017_aruanne.pdf

Compared with 2018, 638 applications were resolved in the CDC, of those 399 were resolved with the decision of the three-member committee and 239 were head of the committee as the proceeding was closed with the compromise of the parties either at the hearing or terminated from the proceeding in other cases, by the law⁹⁸.

Depending on the different circumstances the proceeding had to be suspended in 419 cases⁹⁹, which makes 17% of all applications reaching the secretariat of the CDC. The biggest part of the applications that do not reach the proceeding have shortcomings in the applications which deficiencies were not eliminated by the consumer ever after having given additional time. But big part of the applications fall out of the proceeding of the CDC because of the lack of competence of the committee, for example, when the contract has concluded between private persons or judicial persons, or then the same dispute has been settled already in another alternative dispute resolution body or the trader has been registered outside of Estonia.

The third bigger category of why the proceeding has been terminated is by the request of the consumer¹⁰⁰. The reasoning for the consumer to decide so are different, for example, consumer has reached to an agreement with the trader, the court proceeding has been conducted under the contract under dispute. The most criticised reason why the consumer may request the termination of the proceeding is when the consumer has received explanations from the secretariat of the committee why the possible prospect of success in the lights of the committee's previous practice is low. 309 disputes were closed for this reason in 2019.

As the criticism of the CDC is that the proceeding is not effective, it is important to analysing the effectiveness of the procedure, namely how the committee decided over the disputes¹⁰¹. then it can be seen that 69% of the 2019 decisions were made in favour of consumers¹⁰², which shows the successful work of the CDC. That is comparable with ADR entity of Finland, where 80% of the decisions that reached the committee, were made in favour of the consumer.¹⁰³

One of the obligations of the CDC is to provide an independent legal assessment of both parties of the contract; therefore, it must be assessed whether the trader's actions were correct the trader

⁹⁸ Please see Appendix 1

⁹⁹ Please see Appendix 2

¹⁰⁰ The Consumer, after receiving an evaluation of the circumstances of the secretariat may take back the application Consumer Protection Act §46 (9).

¹⁰¹ Please see Appendix 3.

¹⁰² In 2018 77% of the decisions were made in favour of the Consumer. Annual Report of CDC, 2019.

¹⁰³ E & Y analysis, p 48.

has fulfilled its obligations. From the point of view of whether consumer's rights and access to justice is guaranteed, the disputes that are resolved with the conciliation can also be read positively and therefore considered as resolved in favour of the consumer.

Another criticism of the effectiveness of the CDC is an enforcement of the decisions¹⁰⁴, namely the fact that in its nature the decisions are voluntary for traders to comply with. There are no direct coercive measures that the committee may take in order to force the traders to comply with it and in case the traders do not comply with the decision, the only so-called punishment is to be listed in the "black list" of the traders, that do not comply with the decision¹⁰⁵, which everyone can get acquainted with from the web page of CDC. The possibility to enforce the decisions of the CDC is one of the suggestions that E & Y made and will be closely analysed in the third chapter.

It can be concluded from the comparative statistical analysis, that the access to justice the CDC has been granted for everyone, for consumers as well for traders. A large amount of the applications do not reach the proceeding, but that does not show the incompetency of the CDC, as the termination of the proceeding is resulted frequently because there are deficiencies in the consumer's application, the CDC does not have a competency¹⁰⁶ or the consumer has terminated the proceeding on proposal of the secretariat.

Despite the fact that Eurostat proved remarkably different consumer evaluations for the current system and the E& Y has decided to interpret that as an assumption that the current system should be change, the local statistical indicators show that consumers, but also the traders do not evaluate the current system as poorly. Building in this analysis, next chapter analysis a question whether the CDC meets the quality requirements, and would the procedural amendments improve the access to justice? For that the CDC should be analysed in the lights of the quality requirements set with the ADR Directive in the next chapter.

¹⁰⁴E&Y found that overall presumption of the consumers was positive for current system, 63% of the consumers considered the work of the CDC good and rather good, p 80

¹⁰⁵The "Black List" of the CDC can be found here: <https://komisjon.ee/et/must-nimekiri> Media is eager to pick up the decisions, especially in the cases when the trader is well known in Estonia. The trader shall be removed from the list when he complies with the decision or one year has passed since the date of being added.

¹⁰⁶CDC does not resolve disputes related to non-economic services of general interest, education services offered by a legal person, health care services or if the complaint arises from an event of death, physical injury or health damage. Consumer Protection Act § 40 (3)

2. ADR DIRECTIVE'S QUALITY REQUIREMENTS AND ARE THOSE REQUIREMENTS MET IN CONSUMER DISPUTE COMMITTEE IN ESTONIA

The main conclusion of the Chapter 1 is that the Estonian CDC is working rather successfully and even though there are relatively large amount of disputes, that are declined for different reasons, the ones that are qualified and reach the committee are mostly solved in a favour of the consumer. This Chapter takes this analysis one step forward and concentrates to the evaluation of the CDC based on the quality requirements set with the ADR Directive that all the notified entities must comply with in order to ensure the common quality of the out-of-court dispute redress entities. The purpose of analysing these requirements is to assess whether the work of the CDC is in compliance with quality requirements and where and which improvement would be necessary to enhance the quality.

2.1.ADR entities in the consumer disputes: main principles and transposition in Estonia

ADR Directive requires the MS to facilitate consumers access to ADR procedures and to ensure that disputes covered by the Directive¹⁰⁷ that involve a trader established on their respective territories can be submitted to an ADR entity that complies with the requirements set out with the Directive¹⁰⁸. Given that the directive aims at minimum harmonization, MS have the opportunity to provide for a better design in their countries to improve the quality of the dispute entity.¹⁰⁹

The ADR entity¹¹⁰ is any entity, however named and referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure¹¹¹. Quality standards of the ADR entity have been selected on the basis in a manner that they could be applied to any ADR entity operating in any sector. That raises a question of whether they are not in practice a too low common denominator for enhancing ADR quality and meeting consumers' demands.¹¹² Member State is free to promote higher standards in their national implementing legislation. Estonia, among

¹⁰⁷Non-economic services, health care services, procedures before the consumer complaint handling systems operated by traders, disputes between traders, judicial proceedings, procedures that are initiated by traders and public providers, including higher education. Directive 2013/11/EU Article 2 (2. a- i) and recitals 13- 14; 16, 20 and 23.

¹⁰⁸Directive 2013/11/EU (ADR Directive) Article 5 (1)

¹⁰⁹Weber.F. (2015) Is ADR the Superior Mechanism for Consumer Contractual Disputes? – an assessment of the Incentivizing Effects of the ADR Directive. Journal of Consumer Policy. Vol 38, p 266

¹¹⁰Directive 2013/11/EU (ADR Directive) Article 4 (1) (h)

¹¹¹ that is listed in accordance with Article 20 (2) Directive 2013/11/EU (ADR Directive)

¹¹² Kirkham, R. (2016) Regulating ADR- Lessons from the UK, in: Cortes.P. (ed.), The New Regulatory Framework for Consumer Dispute Resolution. Oxford University Press. p 302.

the other Baltic States, did not use that opportunity at first¹¹³, but nevertheless has established partly higher standards, that the minimum requirements of the Directive.

CDC, one of the four notified ADR entities in Estonia¹¹⁴ has been operating since 2016¹¹⁵. It is an independent and impartial out-of-court settlement system of consumer disputes within the Consumer Protection and Technical Regulatory Authority (CPTRA), established based on the Consumer Protection Act. The CDC is widely used and competent to resolve national and cross-border disputes¹¹⁶ arising from the contract between the consumer and the trader, which are not resolved at the same time by the Bar Association Honorary Court or the conciliation body of the Association of Estonian Insurance Companies and the Estonian Traffic Insurance Fund.

Estonia transposed the ADR requirements from the ADR Directive in 2015 and updated in this regards the Consumer Protection Act. Thus, the common binding quality requirements throughout the EU for the out of court schemes were provided allowing consumers and traders to resolve their disputes in the reliable body without going to court.

In 1998 the EC's Recommendation on the principles applicable on the bodies responsible for out-of-court settlement of consumer disputes was adopted¹¹⁷. This objective was to set out the basic principles for out-of-court consumer dispute resolution schemes involving a third party. The recommendations are addressed to bodies that take a substantive decision in resolving a dispute, not merely to conciliation or mediation bodies. In the preamble of the document, the consumer dispute has been characterised with a disproportion between the economic value at stake and the cost of its judicial settlement, and that may discourage consumers from exercising their rights in practice. The Recommendation brings out four recommendations to which the out-of-court consumer dispute bodies have to comply to the principle of independence, the principle of transparency, adversarial principle, the principle of effectiveness, the principle of legality, the principle of liberty and principle of representation.

¹¹³Biard, A (2018) Monitoring Consumer ADR Quality in the EU: a Critical Perspective *European Review of Private Law*, 2- 2016; p 12

¹¹⁴Among the Court of Honour of the Estonian Bar Association, Insurance Reconciliation for Car and Motor Insurance Reconciliation Body.

¹¹⁵Previously name Consumer Complaint Committee

¹¹⁶CDC does a close cooperation with the ODR platform, providing consumers to submit their contractual dispute and conduct the ADR procedure online by using reasonably friendly online tool, that is specifically designed to help the consumer who has bought goods and services online and subsequently have a problem with online purchase, especially in cross-border disputes.

¹¹⁷98/257/EC Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. Reachable: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998H0257>

In 2001 the EC adopted another set of Recommendations, that time on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes¹¹⁸. In the document, EC finds it relevant to stress out that in order to ensure a high level of consumer protection and to promote consumer confidence, the Community should ensure that consumers have simple and effective access to justice and encourage and facilitate the settling consumer disputes at an early stage. The recommendation 2001/310/EC list four principles: impartiality, transparency, effectiveness, and fairness.

Aforementioned Commission Recommendations are prerequisites for ADR Directive, laying a foundation to the legislation¹¹⁹. The preamble of the Directive states, that despite the recommendations, the ADR systems are not yet sufficiently and consistently developed across the Union, either the ADR schemes are not correctly established, not running satisfactorily in all geographical areas or business sectors or the consumers and traders are not aware of the existing out-of-court redress mechanisms. As well, where the ADR procedures are available, their quality levels vary considerably in the MS and cross-border disputes are often not handled effectively by ADR entities.

2.2. Requirements of the ADR Directive for the ADR entities

The ADR Directive sets out several requirement ADR schemes established under the directive must comply with¹²⁰. To obtain and keep the certification, ADR bodies must continuously comply with these binding requirements set down with the directive, proving among other factors their impartiality, expertise, transparency, accessibility, as well of the fairness, timeliness and effectiveness of the procedure¹²¹ to prove they have the adequate expertise, to handle complaints, are independent and impartial, that their procedures are transparent, fair. Accessible and effective and comply with the principles of legality and liberty. Those agreed minimum standards are considered by the legislator the essential to achieve fair and effective ADR system for consumer and for traders. According to the procedural justice theory in several empirical studies has brought

¹¹⁸2001/310/EC Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. Reachable: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001H0310&from=EN>

¹¹⁹ Creutzfeldt. N (2016) Implementation of the Consumer ADR Directive. *Journal of European Consumer and Market Law*. vol 5, p 169

¹²⁰These are expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality.

¹²¹Biard. A. (2018) Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK. *Journal of Consumer Policy* vol 42. p 109.

out, individuals tend to care a lot about the fairness of the process leading to a decision and the perceived legitimacy of the third party taking the decision.¹²² Therefore, the notified entities of the ADR redress should take fairness of the procedure into a high consideration.

Some authors have argued that since the Directive did not erase the national differences of the ADR entities and the Directive demands just minimum-harmonization approach, the quality criterion will be differently implemented which would limit the effectiveness of the system.¹²³

2.1.1. Expertise, independence, and impartiality

Qualifications and expertise of a person conducting the proceedings

The precondition for the successful ADR procedure is the expertise of the person conducting the proceedings. Although that the level of professionalism of the lawyers is equivalent to his communication and negotiation skills, it is considered to be a decisive factor - especially in conciliation proceedings, but it can be considered equally important in any out-of-court dispute resolution procedure.

Unlike the recommendations, where the professionalism of the person conducting the proceeding as the quality criterion was not brought out, the ADR Directive requires, that the person in charge of ADR must be sufficiently professional by possessing the necessary knowledge and skills in the field of alternative or judicial resolution disputes, as well as a general understanding of law¹²⁴. That person however is not obligated to have a qualified degree in law¹²⁵.

With the criterion listed in the Directive, the range of persons who may be qualified to carry out the procedure established by the Directive is rather broad. However, this may not always ensure the successful out-of-court settlement, especially in those countries where out-of-court dispute resolution is voluntary for the parties.¹²⁶ On the other hand, those countries where under national

¹²²Tyler T (2011) Procedural justice and the rule of Law: fostering legitimacy in alternative dispute resolution *Journal of Dispute Resolution* and Howieson J (2002) Procedural justice in mediation: an empirical study and a practical example (2002) p 5 ADR Bulletin 1

¹²³Kirkham, R. (2016) Regulating ADR- Lessons from the UK, in: Cortes.P. (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*. Oxford University Press. p 294-324.

¹²⁴Directive 2013/11/EU (ADR Directive), Article 6. 1 (a)

¹²⁵Directive 2013/11/EU (ADR Directive), preamble p. 36

¹²⁶ Stürner. M. Fernando. G.I, Caponi. F (2015) *The Role of Consumer ADR in the Administration of Justice*. (7th ed). European Law Publishers GmbH, p 137.

law the extrajudicial proceedings are a mandatory stage before court proceedings, there are probably more attention brought to out-of-court proceedings and the level of qualification of those responsible, given that the aim is to achieve a maximum level of positive decisions and which would reduce the number of disputes in the court proceeding and in this way would reduce the burden of courts¹²⁷.

Qualifications and expertise of a chairman of the CDC

The level of expertise of the chairmen of the CDC was criticised with the survey conducted for the E&Y study¹²⁸.

According to the current legislation, the chairman of the committee must possess a master's degree in law, required skills of resolving disputes and be proficient in consumer law. The Ministry, who is coordinating the list of chairman appoints them for five years^{129 130}. There are currently 12 chairmen in the CDC, appointed in March 2021¹³¹, all of having higher degree in law, among other four attorneys, four law lecturers and lawyers. Even though, the chairmen are not officially categorised by economic sectors, the separate cases have been divided taking the best knowledge of them into a consideration. When taking into consideration that the ADR procedures may sometimes involve the resolution of complex legal issues, especially when the dispute implies a conflict of law, the expertise of the person making the decision is highly important. If the level of expertise is set low in MS level, then they might consider that the case would better be resolved before court.¹³²

There should not be any critics for a level of education of the chairmen and the requirement of expertise is formally met and even strengthened with in the national level. The expertise is strongly related with impartiality and fairness, therefore, when the traders have doubted whether the

¹²⁷ It is a fundamental right stated in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in Article 47 of the Charter of Fundamental Rights of the European Union, recognized repeatedly as such by the case law of the European Court of Justice. Commission's Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. Reachable: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>

¹²⁸ E&Y, page 5. The chairmen were criticised by traders of lacking sectoral knowledge, especially in the finance and tourism sector. The critics involved also the willingness to accepting the view of representatives of traders participating in the work on CDC.

