

20th November, 2015

**User Guidelines for the Consumer Alternative Dispute Resolution (General) Regulations, 2015
(Legal Notice 374 of 2015)**

Background and Scope of the ADR (General) Regulations

The purpose of the Consumer Alternative Dispute Resolution (General) Regulations, 2015, hereinafter referred to as the Regulations, is to transpose, to implement and to assist in the implementation process of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC hereinafter referred to as the ADR Directive, that:

ensures that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures, without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their rights of access to the judicial system; and

applies to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the European Union and a consumer resident in the European Union through the intervention of an Alternative Dispute Resolution (ADR) entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.

These Regulations, that have entered into force on the 20th November, 2015, assist in the above-mentioned implementation of the ADR Directive, as they are to come into force concurrently with the necessary amendments to the Consumer Affairs Act (Chapter 378 of the Laws of Malta) introduced by Act XXX of 2015 (that has entered into force on the 20th November, 2015), by means of which the Complaints and Conciliation Directorate within the Office for Consumer Affairs has been enlisted as the Residual ADR entity, the Consumer Affairs Council, hereinafter referred to as the Council, has been established as the competent ADR regulatory authority, and provisions contained in Part XII of the Consumer Affairs Act regarding enforcement and appeals from regulatory decisions taken by the Council, have been made applicable to the Council, its workings and relative matters.

The ADR Directive establishes harmonised quality requirements for ADR entities and ADR procedures in order to ensure that, after its implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the European Union.

An “ADR entity” is defined as “any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed” by the Consumer Affairs Council after being assessed. Regulation 2 of these Regulations provides other relevant definitions for the purposes of interpretation.

Member States may maintain or introduce rules that go beyond those laid down by this Directive, in order to ensure a higher level of consumer protection. Malta has adopted this option as well as opting to introduce a residual ADR entity, namely the Complaints and Conciliation Directorate within the Office for Consumer Affairs (in Malta Competition and Consumer Affairs Authority), and to permit ADR entities, with the prior consent of the Council to maintain and introduce procedural rules that allow them to refuse to deal with a given dispute on the grounds enlisted in regulation 6 of these Regulations.

These Regulations do not apply to:

- (a) procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader;
- (b) procedures before consumer complaint-handling systems operated by the trader;
- (c) non-economic services of general interest;
- (d) disputes between traders;
- (e) direct negotiation between the consumer and the trader;
- (f) attempts made by a judge or a magistrate however so described to settle a dispute in the course of a judicial proceeding concerning that dispute;
- (g) procedures initiated by a trader against a consumer;
- (h) health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices;
- (i) public providers of further or higher education.

Nothing in these regulations is to be interpreted as preventing any person from exercising the right to access to the judicial system.

If any provision of these regulations conflict with a provision laid down in any other national law that relates to out-of-court redress procedures initiated by a consumer against a trader, the provision of these regulations prevail.

Information and Cooperation

A trader is to inform consumers about the ADR entity by which he is covered, when he commits to or is obliged to use such an entity to resolve disputes with consumers. Provided that such information is to include the website address of the relevant ADR entity and is to be provided in a clear, comprehensible and easily accessible way on the trader's website, where one exists, and, if applicable, in the general terms and conditions of sales and service contracts between the trader and the consumer.

Where a dispute between a consumer and a trader cannot be settled further to a complaint submitted directly by the consumer to the trader, the trader is to provide the consumer with the information referred to in the previous paragraph specifying whether he makes use of the relevant ADR entity to settle the dispute, provided that the latter information is to be provided on paper or on another durable medium.

Access to and requirements applicable to ADR entities and procedures

ADR entities are to:

- (a) maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint and the requisite supporting documents online;
- (b) provide the parties, at their request, with the information referred to in paragraph (a) on a durable medium;
- (c) where applicable, enable the consumer to submit a complaint offline;
- (d) enable the exchange of information between the parties by electronic means or, if applicable, by post;
- (e) accept both domestic and cross-border disputes, including disputes covered by Regulation (EU) No 524/2013; and
- (f) take all the necessary measures to ensure that the processing of personal data complies with national legislation on the