¹²⁹ Consumer Protection Act §41 (2) and (5)

¹³⁰ The ADR Directive requests minimum period of three years, Article 6 3. (b).

¹³¹ Degree of the Minister of Economic Affairs and Infrastructures from 1.03.2021. reachable [:https://adr.rik.ee/mkm/dokument/8184435](https://adr.rik.ee/mkm/dokument/8184435)

¹³² Theocharidi. E (2016) Effectiveness of the ADR Directive: Standard of Average Consumer and Expectations. *European Review of Private Law*. vol 103. p 107

chairmen are able to formulate a fair decision, then it would be wise to see how the level of expertise has been regulated for Estonian judges and other out-of-court resolution entities. Estonian judges are required, as well as chairmen of CDC, to have a master's degree in law. In addition, there are requirements of a higher level of Estonian language, and high moral and professional character¹³³.

Requirements set for Estonian judges do not differ from the ones requested from chairmen. However, there are differences with the exclusion clauses¹³⁴. Those exclusionary requirements might strengthen the position of a chairman and build a trust of their knowledge and level of expertise, when these requirements would be transposed to the law. Similarly, to the Courts Act, the requirements applicable to the chairmen of the labour dispute committee are specified with the exclusions. For example, the person may not be convicted of a criminal offence, removed from the position of judge, notary or enforcement agent, and not being disbarred¹³⁵.

CDC is ensuring the professionalism of the chairmen with the regular seminars and trainings, but that is not a visible and therefore it does not raise the confidence of the expertise of the chairmen¹³⁶.

Based on the above the quality criteria 'expertise' could be further enhanced with the possible amendment of the §41 of the CPA could be following:

§41 (2) The chairman of the committee must be a person who has a Master's degree in the field of study of law or a corresponding qualification in accordance with subsection 28 (2) of the Republic of Estonia Education Act, who is proficient in consumer law and who has the required skills in the area of resolving disputes, has high moral qualities, has not been convicted of a criminal offence and has not been removed from the position of judge, notary, bailiff or expelled from the Estonian Bar Association.

¹³³ Courts Act RT I 2002, 64, 390 §47 (1), reachable: <https://www.riigiteataja.ee/en/eli/502022021001/consolide>

¹³⁴ Person who is convicted of a criminal offence, removed from the office of judge, notary or enforcement agent, expelled from the Estonian Bar Association, released from the public service for a disciplinary offence, person who is bankrupt, activity as an auditor has been terminated, deprived of the qualification of a patent office or as a sworn translator, § 47 (2) of the Courts Act.

¹³⁵ Labour Dispute Resolution Act, RT I, 04.07.2017, 3; § 7

¹³⁶ the legislator has encouraged ADR entities to provide trainings for persons in charge of ADR. When such training is provided, the competent national authority is requested to monitor and supervise those training plans developed Directive, article 6 (6)

Despite the professionalism of the person responsible of out-of-court proceeding is highly important, the two other quality criteria of independence and impartiality are equally important.

Independence and impartiality

The importance of understanding while analysing independence and impartiality, is to understand in whose initiative a particular entity has been created. When looking at this situation from the sides of the consumer, then perhaps the dispute settlement mechanism, that has been created by the private sector¹³⁷, business organisations or associations, the trust of the consumers for those schemes might be smaller than for state-created schemes. On the other hand, the state created schemes might not seem sufficiently independent for businesses and traders¹³⁸

Independence and impartiality are considered to be sufficiently addressed with the Directive¹³⁹. The general idea is that if the natural person who is in charge of ADR is appointed for a longer period of time and cannot be dismissed without any justified reason, the independence and impartiality are guaranteed. Such person should disclose any circumstances that might affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve¹⁴⁰. However, in a situation where only one natural person is involved in resolving a dispute, he or she is not necessarily obliged to withdraw in the event of a conflict of interest and is allowed to conduct the proceedings, provided, that the parties have been informed of such circumstances and they have not raised any objections¹⁴¹. The committee of the CDC has to consist at least three members: a chairman, a person representing the views of the trader¹⁴², and a representative of the interest of consumer¹⁴³.

¹³⁷ There are out-of-court resolution bodies that offer quick and efficient dispute settlement system as part of its own customer service department that are not a notified ADR entity as those cannot be considered impartial nor independent.

¹³⁸ Ernst and Young analysis. Possible Models for out-of-court settlement of consumer disputes in Estonia.

¹³⁹ As compared with the EC recommendations, the wording is not changed.

¹⁴⁰ This may be for example financial interest, in the outcome of the ADR procedure or any personal or business relationship with one or more of the parties for three years period Directive 2013/11/EU (ADR Directive), preamble p 34.

¹⁴¹ Directive 2013/11/EU (ADR Directive), Article 6 (2) C

¹⁴² either a representative of the business or professional association.

¹⁴³ Consumer Protection Act RT 31.12.2015.1. § 41 (11¹)

For ensuring impartiality an equal number of representatives of the trader and consumer must be appointed where the chairman receives additional requirement being appointed for several years to ensure the independence of their decisions ¹⁴⁴.

However in Estonia, the composition of the CDC comprising of one member, just chairman of the committee, may be approved if the circumstances of the dispute are clear on the basis of the information that was presented and the dispute can be solved in written proceeding¹⁴⁵. This amendment, that was introduced into the current legislation at the end of 2019¹⁴⁶ may rise a question of whether the expertise and impartiality requirement could be compromised.

The thesis finds however, that as most of the e-commerce cases that reach the one-member committee are based on the non-delivery of goods or services, where the circumstances are clear, the quality requirements are not compromised. While discussing whether the written procedure could affect the fairness in a sense that the parties cannot participate in a proceeding and not therefore able to present their additional evinces, then the one-member committee will be formulated only for so-called clear cases and only in the situation when the applicant agrees with it. In 2019, before that amendment, 84% of the proceeding took place in the written form¹⁴⁷, showing that the written proceeding does not affect the impartiality of the decision.

To sum the quality criteria “expertise, independence, and impartiality” are generally met by the current Estonian system, however amendments in the CPA Article 41, that would changing the chairman of the committee’s position to permanent, similarly as chairman of the Labour dispute committee¹⁴⁸, could further enhance this criteria.

2.2.2. Transparency and effectiveness

The criterion of transparency and effectiveness are strongly related to technical requirements. The criterion of transparency in the directive brings in disclosure of the information that the ADR entity

¹⁴⁴ ADR Directive considers three years sufficient for guaranteeing the independence, but Consumer Protection Act request the chairmen to have the position for five years. ADR Directive Article 6 (3) and CPA § 41 (5)

¹⁴⁵ Consumer Protection Act RT 31.12.2015.1. § 11²

¹⁴⁶ The Consumer Protection Act Amendment and Related Acts Amendment Act 103 SE, reachable: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/4495218b-e81c-462e-abc8-9afbb07eaa57>

¹⁴⁷ Annual report of the CDC 2019, p 8

¹⁴⁸ Labour Dispute Resolution Act, RT I 04.07.2017.3. § 7

should provide, either voluntarily or if so requested. Such information includes the contact details, the jurisdiction of that particular entity, natural persons in charge of the entity¹⁴⁹, the expertise, impartiality of the natural person in charge of the ADR, nature of the decision¹⁵⁰, types of the dispute the entity is competent in dealing with, the working languages of the entity, the costs to be borne by the parties while deciding to complete this procedure, .¹⁵¹. One of the worries of the European Parliament has been the lack of information about the mechanisms that solve the disputes, as the lack of information makes the dispute mechanism useless altogether¹⁵². The general information about the ADR entity are made available in different EU institutions websites¹⁵³.

Transparency

Uncertainty and a lack of relevant information on the ADR mechanism may harm the legal interests of the parties and create misunderstandings as to the details of a particular proceeding. The availability of relevant and sufficient information also helps consumers to make the decision whether or not to submit the application and to start a proceeding under the conditions laid down for that particular entity.

Both, recommendations as well the Directive bring out the need for disclosure of the data about the previous proceeding as one of the key elements of transparency requirement. This has been even more detailed with the directive, ensuring that ADR entities must make publicly available on their website their annual activity reports that include among other information the statistics of the number of the disputes received, the types of the complaints, any systematic or significant problems with the recommendations of how such problems can be avoided or resolved in the

¹⁴⁹ as well the method of their appointment and the length of their mandate

¹⁵⁰ enforceability of the ADR decision or recommendation

¹⁵¹ Directive 2013/11/EU (ADR Directive), Article 7 (1)

¹⁵² Villamarin Lopez, M.L. (2014) On Minimum Standards in Consumer ADR. A Role of Consumer ADR in the Administrative of Justice. Sellier European Law Publishers, p 139

¹⁵³ The transparency and accessibility will be greatly supported with the Single Digital Gateway that will facilitate interaction between citizens and businesses, on the one hand and competent authorities, on the other hand by providing access to online solution to up-to-date information to procedure and problem-solving services that could help the users' awareness of the different existing online services saving time and expenses. The Single Digital Gateway will in the near future provide additional information about the ADR and ODR procedures, allowing the consumer to choose the procedure that would be most effective for the problem and providing information of how to access the competent body.

Single Digital Gateway Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012Text with EEA relevance. (europa.eu)

future, the rate of the disputes the ADR entity has refused to deal with and the percentage share of the types of grounds for such refusal and the average time taken to resolve the dispute.¹⁵⁴

The ADR entity can however take the obligation of providing the annual report as a bothersome obligation by fulfilling the minimum requirement needed, but it can be also comprehensive document with the best practices where the decisions are categorised and from where not only consumer but also other interested parties may find the information needed. This general information may help to facilitate the public scrutiny of the entities to some extent¹⁵⁵, but it may also help the consumer in deciding whether or not to submit a complaint to that ADR entity. Unfortunately, it will not inform consumers as to the outcome of similar cases and therefore about the possibilities of whether the decision will be possible in favour of the consumer, are there other similar cases against the same trader or has the trader complied with the decision. Therefore it would have been more beneficiary of the consumer, if the ADR Directive would have required entities to establish an online database with the details of all the cases decided by these entities¹⁵⁶

From the point of view of ensuring the criterion of transparency, it has often been a problem that rather a large part of notified ADR entities do not have a clear and separate¹⁵⁷ website, leaving consumers with limited information about the proceeding the entity is offering as well with a lack of accessibility either because the entity manages the webpage just in the national language(s) or does not provide a modern opportunities of submitting complaints via online forms. Directive does not demand in a clear form the need of the separate webpage of the ADR entity, but the fulfilment of several aforementioned requirements do presuppose their existence.

Therefore the entity is entitled to disclose whether or not it is a member in networks of ADR entities facilitating cross-border dispute resolution, which types of dispute it is competent to deal with, which preliminary requirements (such as the requirements that the consumer must first contact the trader) and which procedural rules apply to the dispute resolution, whether it will decide or mediate a dispute on the basis of law, equity, or codes of conduct, or a combination thereof, what the legal effects of the procedure are and whether the decision is legally enforceable

¹⁵⁴ Directive 2013/11/EU (ADR Directive), Article 7 (2)

¹⁵⁵ Luzak, J.A. (2016) The New ADR Directive: Designed to Fail? A Short but Hole-Ridden Stairway to Consumer Justice. *European Review of Private Law*. p 90-92

¹⁵⁶ CDC has such database and Consumers (who are Estonian speakers) can conduct a search. However, unfortunately the current technical system is not user friendly.

¹⁵⁷ The ADRs hold their websites together with Consumer Protection Agencies or public authorities.

against the losing party, what costs are to be borne by the parties, what is the average length of the ADR procedure is and in which languages the complaint may be submitted to the ADR entity and in which languages the ADR procedure is conducted¹⁵⁸.

A lack of website may be an indicator of lack of resources or a lack of public relations strategy for a particular scheme, but at worst it can show the lack of transparency since information on the scheme is not easily and readily available to consumer or to those who advise or refer them¹⁵⁹.

Based on the analysis above, the criteria of transparency of CDC could be enhanced. It is difficult to find the annual reports¹⁶⁰ which should give the consumer useful knowledge of possible success or outcome of the proceeding. The CDC has its own separate web page, but the information is only presented in Estonian, which puts non-Estonian speakers into a weaker position.

Unlike the transparency criterion that was listed already with the recommendations, the accessibility requirement was only introduced with the directive, but the general idea has remained the same, but the requirement has named effectiveness.

Effectiveness

The principle of effectiveness is somewhat linked to the latter mentioned transparency requirement as a clear-manner provided information is a first step of finding access to the right entity given the consumer an opportunity to present their application to an entity in accordance with the right economic sector, either domestic or cross-border dispute solving entity, both offline or online medium. Easy access for consumers to the effective out-of-court dispute resolution body is also expected to motivate traders to step up their efforts to resolve disputes as quickly as possible.

Ensuring consumer accessibility to the dispute resolution entity must be available, among other mediums, through an electronic portal which offers relevant information about the competent entity and offer a possibility to submit a complaint. Similarly of filing the complaint electronically, there must be the possibility of exchanging information in the same form during the whole

¹⁵⁸ Loos. M.B.B. (2016) Enforcing Consumer Rights through ADR at the Detriment of Consumer Law. *European Review of Private Law*. 1-2016. p 65

¹⁵⁹ Villamarin Lopez, M.L. (2014) On Minimum Standards in Consumer ADR. A Role of Consumer ADR in the Administrative of Justice. Sellier European Law Publishers. p 139

¹⁶⁰ The Annual Reports can be found Under the subsection of „Decisions of the Committee“ and only while scrolling to the end of the web page, while the more logical location would be Under the general information section of CDC.

procedure. MSs are obligated by relying on ADR entities in another MS or region, transnational or pan-European dispute resolution entities, where traders from different MSs are covered by the same ADR entity, without prejudice to their responsibility to ensure full coverage and access to ADR entities¹⁶¹.

The working language of the CDC is Estonian¹⁶². That can be considered as a breach of the effectiveness criteria, as the electronic form that the consumers use to submit a complaint is only accessible through electronic identification of the person¹⁶³. In the situation, when the person has the ID-code, the form can be filled just in Estonian language. This might be in non-compliance with the effectiveness requirement. In the case of cross-border disputes, the consumers are assisted upon settlements of complaints against a trader operating in another member state by the European Consumer Centre¹⁶⁴. The problem with the effectiveness lies in the situations where non-Estonian speaker (without Estonian ID-code) wish to submit a complaint to CDC. The application can also be submitted via e-mail, but there is not exact reference and possibility clearly stated¹⁶⁵, so the consumer may not think of that option.

Accordingly, to enhance the criteria of effectiveness the following amendments to the procedure are suggested:

The CDC should consider accepting applications also in English¹⁶⁶ and if the language qualification of the members of the committee allow, the hearing of the dispute could be also conducted in English, when it's strongly necessary.

The criterion of effectiveness is closely linked with the ODR platform. As certified ADR entities must accept both domestic and cross-border disputes, it does not automatically imply that certified ADR entities are required to offer their service in all European languages. The ADR can choose

¹⁶¹ Directive 2013/11/EU (ADR Directive) Article, 5 (3)

¹⁶² Consumer Protection Act RT I, 31.12.2015, § 52 (1)

¹⁶³ meaning that the person has to have Estonian personal identification code to enter the electronic complaint form

¹⁶⁴ helping consumers to submit a complaint to a trader operating in another member state as well submitting a petition to another ADR entity RT I, 31.12.2015, 1 Consumer Protection Act § 27.

¹⁶⁵ Web page of Consumer Dispute Committee, submission of the application:

<https://www.komisjon.ee/ET/avalduse-esitamine>

¹⁶⁶ The applications reaching the CDC via European Consumer Centre are in English and that has not appeared as a problem.

the working languages, mostly being the language of the trader. As well with the CDC, the dispute is heard at the sitting where Estonian is used as the working language¹⁶⁷¹⁶⁸.

Transparency urges the MS to ensure, that the access is not limited for unjustified manner.

Under the relevant national legislation laid down by the MS, the consumer disputed may decline to accept a certain type of complaints with the obligation to reason the non-acceptance within three weeks after acceptance of the claim¹⁶⁹. The reason for refusing to accept a complaint may be, for example, that the consumer has not contacted the trader beforehand to discuss the complaint and seek options to resolve the matter, submitted, the complaint is frivolous or vexatious, the same dispute has been or is currently considered in court or in another ADR entity, or the claim does not fall within given value limits. Looking at the grounds for refusal listed, it remains unclear what motivates them the requirement that the entity must provide a decision to refuse to both parties to the dispute. If the reason for the refusal may be, for example, the fact that the consumer has not previously contacted with the trader, the latter does not have any knowledge of the fact that there was a claim, and contacting the trader with the decision would probably be unnecessary as it would just rise unnecessary questions for the trader and would place an additional burden for the ADR entity.

Requirements for which ADR procedure should be free of charge for consumers, or for a nominal fee for consumers, be made notified the parties of the dispute as soon as possible, be easily accessible (including electronic channels) and the proceeding should be carried out without any obligation for the parties to retain a lawyer or legal advisor.

The adoption of Directive did not significantly change the substance of the principle of effectiveness. In the terms of availability, only an additional requirement for out-of-court settlement of consumer disputes was added, that the settlement procedure must be available to the parties both online and online regardless of the location of the parties. The complaint is also

¹⁶⁷ RT I, 31.12.2015, 1 Consumer Protection Act § 52 (1).

¹⁶⁸ Despite the fact that the ODR platform provides users with an automated translation tool, the program is not supporting the translations, especially for “smaller languages”, like Estonian is “It is proposed that the automatic translation tool is brought in line with the state of the art. For some languages it works insufficiently. For others it does not seem to work at all, for example for the Hungarian and the Swedish language. 21 countries support this proposal. Slovenia emphasises that the translation tool works (better) between languages commonly used (EN, DE, FR, IT, ES) but much less so when it comes to more ‘exotic’ or less spoken EU languages”. ODR Contact points joint letter to European Commission, 29.11.2018

¹⁶⁹ Directive 2013/11/EU (ADR Directive), Article 5 (4)

admissible according to the Directive as soon as all the relevant documents are received, and the outcome of the procedure will be made available within a period of 90 calendar days from the date on which the ADR entity has received the complete file¹⁷⁰.

The CJEU has supported ADR mechanisms by not precluding national laws which make access to courts dependant on first having tried to use ADR mechanisms In *Alassini*¹⁷¹ case, where Italian telecommunications law required users first to use a mandatory ADR procedure before being allowed access to courts. The CJEU noted, that the principle of effectiveness might be impeded by this requirement but noted restrictions could be allowed if they pursued the general objective of promoting the out-of-court settlement of disputes and were not disproportionate. It also noted that the procedure was non-binding, involved no fee, suspended any time-bars and did not involve substantive delay as it was required to be completed within 30 days. However, it required the national court to investigate whether complaints could only be submitted by electronic means and whether interim measures were possible, as the absence of non-electronic procedure and interim measures might allow the mandatory procedure to be challenged.

Efficiency is strongly related with the time management, and the procedures should be handled within 90-day period set down in the Directive.

2.2.3. Fairness, Liberty and Legality

The principle of fairness was previously only included in the 2001 recommendation and the Directive does not change significantly that principle, but makes some adjustments and adds additional criteria¹⁷²

In accordance with the principle of fairness, the ADR entities must ensure that the parties have the possibility to express their points of view about the evidence submitted by the other party¹⁷³. The

¹⁷⁰ Directive 2013/11/EU (ADR Directive) Article 8

¹⁷¹ C-317/08 *Rosalba Alassini v Telecom Italia SpA (The Alassini)* (2010) ECR I-2213.

¹⁷² Unlike the Directive, for example, the recommendation refers to the principle of fairness the fact that the parties should have an out-of-court procedure

make every effort to ensure that the dispute settlement process is seeking a proper, fair and timely resolution of the dispute while the parties are encouraged to fully cooperate with the procedure, in particular by providing information necessary for a fair resolution. The Directive explicitly does not include this criterion, but it is presumably perceived by the legislator for its too declaratory nature. 2001/310/EC Recommendation, D 1. (c)

¹⁷³ Directive 2013/11/EU, Art 9

requirement of fairness has brought to the CPA in § 48 (3), as accordingly, the secretariat of the committee must send the copy of the petition to the trader, who is asked to provide a written response, and possible solution for the matter, which will be sent to the consumer who can either accept the proposed solution or provide contra arguments while refusing it¹⁷⁴. The fairness principle is important in the lights of the decision maker, who has opportunity to receive all the documents and arguments from both parties in the dispute, as in some cases, there have been situations when either trader or consumers “accidentally” forgets to send some documents that might drastically change the nature of the dispute¹⁷⁵.

If the recommendation stated that before accepting the proposed solution, or disagreement, the consumer has the right to seek independent advice¹⁷⁶, then the directive as if the content of this criterion was extended to provide for out-of-court settlement of consumer disputes the parties are informed that they are not obliged to use a lawyer for the out - of - court settlement of the dispute; but may request independent advice at any stage of the proceedings represented by a third party or receive assistance from a third party¹⁷⁷.

The principles of liberty and legality provide a safeguard to the consumer, that in case of not agreeing with the decision may go to court after the ADR procedure, as the decision is only binding on the parties, when they were informed of its binding nature in advance and they have specifically accepted it¹⁷⁸.

The quality requirements set down with the ADR Directive need more development and tailoring to design them for the specific scheme. The quality of any entity depends mostly of the effort (work put into it) and monetary availabilities. Therefore, it can be said that funding of the ADR schemes is closely connected to the overall quality of specific ADR. Without sufficient resources, schemes will not meet its expectations, and will not be able to provide high-quality services within the 90-days period. In summer 2018, EC published several calls for a grant aimed at assisting the development of ADR and ODR entities. One of the categories of those grants was aimed to increase the capacity at assisting ADR entities to develop their IT tools, training, promotion and

¹⁷⁴ Consumer Protection Act § 48 (3)

¹⁷⁵ As huge part of the contracts is concluded by means of communication, then for example missing an e-mail with the information of what was agreed with might change the substance of the complaint.

¹⁷⁶ Commission Recommendation 2001/310/EC D 2(c)

¹⁷⁷ Directive 2013/11/EU Article 9 1(b)

¹⁷⁸ Directive 2013/11/EU article 10. 2.

also their awareness-raising, networking and mutual learning activities¹⁷⁹. Among other activities that were aimed to improve the technology that would simplify the consumer's access to ADR entity, two seminars were held in order to improve the personnel of the ADR.¹⁸⁰

Any deviation from the quality criterion listed above, might lead to consumer's doubt to fairness of the ADR entity, if consumer is not well informed about the competence and the sphere of influence of the entity and to a lack of trust to the entity. Consumers might perceive ADR entities as less professional parties when compared to national court when lack of trust to their expertise and impartiality.

The quality requirements are highly important as they are not only in place to better protect consumers but also to induce consumer trust in ADR schemes¹⁸¹. The general idea that the EC had, with the ADR Directive- to establish the horizontal legislative framework for consumers is fulfilled, but at least in Estonia general ADR, the quality requirements should be re-analysed and evaluated and partly, specially the "expertise", "transparency" and "effectiveness", improved.

Based on the analysis above, the CDC meets all the quality requirement. As the requirements have rather general nature, to ensure the pan-European horizontal coverage with the out-of-court consumer redress systems. However, to further improve the quality a number of amendment to the existing procedure are proposed the lights of the expertise, independence and partiality criteria.

Namely, in the qualification of the chairmen of the CDC to ensure their professionalism and necessary skill and to gain trust among parties in dispute. The possible suggestion was made in the current regulation of Consumer Protection Act §41.

The second suggestions would be to bring the attention of the CDC to the fact that the transparency regarding the provided information could be done in better means so that it would not harm the legal interest of the parties in dispute and would prevent the ambiguity of interpreting the

¹⁷⁹EU Commission (2018) Capacity-building grants for ADR entities: Including IT-tools, training, promotion and awareness-raising, networking and mutual learning. Reachable: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/topic-details/cons-adr-2018>

¹⁸⁰ Seminar/training on conciliation and Seminar on the claims for the compensation on damages (importance of evidences, proof and of resolving legal disputes. Best practices on the webinar (due to Covid-19) with the Finnish Competition Authority was exchanged.

¹⁸¹ Fejos, A; Willett, C (2016) Consumer Access to Justice: The Role of the ADR Directive and the Member States. European Review of Private Law. 1-2016 p 43

information. Therefore, the thesis suggest to make annual reports more visible, perhaps also either in Russian or English language and provide the information about the proceedings, “black-listed” traders on the web page so, that it would be more easy to find.

The third suggestion would be towards the access of justice. It is not easy to submit a complaint to CDC when a person does not have Estonian identity card or the consumer’s knowledge of Estonian language is poor. The current situation might discriminate those who are not permanent inhabitants of Estonia but live here for certain period of time and need to access justice via CDC. Therefore, other medium of submitting a complaint should be made clear and the CDC could accept the applications also in one of the other common languages spoken in Estonia.

3. REVISION AND MODIFICATION OF CONSUMER DISPUTE COMMITTEE

Following the analysis of the ADR requirements (Chapter 1) and assessment and application of the quality criteria to the Estonian CDC (Chapter 2) this Chapter focuses on the evaluation of the proposal for amendments proposed in the E&Y study commissioned by the Ministry. Considering, the page limitations of the thesis, and the assessment of the quality criteria in Chapter 2, this Chapter focuses on the analysis and assessment of the solutions of four shortcomings identified by the E&Y study to improve efficiency of the CDC in solving consumers' disputes.¹⁸²

The CDC has been resolving consumer disputes for four years.¹⁸³ Therefore it is appropriate to analyse whether the current regulation is working effectively and would it be necessary to make amendments in the procedural regulations or legislation to achieve more efficient consumer dispute resolution.

The analysis is performed considering the quality requirements set down with the ADR Directive. The Directive does not impose restrictions on the entities and the MS remain their freedom to develop the out-of-court procedures respecting their legal traditions.

E&Y conducted the analysis¹⁸⁴ to find out best possible models for an out-of-court settlements in Estonia¹⁸⁵ to suggest ways to improve it in order to ensure reliable, sustainable and efficient consumer dispute out-of-court settlement system.

The E&Y study identified several shortcomings in the current system. The identified shortcomings include: (1) low consumer confidence and low level of redress compared with other EU countries; (2) CDC takes a significant resources from the state's budget; (3) low and uneven level of competency or sectoral knowledge of chairmen of CDC (especially in tourism and financial sector); (4) individual decision-making process where the chairmen do not consider the viewpoints of other members of the committee, (5) the work of the members of the CDC are not remunerated, and (6) high level terminated proceedings.

¹⁸² The proposals have made based on my own work experience as a lawyer in the as a secretariat of CDC in cross-border disputes and considering the experiences of my colleagues.

¹⁸³ The current Consumer Protection Act was adopted in 2016.

¹⁸⁴ Ernst & Young Analysis Possible models of out-of-court settlement of consumer disputes in Estonia. Reachable : https://www.mkm.ee/sites/default/files/tarbijavaidluste_kohtuvalise_lahendamise_voimalikud_mudelid_eestis.pdf

¹⁸⁵ The analysis was financed by the European Commission's Operational Programme 2014-2020.

Based on the identified shortcomings, the E&Y proposed two key solutions. First, in order to improve competences, a separate dispute body for financial sector¹⁸⁶, as well as subdivision for tourism¹⁸⁷, It- and electronics products¹⁸⁸ and e-commerce sector¹⁸⁹ ¹⁹⁰ should be established.

Second suggestion is to form a two-level committee.¹⁹¹ The first level should handle the conciliation¹⁹² and in case that fails the dispute resolution would be continued to the second level. The second level would conclude with the decision that would be enforceable in bailiff's office when the trader is not complying with decision voluntarily and does not take the dispute for further discussion to the country court.

The analysis below focuses on discussions and assessment of the solutions of four shortcomings identified by the E&Y study to improve efficiency of the CDC on solving consumers' disputes. The selection is informed by the quality criteria and specifically focus on the restructuring of the CDC in the way, that would be most beneficial for the consumers.

¹⁸⁶The idea was probably motivated by European Commission's guidelines European Commission's proposal for Directive of the European Parliament and of the Council COM 2018, 185 final. Accessible: [https://advokatuur.ee/uploads/files/\(2018\)%20185%20ET.pdf](https://advokatuur.ee/uploads/files/(2018)%20185%20ET.pdf)

¹⁸⁷ The subdivision would be responsible for both the package travel claims, the whole transport cases of general-public transport, passenger transport by air and by bus and taxi transportation.

¹⁸⁸ electronic products like smartphones, tablets, laptops, and other electronic items.

¹⁸⁹ E-commerce is in growing trend in Estonia, the increase of purchases conducted online is 30% per year. For example in the first quarter of 2021, e-commerce had 0,4% of growth. Statistics available: <https://www.eestipank.ee/press/maksete-kaive-suures-i-kvartalis-kaarditehingute-kaive-muugikohtades-vahenes-26042021>.

¹⁹⁰ Legislator's idea was not to obligate MS to create a specific ADR entity in reach retail sector. Recital 24 of the ADR Directive.

¹⁹¹ The suggestion combines Danish and Finnish model.

¹⁹² That would be done by the secretariat of the CDC and is the process of the current CDC.

3.1. Proposal of making decisions of CDC binding for traders and enforceable through enforcement proceeding

The decisions of the CDC are of the suggestive nature. The law does not state it explicitly¹⁹³, however CDC itself states that.¹⁹⁴ Despite of its non-binding nature, the traders' compliance with the CDC decisions are rather high¹⁹⁵, being comparable with other EU MS.¹⁹⁶

Nevertheless, the situations where the trader intentionally does not comply with the CDC decision might significantly decrease the trust into effectiveness of the CDC and satisfaction to the access to justice¹⁹⁷. With non-binding decisions, the individual consumers will often not obtain redress, nor will the traders' behaviour be disciplined and malicious behaviour may be repetitive. The confidence of the consumer regarding the current system is rather high¹⁹⁸, the same result has been noted by the Ministry¹⁹⁹ who concluded that the large number of applications reaching CDC show consumers continued confidence to the proceeding²⁰⁰.

When looking how the EU legislator has interpreted the possibility of the binding decisions, then it can be seen that the Directive does not insist MS to provide an entities with the binding decision dispute resolution, leaving the discretion for MS.²⁰¹ However it is strongly arguable whether the outcome should be binding for traders,²⁰² and trader's should only be able to challenge the outcome

¹⁹³The Consumer Protection Act § 60 states that the decision of the committee shall be complied with the trader within 30 days and if the parties do not consent to the decision, they may refer the same dispute to the county court.

¹⁹⁴ Participation in the CDC procedure is voluntary for the traders, the decision is recommended for the traders and voluntary to comply with. Annual Report 2019 of CDC, p. 3.

¹⁹⁵ In 2019, 123 traders did not comply with the decision from the total of 171 decisions and after listed to the „black list“ additional 78 traders complied with the decision. After 6 months, out of 343 decisions made in a favour of the Consumer, 93 decisions were not complied by the traders. Annual report of CDC 2019, p 9 https://komisjon.ee/sites/default/files/komisjoni_2019_tegevuse_aruanne.pdf

¹⁹⁶ E & Y (2019) analysis Finland, UK and Denmark, pp 35-69.

¹⁹⁷ When the decision has merely recommendation value the Consumer may not understand the purpose of the out-of-court settlement or the or the purpose of such proceeding may remain unclear.

¹⁹⁸Only 32% of consumers rating the system as bad (11%) or rather bad (23%) E&Y (2019). Possible models of out-of-court settlement of consumer disputes in Estonia - final report, 17.12.2019, p. 80.

¹⁹⁹ The number of complaints reaching to CDC has been increased over the years and comparing years 2016 to 2107, 460 more applications were submitted. Report on Functioning and development of Consumer Dispute Settlement Bodies in Estonia 2018. P 5, reachable: https://www.mkm.ee/sites/default/files/tarbijavaidluste_kohtuvaline_lahendamine_aruanne_2018.pdf

²⁰⁰ There is a strong link between the assessment of consumers and traders and the outcome of the proceedings and that should be considered when interpreting the results. Both consumers and traders evaluate the process more positively if it has brought the more favourable decision to them.

²⁰¹ Directive 2013/11/EU, Art. 10 (2)

²⁰² In consumer disputes, ADR schemes are most effective when outcomes are binding on the business. See Schwarcz D. (2009) Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict, 83. *Tulane Law Review*. 2009, p 739 and Fejös. A. (2013) The Impact of EU Norms and Policies on Consumer Protection Enforcement in Serbia vol 36 (3). *Journal of Consumer Policy* p 247. See also

on the very limited grounds of a judicial review type action²⁰³. If the outcome is binding for the traders, there would not be a situation where the trader can cause harm for the consumer, who is considered to be a weaker party in the contract and cannot routinely refuse to adhere the decisions that go against them. Hence, it can be expected that the traders, in case of binding decisions, would avoid the out-of-court proceeding altogether by finding a solution between the parties themselves, providing consumers' fast and cost-effective way to enforce their private law rights. Based on the empirical research, in the situation of the binding ADR decisions, the EU median compliance rate is 100%²⁰⁴. Moreover, binding outcomes might also interest the consumer in cross-border disputes, when consumers might invest substantial resources, just to find out that no solution can be achieved.²⁰⁵

One of the supporting argument for the binding decisions is that when the MS has decided to use the scheme with non-binding decisions then improving access to justice depends on the use of incentives to influence the trader to comply with the decision²⁰⁶. Even CJEU does not consider binding decisions conflicting with the fundamental rights to justice protection.²⁰⁷

The proposed amendment would increase the rate of voluntary compliance with the decision.²⁰⁸ However, this amendment would directly affect the bailiffs and indirectly consumer and traders. Approximately 100 decisions in a year are not complied with. Making an assumption, that no all of the consumers would initiate their rights in the enforcement procedure, the number of enforceable decisions would be maximum 100 but probably less than that. There are currently 43 bailiffs in Estonia²⁰⁹, therefore handling 100 enforcement claims more, than usual would not significantly increase their workflow.

Hodges. C, Benöhr, I., Creutzenfeld-Banda. N (2012) *Consumer ADR in Europe*. (1st ed.) Hart Publishing, Oxford, p 252.

²⁰³ Willett. C; Fejös, A (2016) *Consumer Access to Justice: The Role of the ADR Directive and the Member States*. *European Review of Private Law*, p 46

²⁰⁴ Civic Consulting (2009). *Study on the use of Alternative Dispute Resolution in the European Union*, http://www.civic-consulting.de/reports/adr_study.pdf, Civic Report, p 55. See also: Loos.M *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe*, Centre for the Study of European Contract Law Working Paper Series 1 (2010), p 4. Accessible: https://www.researchgate.net/publication/228218830_Individual_Private_Enforcement_of_Consumer_Rights_in_Civil_Courts_in_Europe,

²⁰⁵ With binding decisions, the decision can be forced in the bailiff's office, and even when it might be slightly more difficult, the Consumer would see the actual outcome.

²⁰⁶ For example the „naming and shaming „lists of traders, that do not comply with the decision (Estonia, Latvia) .

²⁰⁷ Fejös, A, Willett. C (2016) *Consumer Access to Justice: The Role of the ADR Directive and the Member States*. *European Review of Private Law* p 37

²⁰⁸ In 2019, 250 decisions were complied and 93 were not complied by the traders. Annual Report 2019 of the CDC, p 9, reachable: https://komisjon.ee/sites/default/files/komisjoni_2019_tegevuse_aruanne.pdf

²⁰⁹ The Chamber of Bailiffs and Trustees. Reachable: <https://kpkoda.ee/kohtutaiturid/kohtutaiturid-kontakt/>

When arguing whether the CDC decisions could be binding then one of the supportive arguments might be the disciplinary effect. It could decrease non-compliance of the decisions as the traders who do not comply with the decision might face the enforcement proceeding with its additional costs²¹⁰. This system has successfully put in force in Lithuania and it has shown good results for consumers who have enforced the Lithuanian ADR decisions in the Lithuanian bailiff's office.²¹¹ Good parallels can be found also in Estonia, where the out-of-court dispute resolution for labour disputes and rental committee decisions are binding and enforceable for the parties. By making the CDC decisions enforceable, it would make the approach of the out-of-court disputes similar no matter the area of the dispute.

Unfortunately, there are some obstacles with this regulatory amendment. For instance, the change might reduce the enforcement of the consumer's claim are the bailiff's fees. According to the law, the amount of the fee is based on the amount of the enforceable claim. The minimum enforcement agent's principal fee is 25 euros.²¹² Considering that the average claim of the consumer is about 100 euros, some might consider that the enforcement procedure with additional fee, at the same time not being confident, that it would be reimbursed, might be additional burden for consumer²¹³. At the same the option of enforcement brings additional confidence for the consumer that the access to justice can be set in force.

Looking the concept of enforceable decisions from the other side, then the consumer who overcomes with the doubts of starting an out-of-court proceeding, there should be also a trust in the possible enforcement possibilities. Pursuant to the Article 9 (3) of the ADR Directive, the decisions are only binding when the national law provides for such possibility. The doubt might rise on how could the decisions of the ADR entities recognised in case of cross-border disputes.

²¹⁰for remuneration the fees of the enforcement procedure for the consumer.

²¹¹ The decision made by the authority for settlement of Consumer dispute shall become effective and binding, unless within 30 days after passing of decision on the merits of the dispute any of the parties files an action before the court Article 28 of the Lithuanian Consumer Protection Act. Reachable : <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=18117lifma&documentId=e86e8310231911e6acbed8d454428fb7&category=TAD> (last accessed 11.05.2021)

²¹² Enforcement Agents Act § 35, RT I 2009, 68, 463 reachable: <https://www.riigiteataja.ee/en/eli/501042021001/consolide> (last accessed 11.05.2021)

²¹³ The enforceable claim arises from the enforcement document, therefore national legislation must be changed, Code of Enforcement Procedure RT 2005.27.108, § 2 (1) regards the competent body and § 12 regarding the document must be entered into force.

Consumer might therefore wonder whether it is worth it to bring the dispute to an ADR entity, when it might not be possible to have any practical benefit²¹⁴.

The decisions that can be enforced through a bailiffs proceeding are the ones that the traders do not comply with voluntarily. The compliance with the decisions of CDC is rather high. In 2019 just 123 traders did not comply with the decision of the CDC²¹⁵. Perhaps the “black list” as a punishment system is successful. That can be illustrated with the fact that only 78 of the traders did comply with the decision after 6 months of being in the black list, and there were just 93 decisions in favour of the consumer that was unfortunately unfulfilled after 6 months as some of them were compiled in the future²¹⁶.

The enforcement proceeding can be initiated with the court decision or decision of the administrative body that bring additional burden for the consumer²¹⁷. The proposed amendment limit traders’ lawful rights. The traders should remain the possibility to turn to court when the trader does not agree with CDC decision²¹⁸.

In general the enforcement of the decisions of the CDC could follow similar procedure as the Labour Dispute Committee, where the parties may turn within 30 days to court for review of the same dispute where the decision of the committee would not be contested, but the claim would be reviewed from the beginning²¹⁹. If the parties do not turn to court the claim of the CDC enters into force and the decision is essentially equivalent to a court decision and is binding on the parties²²⁰ and could be published by the CDC²²¹. In the situation of the decision is not voluntarily complied with it could be enforced with the help of the bailiff.²²²

²¹⁴ Luzak, J (2016) ADR Directive: Designed to Fail: A Hole-Ridden Stairway to Consumer Justice. *European Review of Private Law*, p 89

²¹⁵ 171 decisions were not complied by those traders, which shows that there were several disputes against the same trader in the proceeding.

²¹⁶ That shows that many traders comply with the decision after they have placed to the black list.

²¹⁷ Those decisions can no longer appealed in court. The court decision is forcible after 30 days, when the parties have not appealed. Only then the claim maybe processed through the bailiff’s enforcement system. The bailiff gives the debtor additional time, at least 30 days (§ 25 (1) of the Code of Enforcement Procedure) for voluntary compliance of the decision. The claimant must pay a fee for initiating the proceeding (§ 34 of the Bailiffs Act)

²¹⁸ The trader, as considered to be a stronger party in consumer contracts, has more resources for starting a court proceeding, but the trader must remain the option for solving the dispute for example when the question is important to the trader or the decision would solve fundamental question.

²¹⁹ In that way the Consumer would not be forced out of the legal system’s protection.

²²⁰ Technically the document requires a sign of entry into force that could be given by the CDC (either a chairmen or secretariat)

²²¹ In accordance with the Code of Civil Procedure § 462, 2-4. <https://www.riigiteataja.ee/en/eli/513042021008/consolide> (last accessed 11.05.2021)

²²² The procedure is not free of charge, so the interested party has to pay the bailiffs fee.

Based on the above, to enhance the enforceability and compliance with the decisions of the CDC, the following amendments are proposed to the CPA

§ Entry into force of the decision

(1) A decision of the committee enters into force if:

- 1) neither the consumer nor the trader submitted a corresponding action to the court within the term for filing with the court;
- 2) the court did not accept the application.

(2) A decision of the committee which has entered into force is binding on the parties.

§ Disclosure of an effective decision

(1) The decision that has entered into force will be published on the website of the committee administered by the Consumer Protection and Technical Regulatory Authority under the conditions and pursuant to the procedure provided for in § 462 (2-4) of the Code of Civil Procedure.

(2) Disclosure of the decision does not affect its entry into force

§ Execution of an effective decision

(1) A decision of a committee shall be executed after its entry into force.

(2) Enforcement of a judgment shall take place pursuant to the procedure established by the Code of Enforcement Procedure.

The main aim of those amendments would be to make the decision of the CDC binding and enhance the enforcement. This would arguably reduce number of non-compliant decision and further enhance consumer trust.

3.2. Proposal for imposing non-refundable state fee for consumers for starting a CDC's proceeding

A contractual dispute is generally settled on a civil court basis, where the losing party pays or reimburses the costs of the winning party. ADR Directive imposes an obligation to allow out-of-court dispute resolution for the consumer free of charge or for a nominal fee²²³. The legislator's

²²³ ADR Directive, recital 41. To be exact, the specific wording of the recital states that the ADR procedure should be preferably free of charge for the consumer and in the event that costs are applied, the ADR procedure should be

goal was that access should be free for consumers, but it's appropriate to establish fee for more complex cases as a barrier to deter malicious or unfounded claims²²⁴. Most of the ADRs in the EU are free of charge for the consumer. There are some exceptions in that rule. For example, the fee for consumers has been established in most of the Croatian ADR entities.²²⁵ Only ADR body for insurance, the Courts of Honour²²⁶ and the Mediation Centra at the Croatian Employers' Association are free of charge for consumers. However, the other ADR bodies charge the consumers and traders whereas the fee is in correlation with the value of the dispute.

Analysed from the economical side, resolving single dispute in the CDC will cost for the state an average of 145 euros²²⁷, including the remuneration and management costs of both the chairman and the CDC's secretariat. Most disputes are settled by agreement of the parties, and therefore the costs of resolving single case may be lower than with more complex cases. In the case of difficult disputes, which are resolved by a three-member committee, the procedural costs may exceed 300 euros. Calculatedly, almost 300 000 euros of the CDTRA's budget is spent annually on resolving disputes between consumers and traders²²⁸. The state fee from the consumer disputes would contribute to the state budget, but with its nominal nature it would not have effect in reimbursing the full costs of CDC. However, the benefits of the fee can be calculated in terms of quality of the complaint. Nominal fee would decrease the number of disputes, that do not have a legal basis or are incompetent regarding the content.

The survey²²⁹ concluded that the monetary fee for consumers is preferred by both parties of the dispute.

accessible, attractive and inexpensive for the consumer and cost should not exceed the nominal fee. According to the legislator's general idea, the preferred idea was that the procedure is free of charge for the consumer.

²²⁴ Hodges. C. A Model for consumer ADR in Europe. References to Directive 2013/11/EU. *Centre for Socio-Legal studies*, 13. May 2013, p 2 reachable: ECC-Net wiki platform.

²²⁵ General ADR entity Hrvatska Obrtnicka Komora (Croatian Chambers of Trades and Crafts). Reachable : <https://www.hok.hr/usluge-rjesavanja-sporova>

²²⁶ The Court of Honour, one of the ADR entities in Croatia: reachable: <https://www.hgk.hr/>

²²⁷ Analysis of the Ministry of Economic Affairs and Communication, Intention to develop a draft law amending the Consumer Protection Act, 2020, p 4

²²⁸ At the same time, the activities of private conciliation bodies are financed by market participants themselves. In order to ensure equal treatment of economic operators in different sectors, it would be more appropriate for the costs of resolving a dispute to be borne in part by traders who have infringed consumer rights. The state, for its part, offers easy, fast and high-quality out-of-court settlement of disputes.

²²⁹ E & Y survey's questionnaire established that 54% of the consumers would pay the fee for submitting the application, but it depends of the amount whereas 28% of the consumers agree with the fee if it would be returned when the consumer's claim is justified and resolved in favour of the consumer. When the opinion of the traders was asked, then 21% of the traders would agree to pay the fee, when the consumer's claim is justified and 14% of the traders in the situation when the chairman and members of the entity solving the claim would have and sector-specific knowledge and knowhow and surprisingly only 10% of the traders would agree to monetary input when the dispute is solved by the professional association or trade union.

The E&Y has compared the Estonian system with the ADR systems of Finland, Denmark, Austria and United Kingdom. Out of those countries only Denmark has introduced the fee for consumer²³⁰. In the United Kingdom, which is not the relevant subject of analysis any longer since the country is not a MS of the Union, there is no fixed fee for the consumer.²³¹

The state fee for submitting a complaint to CDC is several reasons reasonable idea, but the sum has to be carefully calculated. At the moment, the petition will be refused when the claim is less than 30 euros²³², taking this into consideration, the entrance fee for example 10-euro might be too pricy. Therefore, the legislator should strongly consider whether it would be reasonable to abolish the 30 euros base fee.²³³

The E & Y has considered Denmark as a good example in a question of determining the state fee in CDC.²³⁴. The introduction of the state fee will affect traders to deal with the consumers complaints more seriously and motivate to find an amicable solution before the even case reaches the CDC. That would reduce the number of disputes all together and lower the workload of the secretariat²³⁵. The positive effect would also be that the costs of resolving the disputes would be lower in the situation when parties reach amicable solution without additional help from the CDC. The indirect positive effect could be the credibility and trust to traders and business environment overall, as the traders, who are reluctant to participate in the CDC proceeding at the moment would be more motivated to do that in the future.

²³⁰ 100-500 DKK

²³¹ There are 145 ADR entities in the United Kingdom. According to the knowledge, Consumer can submit a claim only to the entity the trader has referred to. The trader however is not obligated to choose the entity. For 8 years work in the European Consumer Centre of Estonia, I have not been able to transfer Estonian consumer's complaint to any of the UK's ADR entity.

²³² Consumer Protection Act § 47(3)4. The Committee may refuse to accept the petition or terminate the proceeding, when the value of the disputed goods or services or the amount of the claim is less than 30 euros, and the dispute is not important from the point of view of forming or changing of practice.

²³³ Having 10- euro entrance fee and 30-euro base fee will compromise the access to justice, as consumers with smaller claims are not able to seek help. In 2019, 41% of the consumer claims were in the monetary range of 101-500 euros and 35% of the claims were over 500 euros E&Y (2019). Possible models of out-of-court settlement of consumer disputes in Estonia - final report, 17.12.2019, p. 108

²³⁴ It has to be considered, that in Denmark there are several ADR entities, namely 25 notified entities most of them are sectoral based, private ADR entities. The analysis has looked closely Danish Competition and Consumer Authority- Danish Complaint Board. The board has settled the non-refundable entrance fee for the consumers DKK 100-500 (13-76 euros) depending on the stage of the procedure, but DKK 13, being the non-refundable sum. Notified ADR entities in Denmark according to the ODR platform: <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>. (last accessed 11.05.2021)

²³⁵ The average number of cases for one secretariat official in March 2021 was 80 open cases.

The parallel could be drawn with the Estonian CDC, where the fee for approximately 13 euros will be paid for a dispute to be proceeded in the CDC secretariat, in a pre-litigation procedure. In a situation where the dispute will not find amicable solution for the parties and the consumer would like to continue with the proceeding in the Committee, then additional charges would be stipulated, being approximately 54 euros. The additional fee could be refunded when the decision will be in favour of the consumer or the proceeding is terminated without the result.

The most questionable about determination of the state fee is that it would significantly reduce the activity of consumers turning to CDC with their dispute. When the general purpose of the alternative dispute resolution is ensuring simple, efficient, fast and low-cost dispute resolution through the achievement of a high level of consumer protection, then by making the system not that easily accessible²³⁶ and leaving the so-called cheaper complaint owners to recon whether forwarding the application to the CDC is effective or profitable may leave consumer without their legal right to seek out-of-court redress.

Despite those concerns, the establishing a state fee would reduce the administrative burden of the CDC in relations of the malicious and unfounded applications, namely the CDC secretariat would save time of analysing the content of appendices that consumer have attached to the claim to understand whether the complaint falls within the scope of consumer law and whether the complaint is well-founded. Consumers would have an obligation to file a clear and well-grounded claim, with supporting documentation as they are aware, that service is chargeable.

Surprisingly, the survey of the E&Y found out that more that 50 percent of consumers agreed with state fee ²³⁷ when it is in symbolic value.

As the ADR Directive stipulates that the proceeding is preferably free but when the fee for consumer is established, then it has to have nominal value. The survey suggests taking the Danish ADR system as an example, but that can be considered only as an example of the system, and the actual sum of the fee should be considered in the lights of the economic situation. The salaries in

²³⁶ For example, for older generation of consumers.

²³⁷ 54% of the consumers agree to pay the entrance fee, depending of the amount and 28% of the consumers were willing to pay the fee, in case it would be returned when the dispute has been solved in favour of the consumer E&Y (2019). Possible models of out-of-court settlement of consumer disputes in Estonia - final report, 17.12.2019, p. 107

Estonia are not comparable with the Danish income.²³⁸ While analysing the possibilities of settling the state fee for consumers, then the average salary should be strongly considered.

Based on the analysis above and following the suggestion proposed by E&Y to reduce an administrative burden of the CDC by reducing a number of malicious and unfounded applications, the following amendments to the CPA are proposed:

§ State fee for reviewing an application submitted to the Consumer Disputes Committee

§ (1) The consumer shall pay a state fee for the review of the application submitted to the committee in accordance with the State Fees Act (5 euros).

§ (2) Upon submission of the application, the consumer shall pay the state fee at the rate provided for in the State Fees Act²³⁹ and attach information concerning the payment of the state fee to the application.

The E&Y study did not analyse in detail the reasons why a large number of claims are left without the proceedings, but it can be assumed that some of the submitted applications are malicious or unfounded and that dealing with them (e.g. deciding to refuse proceedings, pre-litigation and then terminating proceedings) strains CDC's available resources. It can be expected that the introduction of a symbolic state fee for reviewing a consumer's application will reduce unfounded and malicious claims.

3.3. Proposal for amendment in Consumer Protection Act for CDC to start proceeding disputes place against trader registered in another country of EU.

The cross-border dimension of a dispute adds an extra layer of complication²⁴⁰ to consumer dispute resolution in CDC.²⁴¹ In cross-border disputes, the consumers are assisted by European Consumer

²³⁸ The average gross salary in Denmark, in 2020 was between 39000-80000 euros a year, while in Estonia it was 14000-40000 euros in a year Annual net earning, 2020. Eurostat statistics https://ec.europa.eu/eurostat/statistics-explained/images/4/48/Annual_net_earnings%2C_2020_%28EUR%29.png

²³⁹ With this, the State Fees Act need be changed.

²⁴⁰ There might be for example need to negotiate with traders at the distance, operate in foreign languages and be subject to foreign laws and the jurisdiction of the trader's courts.

²⁴¹ A 1995 study had found that 10% of cross-border consumers had been dissatisfied and of these, a third had successfully complained See also: von Freyhold H, V Gessner, EL Vial and H Wagner (eds), Cost of Judicial Barriers

Centre upon the settlement of complaints against the trader operation in another MS ²⁴². The amount of cross-border complains is rather high²⁴³ and it has increased with years, since the EU promotes e-commerce²⁴⁴. But only 30-40 complaints reach ADR entities for several reasons²⁴⁵.

The proceeding of a cross-border complaint in the CDC does not differ significantly from handling of the domestic complaint²⁴⁶. The problems arise when the dispute should be forwarded to CDC. Not all the complaints can enter the proceeding of CDC, as according to the current legislation, the CDC can accept both domestic and cross-border consumer disputes, where one of the parties is a trader whose place of establishment is in the Republic of Estonia. Therefore, the complaint may have either national or cross-border dimension, but the trader has to be established²⁴⁷ in Estonia.²⁴⁸.

for Consumers in the Single Market (Zentrum für Europäische Rechtspolitik an der Universität Bremen, 1995) at pp.392–393, Reachable: <http://aei.pitt.edu/37274/1/A3244.pdf> (accessed 1.03.2021).

²⁴²The procedure of the European Consumer Centre is based the same grounds as the procedure of national complaints, and the procedure and time limits of the procedure are regulated by the Consumer Protection Act. The European Consumer Centre of Estonia performs the functions of the secretariat in cross-border disputes pursuant to the provisions of § 44 of the Consumer Protection Act. The duty of the European Consumer Centre of Estonia under that section is to assist the consumer in transmitting a complaint with a trader established in another Member State to a competent ADR entity in the Member State in which the trader is established. Consumer claims arising from contractual disputes with a trader in another MS are handled in the European Consumer Centre of Estonia. As a part of the network of European Consumer Centres, applications from consumers living in the other MS who have purchased goods or services from a trader registered in Estonia are received via online complaint system- ECC-Net Case-Handling IT-tool. Consumer Protection Act §27 and ADR Directive, Article 14 - ADR Directive requires the Member States to ensure that, with regards to disputes arising from cross-border sales or service contracts, consumers can obtain assistance to access the ADR entity operation in another Member State which is competent to deal with their cross-border disputes.

²⁴³ In 2020, there were 485 cross-border Consumer disputes and 984 written information requests. The 2021, first four months have had 237 written information requests and 137 complaints. Information available CPTRA database: www.jvis.ttja.ee

²⁴⁴Gomez-Herrera, Martens, B; Turlea G (2014) The drivers and impediments for cross-border e-commerce in the EU. Information Economics and Policy vol 28 (2014) pp 83-96

²⁴⁵ Most of the complaints reach amicable solution before the need of ADR proceeding, in some cases the Consumer waive their rights for ADR procedure. Complaints under 30-euro value are proceeding only in the conciliation procedure. The enforcement through the national agencies have been criticised for its limited power. See Cortes. P. (2011) Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers. *International Journal of Law and Information Technology*. vol 19. p 5

²⁴⁶ While receiving an application from the consumer, the European Consumer Centre performs the functions on the secretariat of the CDC according to §44 of the Consumer Protection Act as well fulfils the obligations according to §48 (contacting the trader/consumer, conciliation of the parties if that is possible and forward the complaint to the CDC).

²⁴⁷The place of establishment is either a place of the business or the registered seat, the location of the management board or the principal place of business thereof, including the registered office, where the representation or other undertaking.

²⁴⁸ Consumer Protection Act § 31

Unfortunately, it is relatively easy to register a private limited company in Estonia.²⁴⁹ This option is widely used by foreigners through the e-residency and digital entrepreneurship options. Therefore, there are many private limited companies registered in Estonia where the member of the board is a foreigner and even the activity of the company is directed to another MS.²⁵⁰ However, the CDC is competent of solving the applications when a consumer has faced problems with such trader, and the provisions of the country where the consumer has habitual residence are applicable.²⁵¹

Another comparable situation is when the consumer does not realise that the dispute cannot be proceeded in the CDC, before such dispute arises. Illustrating this example, with a dispute where the Estonian consumer purchase products from a local store located in Tallinn, Estonia. The items appeared to be defective and as the parties did not reach amicable agreement, and consumer forwarded the dispute to CDC²⁵². CDC fails to proceed this complaint because the traders is registered in Latvia, even though Estonian law applies to the contract²⁵³, and the trader has a premise where he carries out economic activity. The case was forwarded to Latvian ADR entity who had to make the decision based on Latvian law²⁵⁴. However, the consumer law is harmonized within the EU²⁵⁵ the situation may strongly influence the consumer's access to justice. The legislator should remove such restrictions, so that the access to justice via CDC would be granted for those consumers, who have entered to contract with the foreign trader, where Estonian national law applies to the contract.²⁵⁶

²⁴⁹Due to an e-residency system, their relevant person (member of the boards or a founder) does not have to visit Estonia in person but can perform the activities via internet having a e-residency digital identity card. Information of e-residency in Estonia <https://e-estonia.com/about-us/> (last accessed 11.05.2021)

²⁵⁰ The statement is based on her work experience, where the European Consumer Centre of Finland and Sweden has forwarded several consumer complaints to Estonia centre for further ADR proceeding in the CDC.(eg 19 complaints against Regimen OÜ were registered in 2016).Consumer Protection Act § 31. (2) explains the meaning of the place of establishment, which is the place of the business or the location of the management board or the principal place of the business.

²⁵¹ Rome I regulation, Article 6. See more: Ferrari. F; Leible.S (2009) Rome I Regulation: The Law Applicable to Contractual Obligations in Europe. European Law Publishers GmbH, p 129-170.

²⁵² application no.8-1/17-00226, accessible from the information register of Consumer Protection and Technical Regulatory Authority.

²⁵³ § 14 (2) of the Private International Law Act provides that if a legal person is actually managed in Estonia or the main activity takes place in Estonia, Estonian law applies to that legal person. Private International Law Act: RT I, 10.03.2016, 18. As the trader as not registered in Estonia, but the store was located in Estonia, then the main activity of the trader takes place in Estonia, Estonian Law of Obligations Act is applicable.

²⁵⁴ Latvian Consumer dispute Committee "Patērētāju strīdu risināšanas komisija" states on its website, that the Consumer Rights Protection Law of Latvia is applied. General ADR in Latvia : <https://www.ptac.gov.lv/lv/pateretaju-stridu-risinasanas-komisija> (last accessed 11.05.2021)

²⁵⁵ Nessel. S (2019) Consumer Policy in 28 EU Member States: An Empirical Assessment in Four Dimensions. *Journal of Consumer Policy*, vol 42 pp 455-482.

²⁵⁶ However, during the Covid-19 worldwide pandemic the Latvian general ADR made decisions based on Estonian legislation Decision 20-1/20-09489, reachable from CPTRA's database: <https://jvis.ttja.ee/modules/dokumendi->

However, in the cross-border cases, *vice versa* situation is also possible. For example, when Estonian trader is acting in another MS²⁵⁷. When the trader has a premise in Finland the contract is covered with Finnish national law. Such disputes can reach CDC. However, the CDC would examine the dispute under Estonian contract law, which may be a problem if there is a contraction of jurisdiction.²⁵⁸, as consumer cannot be deprived of the protection afforded to him by the provisions of the law of the MS in which the consumer is habitually resident. The situation may be that the ADR entity should not only be able to apply the law of the country where it is established, but also that of the country where the consumer resides. It would be unlikely that the chairman of CDC possesses such knowledge. Therefore, in cross-border cases the consumers may lose the protection of the mandatory law of their place of residence, despite the European legislator intend to protect them with it.²⁵⁹

Formally, the issue of applicable law has been resolved as the national legislation²⁶⁰, that states that in the event of a question of applicable law, the applicable law is determined in accordance with Article 6 (1) and (2) of Regulation No 593/2008 of the European Parliament and of the Council, having regard to the provisions of contract law of the consumer's MS of residence, and the deviating agreement is void.²⁶¹.

[haldus/thing/view/73490](#). The Latvian trader who sell tickets in Estonia for a concert taking place in Estonia failed to fulfil its obligations due to a Covid-19 pandemic. Despite that Latvia made amendments in the national legislation, so that the traders who have postponed the concert do not have to reimburse the payments of tickets to the consumers and it can be only demanded, when the consumer can prove of being ill on the new scheduled date, the dispute was solve in favour of consumer.

²⁵⁷ Complaint number 20-1/20-16153 is concerned with the private limited company registered in Estonia, which is selling furniture in Finland. CPTRA information system: <https://jvis.ttja.ee/modules/dokumendi-haldus/thing/view/80302>

²⁵⁸Rome I Regulation. OJ L 177, 4.7.2008, p. 6. Article 6 (1) and (2) in the situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with and recital 44 of the ADR Directive, the consumer cannot be deprived of the protection afforded to him by the provisions of the law of the MS in which the consumer is habitually resident.

²⁵⁹The lack of choice of law clause is rare but it may happen in relation to e-mail transactions of standard terms or it can be used for some businesses as a marketing option having a short terms and conditions contract, as for those cases the Rome I Regulation states that applicable law will be the law of the county where the consumer is habitually resident, where the contract is entered into according to the form listed in article 6, that is, what is the specific intention to buy. There is one exclusion, in Article 7 (3), sentence 1 of the Rome I Regulation that essentially limits parties' choice in insurance contracts to the law of the state where the risk is situated at the time of conclusion of the contract or the law of the country where the policymaker has his habitual residence. See also: Ruhl. G. (2011) Consumer Protection in Choice of Law. Cornell International Law Journal. Vol 44p 588. available: <https://ssrn.com/abstract=1816641> and Loos. M.B.B. (2016) Enforcing Consumer Rights through ADR at the Detriment of Consumer Law. *European Review of Private Law*. 1-2016. pp73-74

²⁶⁰ § 57 (3) of the Consumer Protection Act

²⁶¹ Therefore, the CDC must be sufficiently competent to apply the legislation of another Member State of European Union. Such obligation is not sufficiently reflected in the requirements applying to chairmen of the committee stated in § 41 (2) of the Consumer Protection Act, which obligates the chairman to have a master's degree in the field of study of law or corresponding qualification In accordance with the corresponding qualification with Republic of

The CDC is legally obligated to resolve such disputed, because the trader is registered in Estonia, however it is not always conceivable that the chairman of the CDC is able to make a decision based on Finnish, or any law national of another Member State.²⁶²

The legislator should consider making amendments to the § 40 of the Consumer Protection Act to solve the previously reflected problem concerning the trader's place of registration and applicable law of the contracts, through the amendment to the paragraph 3. Accordingly, to provide better access to justice for the consumers, the new wording of §40 (3) could be following:

§ 40 (3): "The committee is competent to resolve both domestic and cross-border consumer disputes which arise from contracts between consumers and traders and which are initiated by a consumer or one of the parties to the dispute is a trader whose place of the establishment is in the Republic of Estonia or in another European Union Member state, if the transaction is governed with Estonian legislation."

By making the following amendment, the contract would be covered with the law of the MS of the consumer's habitual residence, provided that the trader has carried its economic or professional activity to that country. The amendment would significantly improve the access to justice for cross-border disputes and would follow the principle of full coverage of ADR entities in EU.

3.4. The proposal of giving secretariat of CDC more decision-making power in accepting-declining the applications

Estonia Education Act, § 28 (2). When elaborating the problem, discussion may raise some questions under article 6 of the ADR Directive regarding the expertise requirement, namely, whether the directive perhaps imposes too broadly the requirement for the natural person responsible for the out-of-court settlement of consumer disputes by stating that the person be "sufficiently competent" and according to the article mentioned have necessary knowledge in the field of out-of-court disputes and general knowledge and skills of law in general, ADR Directive article 6 (1)

²⁶² If a person practicing law in Estonia, living in a neighbouring country has a certain understanding of Finland legal systems and applicable, then for example, in British or law of the Netherlands the chairman of the committee, may not be able to resolve the dispute. It is appropriate to recall here that pursuant to § 41 (2) of the CPA, the chairman of the committee must have master's degree in law as well necessary skills in dispute resolution and Consumer rights. However, the legislature has not assumed that the chairman of the CDC must have the power to take a decision under the legislation of 27 Member States (plus Norway, United Kingdom and Iceland). In some cases, the national law has given consumers the presumption that the contract, unless proven other wisely, was formed in their habitual country of residence. See also Cortes. P (2011) *Online Dispute Resolution for Consumers in the EU*. (1st ed.) Madison Avenue, New York: Taylor & Francis Group, p 101

The annual reports of CDC show that the entity receives a rather high volume of the complaints that are in one or other reason left out of the proceeding because of the non-prospectively.²⁶³

The legislative act gives a closed list of possibilities for termination of proceedings or refusal of accepting the petition²⁶⁴. It may be done either by the secretariat or by the chairman. The CDC's secretariat may refuse to accept the petition, if the consumer has not contacted the trader with the complaint, the consumer fails to eliminate the deficiencies in the petition within the set term, the resolving of the dispute is not in the competency of the committee on the basis of subscription § 40 (4) and (5) of the CPA, when the proceeding on the same dispute and same grounds between the same parties are being either conducted by another recognised ADR entity or court, or in the situation of bankruptcy or liquidation proceeding has been initiated against the counterparty of the consumer²⁶⁵.

In the event of non-compliance of the petition, the Secretariat must provide the consumer additional term²⁶⁶, to remedy the deficiencies. Additionally, the secretariat may not proceed with consumer's application when it falls out of the competence of the committee²⁶⁷. The legislator has given to the secretariat rather technical legitimate foundation of rejecting consumers complaints, which does not require the official to examine the substance of the application but only to confirm whether the formalities have met.

On the contrary, the chairman of the CDC has given the grates competence on legal grounds of refusing to accept the consumer's petition or to terminate the procedure. The decision is taken based on a legal analysis and an examination of the detailed facts and circumstances of the received complaint. The committee may declare the application inadmissible if the application is not submitted in order to protect a right or interest of the consumer protection law, the achievement of the objective sought in an alternative procedure is unpromising in out-of-court proceedings, the dispute cannot be solved without through investigation and hearing of witnesses and it would be

²⁶³in 2018 46% of the submitted applications were terminated without reaching out-of-court settlement E&Y (2019) Possible models of out-of-court settlement of consumer disputes in Estonia - final report, 17.12.2019, p. 91.

²⁶⁴ Consumer Protection Act § 47

²⁶⁵ § 47 (1) 2-5

²⁶⁶ the term is not specified in the law in the number of days but the term is determined on the basis of the principle of reasonableness, which is considered to be according to the §46 (1), 8 of the Consumer Protection Act, 14-days)

²⁶⁷ on the basis of § 40 (4) and (5) of the Consumer Protection Act if the same dispute is in a proceeding of another recognized dispute resolution entity or court, bankruptcy or liquidation proceedings have been instituted against the company against which the consumer's application is directed.

more expedient to resolve the case in the county court, the value of the goods or services in question or the amount of the consumer's claim is less than 30 euros²⁶⁸.

Surprisingly, the chairman will make the decision of accepting the application on a proposal of the secretariat. From a procedural point of view, it means, that the secretariat will make a written proposal to the chairman, having examined the basis of the complaint together with the supporting documents provided to the consumer. After that the chairman will decide to exclude the application from the proceeding. Therefore, to declare the application admissible, it needs relatively thorough acquaintance of the secretariat. The chairman, however, receives a salary for making the decision.²⁶⁹

It would time saving and economically more efficient if the law could grant the secretariat a greater decision-making power regarding the non-acceptance of the consumer application.²⁷⁰

Unfortunately, it is not possible to extract statistics from the document register of the CPTRA²⁷¹, to illustrate how many applications has been dropped by the commission on the basis of the § 47 (2) of the CPA. Therefore, the thesis will illustrate that statement with case number 6-1/17-002831.²⁷² According to the consumer application, the consumer acquired a fur coat dry-cleaning service which proved to be defective and damaged the consumer's coat. The consumer submitted a claim to CDC asking reimbursement in an amount of the coat's market value, EUR 1500.

The Secretariat of the Committee proposed to the chairman to refuse the consumers petition on the grounds of prospects of finding a solution in alternative procedure is unpromising.²⁷³

²⁶⁸ Consumer Protection Act § 47 (2) 1-4. In case the dispute is important from the point of view of forming practice or necessity to significantly change the current practice, the dispute is meaningful for potential consumers or the dispute involves a claim to perform a contract or to nullify the contract the CDC may accept the disputes under 30 euros value.

²⁶⁹ Tarbijavalduste komisjoni esimehe töötasu määr. Degree of the Minister of Economics and Communications, 22.02.2019. Reachable: <https://www.riigiteataja.ee/akt/119022019033> (last accessed 11.05.2021)

²⁷⁰The bases arising from § 47 (1) of the Consumer Protection Act are rather technical, which does not require from an official of secretariat special legal knowledge, despite the fact that personnel of the secretariat who evaluate the applications have a legal education. Considerable, although the legislator has wished to act considering the procedural economy, it does not bring with the desired result

²⁷¹ The Document register of the Authority (Jivis) was changed in March 2021, bringing several malfunctions with it. It is not possible to search any relevant date or statistics regarding the work of the CDC (nor anything else). The ministry has been notified about the problem and last the IT department has made several attempts of solving the problem. Unfortunately, unsuccessfully.

²⁷² Database of Consumer Protection and technical Regulatory Authority, Accessible: <https://takis.ttja.ee/takis/menetlused/69319>

²⁷³ Pursuant to § 47 (3. 2) of the Consumer Protection Act, the commission may refuse to accept a petition or terminate the proceeding if it is not possible to achieve the objective pursued by the consumer in out-of-court proceedings. At the same time the legislator has not formulated the concept of perspectivity, and it must be evaluated in the basis of each case. The Explanatory Memorandum to the Consumer Protection Act does not extend this definition either. However, stating that a decision to refuse to hear a dispute on the grounds referred to in paragraph 3 shall require a more thorough examination of the substance of the dispute

The Secretariat relies on the fact that there is no documental evidence of the amount of the claim (consumer was unable to prove the price of the product). The trader had also submitted the assessment of the examination bureau, according to which the defects of the product did occur during the cleaning service, but might have occurred due to the inaccuracy of the cleaning instructions on the label of the garment. The chairman of the Committee decided, bases on a proposal of the secretariat to reject the consumer's application. The principle of procedural economy is not followed in this case and similar cases should be excluded from the proceeding based on the evaluation the secretariat.

Consequently, at current situation, the application needed throughout examination by both, the secretariat of the committee as well the chairman. The secretariat has therefore invested time by forming a legal argumentation and reasoned assessment for the chairman of the committee, why the complaint should be terminated without further proceeding. The chairman of the committee has relatively heavy workload²⁷⁴, but nevertheless, they have to examine the consumer complaint the second time before terminating the proceeding. Whereas, the work of the chairmen of the committee is reimbursed with the maximum rate of 170 euros.

Thus, the analysis find that the secretariat has sufficient experience and knowledge to decide of terminating the proceeding on the ground of § 47 (3), and the need of involving the chairman of the committee is not necessary. The officials of the CPTRA, who are working as the secretariat of the CDC, whose knowledge and education does not differ from the chairmen of the Committee, are competent to assess the consumer dispute also in terms of legal content.

The thesis emphasizes that the extension of the competence of the Secretariat pursuant to § 47 (3) of the CPA p 2 should be analysed case-by-case basis, and perhaps approved by the official being in charge of the CDC (Head of the Consumer Services Unit of the CPTRA). The head of the Consumer Services Unit has an overview of all disputes addressed to the CDC as well previously made decisions. For example, when the CDC receives ongoing complaints against the same trader, and there is already one decision made by the chairman, the following disputes should not go through the same proceeding in order to get rejected.

In addition, the Secretariat of the committee could be responsible for not accepting the application based on the value of the claim, pursuant to § 47 (4) of the current Act.

and the Secretariat shall decide on behalf of the Commission not to accept the dispute or to terminate the proceedings in agreement with the chairman of the Commission.

²⁷⁴ The chairmen of the committee perform their duties in addition to their daily work.

The committee rejects the application if the value of the goods or services in question or the amount of the consumer's claim is less than 30 euros and the resolution of the dispute is not relevant to the design of the legal practise or the relevance of the out of court proceeding is not relevant to possible other consumers. In such case, the secretariat could be responsible of evaluation the further assessment of the dispute should be necessary for shaping the legal practice.²⁷⁵

The competency of the Secretariat to assess the consumer's application from the point of view of § 47 (4) CPA is sufficient to make a decision of refusal of acceptance of the claim without including the head of the committee in the process.

According to the § 46 (9), the Secretariat of the committee can make a proposal for the consumer who has filed a petition to withdraw the application on the basis of the applicable legislation, decision of the committee of court judgement has entered into force, it can be reasonably assumed that the dispute shall be resolved to the detriment of the consumer. The author finds that such regulation is somewhat giving remedies to the describes situations, however, the proposal may not be accepted by the consumer and in that case the secretariat has to make a proposal of refusal of proceeding to the head of the committee.

The Secretariat could also have the right to refuse to accept an application in certain cases based on the procedural perspective. This is the case, for example, with the trader against whom has previously filed a statement by other consumers (including similar claims) has already decision in favour of the consumer, the trader has not completed the purchase within 30 days and is included blacklist²⁷⁶ of the CPTRA²⁷⁷.

Such an amendment to the legislation would meet the objectives of the ADR Directive, according to which the procedure should be simple, quick and inexpensive²⁷⁸, while not jeopardizing out-of-court procedures quality requirements granted to notified entities, such as fairness, efficiency and expertise²⁷⁹.

²⁷⁵ It is important to evaluate the content of the claim, sometimes the individual harm can be small, but the problem with the trader not performing its obligations is widespread.

²⁷⁶ The Blacklist of the trader who are not complying with the decision of the CDC. <https://komisjon.ee/et/must-nimekiri>

²⁷⁷ Procedure for composing a list of traders harming consumers' interests, 13.01.2017, reachable: tarbijate_huvisid_kahjustavate_kauplejate_nimekirja_koostamise_kord_2017.pdf (ttja.ee)

²⁷⁸ According to Directive 2013/11/EU of the European Parliament and of the Council, recital 5 provides for out-of-court redress settlement of disputes between consumers and traders by a simple, quick and inexpensive out-of-court settlement.

²⁷⁹ Articles 8, 9 and 6 of the ADR Directive.

The thesis proposes an amendment to the current CPA, that would allow for certain clearly defined occasions the Secretariat of the Committee to decide to refuse to accept the consumer petition of the grounds or §47 (3) of the CPA. This could be supplemented with § 47(1)¹ of the CPA by adding two subsections.

§

(1) The secretariat of a committee refuses to accept a petition if:

- 1) the consumer has not previously contacted a trader with the complaint.
- 2) the consumer has not eliminated the deficiencies in the petition within the set terms.
- 3) The resolving of the dispute is not in the competence of the committee on the basis of subsections 40 (4) and (5) of the Act.
- 4) the proceeding of the same dispute on the same grounds and between the same parties are being conducted by another recognized dispute resolution entity or in court proceedings or by a court or have conducted by a court.
- 5) bankruptcy or liquidation proceedings have been initiated against the counterparty of the consumer.

Paragraph §¹

(1)¹ The Secretariat of the Committee may refuse to accept the petition or terminate the proceedings if:

- (1) the achievement of the objective sought by the consumer in an alternative procedure is unpromising.
- 2) the value of the disputed goods or services or the amount of the consumer's claim is less than 30 euros and resolution of the dispute is of no meaning for other potential consumers or the dispute does not involve a claim to perform the contract or to establish nullity of the contract;

The decision-making competence of the Secretariat as well the work experience is important with regard to subsection 1¹ consequently the ability to assess the specific circumstances of each

application. Considered competent given with the §47 CPA would make a significant contribution to the work of the CDC and lead to financial savings for the state budget.²⁸⁰

²⁸⁰ Most ADR entities are financed by state (for example the Netherlands, Sweden, Estonia, Finland), therefore its necessary not to make unnecessary expenses from the state budget.

CONCLUSION

The thesis focused on the assessment of the consumer ADR in Estonia and specifically the analysis of the functioning of the Estonian Consumer Dispute Committee. By analysing the criticism, advantages and shortcomings of the CDC proceeding, this thesis assessed whether the current legislation must be revised and amended to achieve effective and high-quality out-of-court consumer redress without compromising ADR Directive obligations to ensure simple, effective, fast and low-cost proceeding. The main contribution of the thesis, are the set of practical suggestions to the amendments of the Consumer Protection Act to enhance the efficiency of consumer ADR in Estonia and the work of the CDC.

To evaluate the functioning of the CDC, and to propose practical recommendations for improving the current out-of-court resolution system, the thesis first in Chapter 1 analysed in detail the requirements and quality criteria applicable to the ADR established by the international and EU law including EU ADR Directive. The analysis in Chapter 1 suggests that the quality requirements related to the ADR are closely related to the quality requirements related to the judicial proceeding, as both share the ultimate aim, to provide an effective access to justice for consumers. Those requirements ultimately focus on the substantive provisions related to the efficiency and quality criteria of the dispute resolution itself (e.g. competences, qualification, impartiality) as well as procedural criteria.

Based on this broader discussion on the aims and quality requirements of the ADR system, Chapter 2, focused on the detailed assessment of individual quality criteria applicable to the consumer ADR as established by the ADR Directive. The focus of the assessment was on the analysis and application of the quality criteria to the Estonian CDC, as a notified ADR body within the meaning of the Directive. This in-depth analysis suggests that the current Estonian CDC meets all the quality requirements. This includes the criteria (1) expertise, independence, and impartiality, (2) transparency and effectiveness and (3) fairness, liberty, and legality. Therefore, the CDC is in full competence with the ADR Directive and it provide a good standard for being notified ADR entity. However, to further enhance quality criteria, based on the conducted comparative analysis, thesis suggests a number of legislative amendments to enhance criteria of expertise, transparency and effectiveness.

Specifically, to enhance the quality criteria on expertise, it is suggested to amend Article 41 CPA concerning the competency of the chairmen of the CDC. The proposed amendments suggest that

in addition to the requirements of the level of education and comprehensive knowledge of consumer law currently included in the law, also provisions related to high moral quality restrictions of not being removed from honourable position like judge, member of the bar, notary or bailiffs position and should not be convicted of a criminal offence should be added. Those additional requirements related to moral restrictions imposed for the chairmen would strengthen the position of the chairman, the expertise of the CDC and also public trust

The requirements of transparency and effectiveness can be further enhanced by amendments focusing on the improvement of the access to the CDC and therefore access to justice in the light of the out-of-court proceeding. Specifically, the proposal for amendments focus on the visibility and accessibility of the CDC. The analysis highlighted that the lack of knowledge of Estonian language is restricting consumers' access to the relevant information on CDC's website but even more importantly to the information and procedure submit an application to CDC. Therefore, the proposed amendment suggested in addition to Estonian language to accept the applications also either in English, or Russian, and while the level on lingual knowledge of the members of the CDC allow, to hold also the hearing alternatively in those languages. The analysis also suggests that criteria of transparency can be improved with making available a well-structure and accessible web page of the CDC. This web page should be adjusted so everyone who are in a search of previous proceedings, decisions, annual reports, and general information about the out-of-court redress, would be able to find information quickly and efficiently

Building on the analysis in Chapter 1 and 2, the third chapter analysed possible amendments of the consumer ADR system in the light of effectiveness to access of justice with the CDC. The thesis assessed four main proposals to enhance the current consumer ADR in Estonia and on this basis suggests legislative amendments to the current regulation to improve the efficiency of the CDC without compromising the purpose of the out-of-court redress set with the directive. These four proposals include (1) make the CDC decisions binding for traders; (2)

First key proposal is to make the CDC decisions binding. This amendment would ensure that decisions are enforceable through the state enforcement procedure and would enhance consumers' access to justice. The amendment would also increase the consumers' confidence and trust to out-of-court redress in general and to CDC in particular. As a result, a clear, binding and enforceable redress mechanism, would have a positive impact on the number of consumers availing themselves to the CDC for the resolution of disputes as well as will provide a relief to the judiciary system.

Second key proposal is to establish a reasonable state fee for consumers for submitting an application to CDC. The Directive does not create an obligation or restriction in relation to the fees to submit an application. The Directive suggests that the proceedings should be free of charge or for a nominal fee. Based on the analysis of experiences in other Member States, this thesis suggests that the consumers' obligations to pay five euros to submit a complaint would significantly reduce the malicious and unjustified applications reaching CDC. This minimal nominal fee would not create an obstacle to the consumer to submit an application, however, it would significantly improve an overall efficiency of the CDC. The efficiency would be gained through the reduction of time that CDC employees spend on processing void applications and increase of available time to process pertinent complaints.

The third key proposal is to reduce burden on the CDC to deal with the foreign law. The amendment to the current legislation concerning traders' country of registration is proposed. Presently, the CDC is competent to resolve both domestic and cross-border cases against the traders registered in Estonia. However, the CDC is competent to resolve the complaints placed against any trader as long as the transaction is covered by Estonian legislation. Based on the analysis the paper suggests this amendment.

The fourth key proposal is to amend the existing provision on the competency of the Secretariat of the CDC. The employees working as a secretariat of the CDC are requested to have legal education in order to conduct the proceeding. However, the rights granted with the current consumer legislation give them possibility to decline the proceeding only on ground of technical shortcomings of the application. The secretariat is competent to refuse to accept consumers application based on the legal rights. The suggested amendment would reduce the workload of the chairmen and have positive impact to state budget due to reduce reimbursement paid to the chairmen.

In conclusion, the four suggestions for the amendments to the current legislation could be implemented as a whole or every suggestion individually. The thesis argues that those proposals would enhance the current consumer ARD system, enhance consumers access to justice and the efficiency of consumer dispute redress in Estonia.

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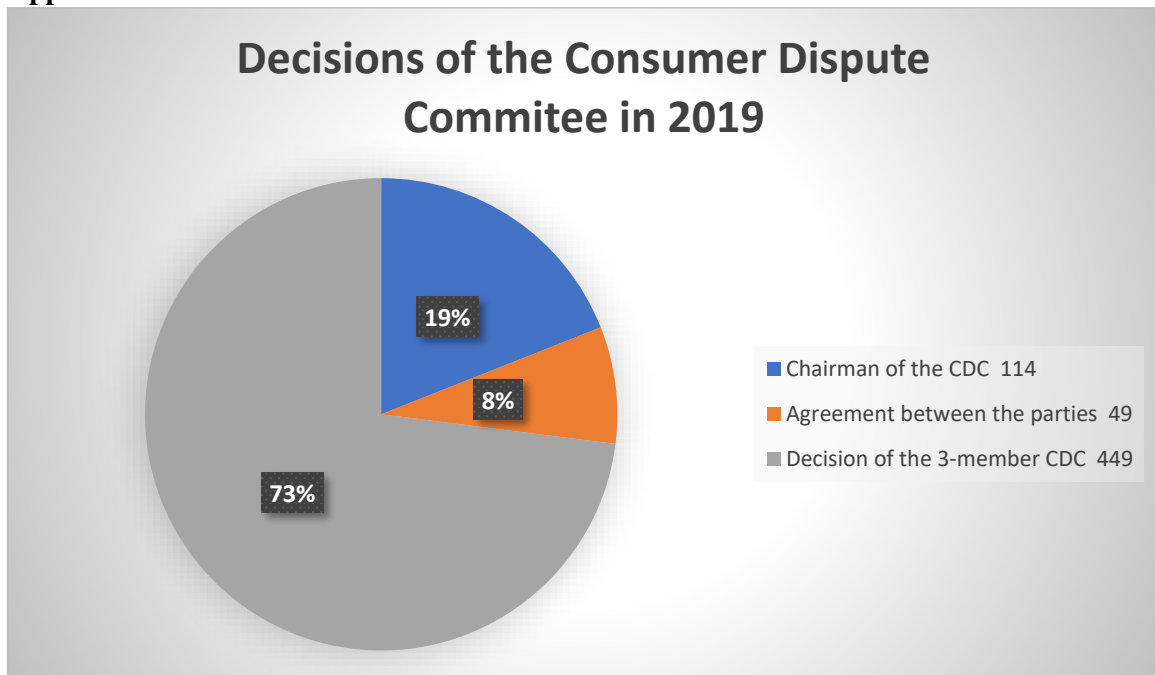
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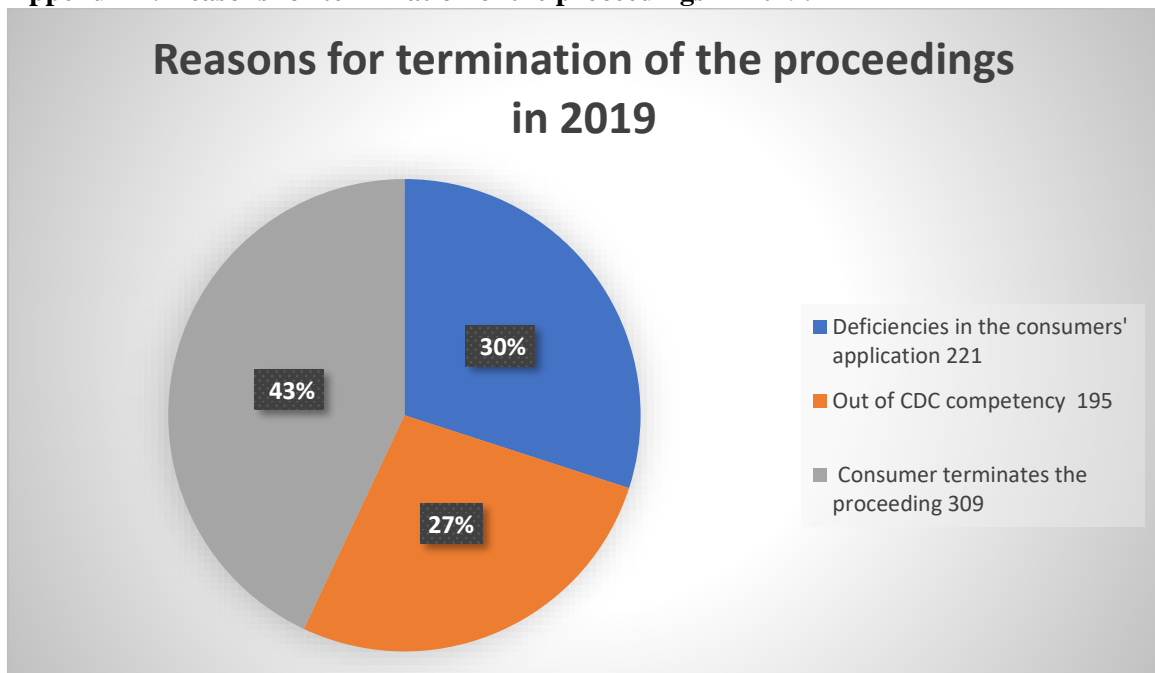
APPENDICES

Appendix 1. Decisions of the CDC in 2019



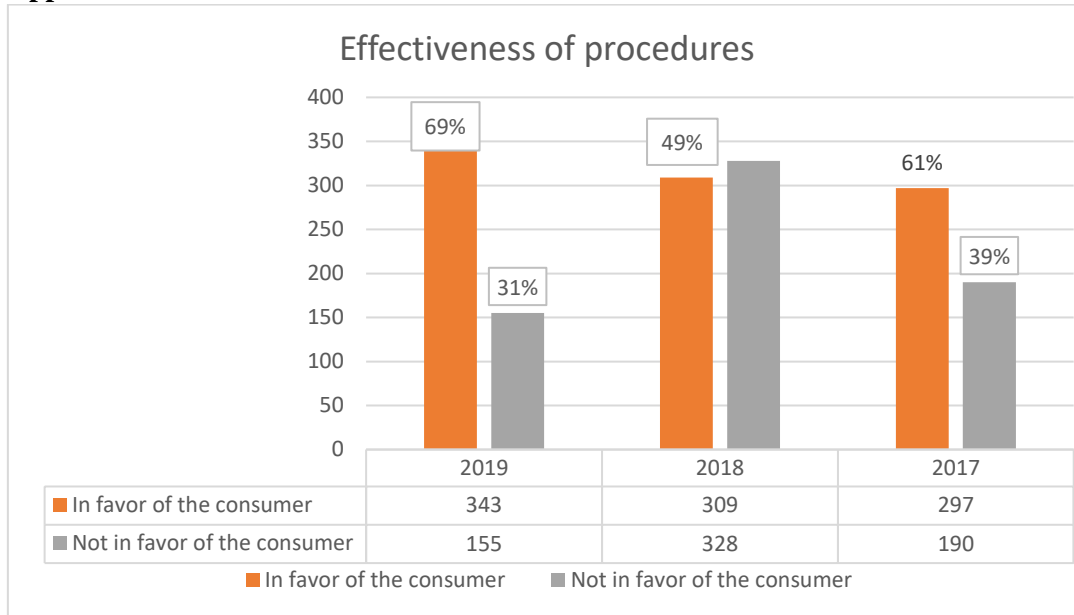
Source: Annual Report of the CDC 2019

Appendix 2. Reasons for termination of the proceedings in 2019.



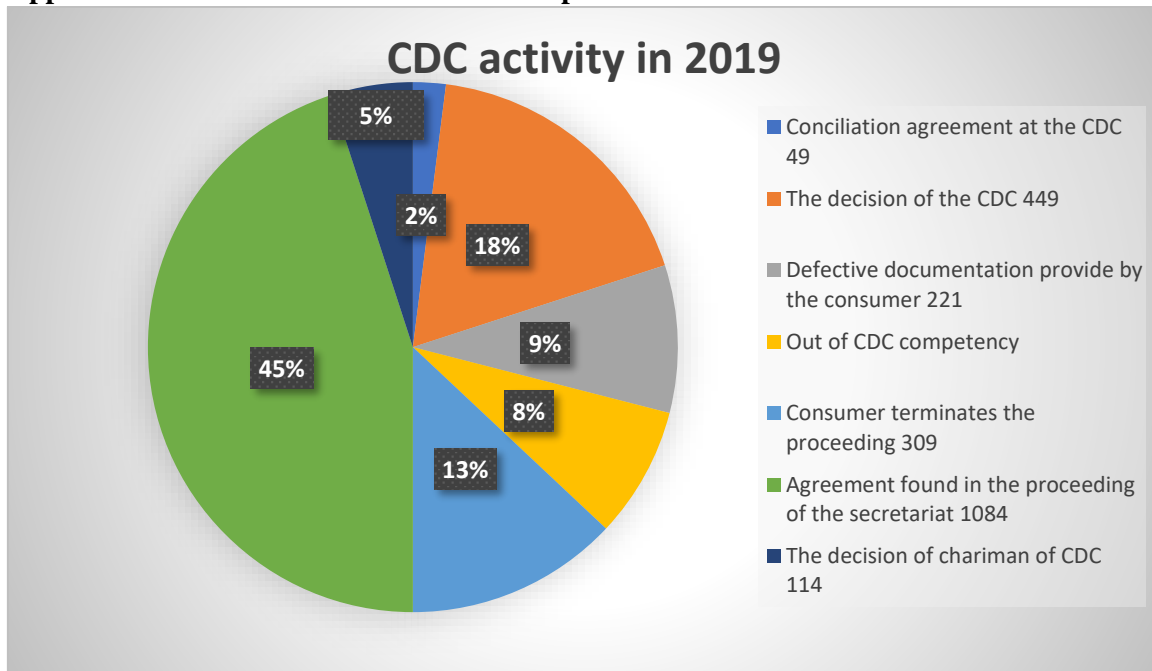
Source: Annual Report of the CDC 2019

Appendix 3. Effectiveness of The CDC Procedure



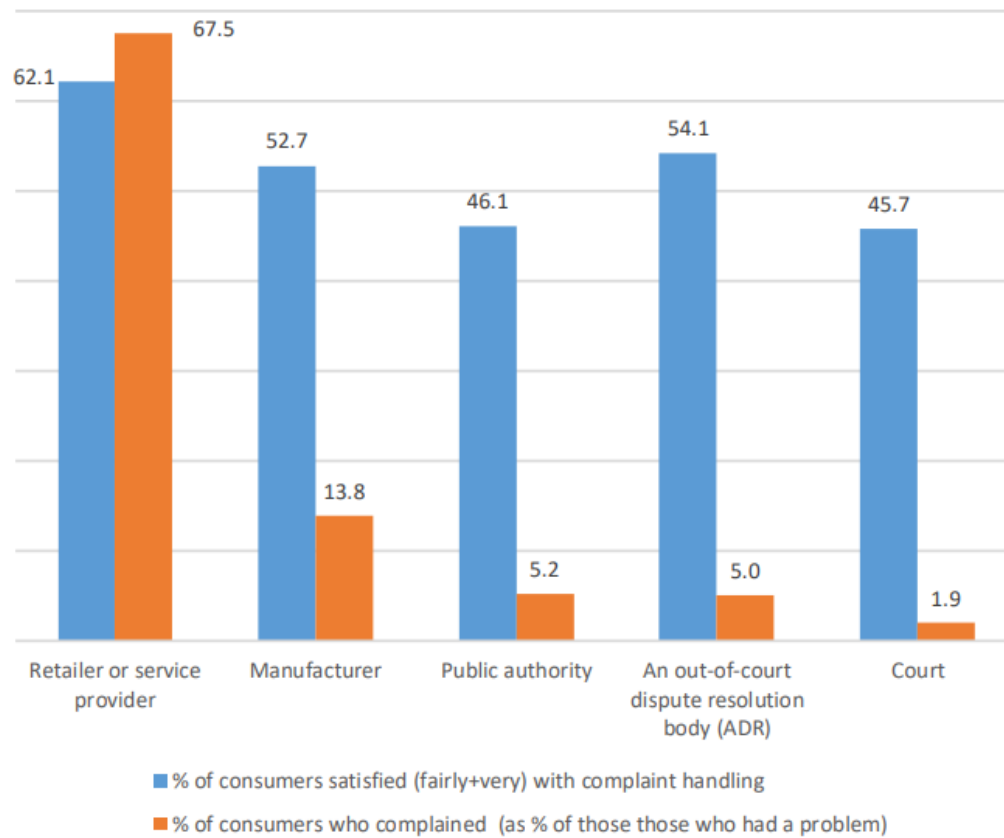
Source: Annual Reports of the CDC 2017-2019

Appendix 4: The Activities of Consumer Dispute Committee



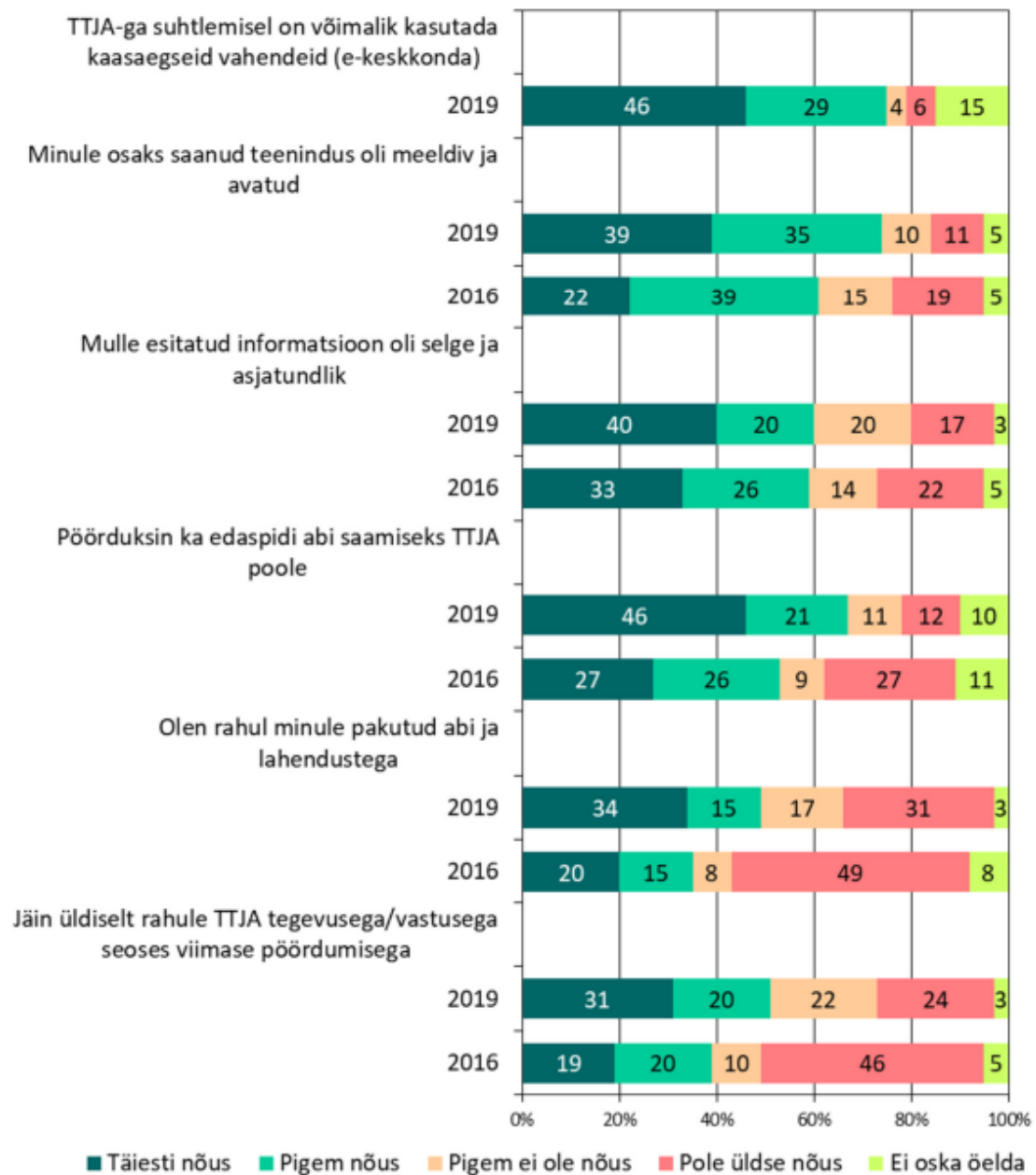
Source: The Annual report 2019 of the CDC.

Appendix 5: EU Consumer' complaints and satisfaction with complaint handling by recipient (% of consumers), 2018



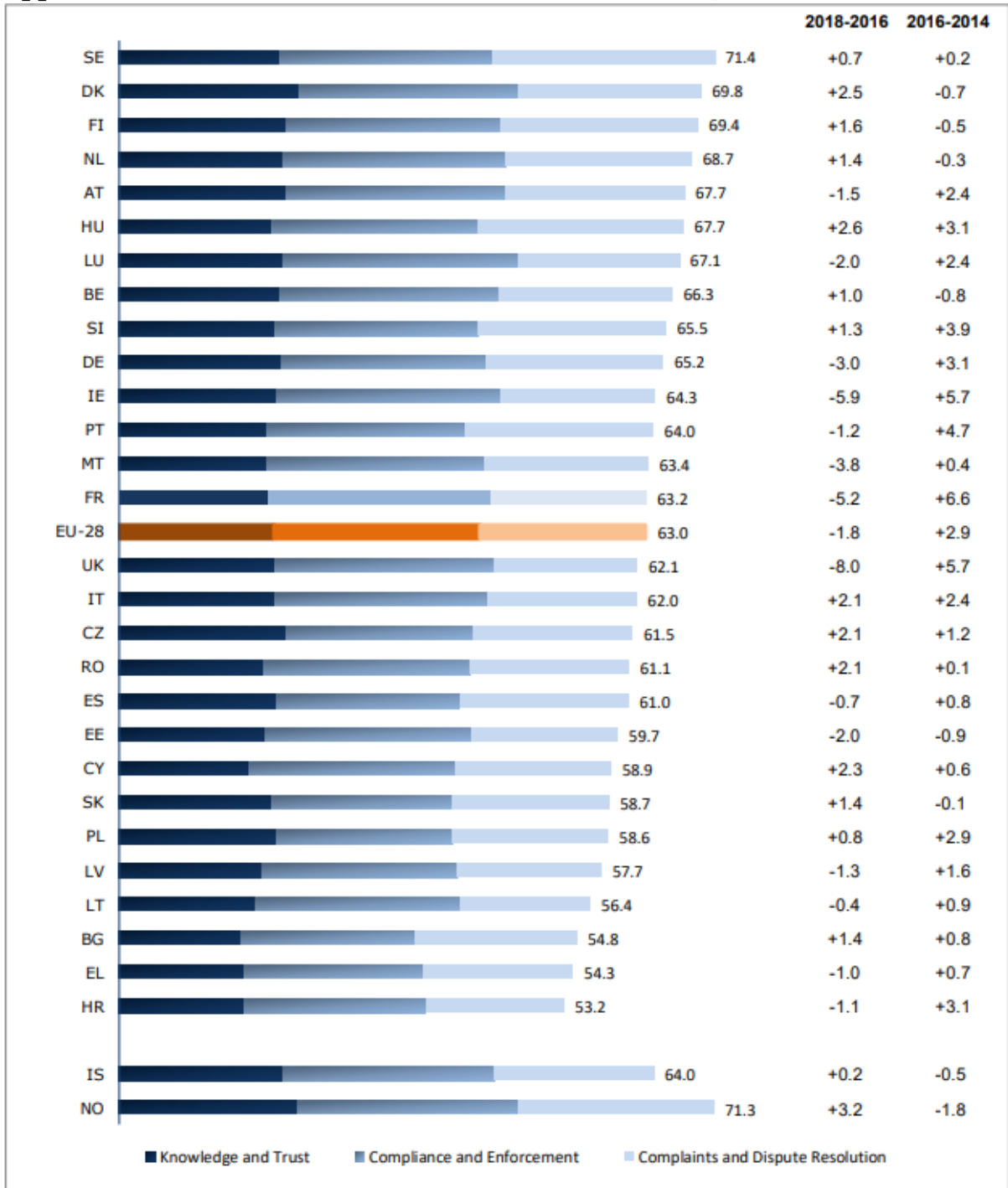
Source: Consumer Condition Scoreboard, 2019, p 10

Appendix 6: Consumers evaluation for the quality of service when contacting CPTRA (CDC) 2016 and 2019.



Source: Consumer Protection and Technical Regulatory information system.

Appendix 8: Consumer condition Index- overall indicator, 2018



Source: Consumer Condition Scoreboard 2019. p 22

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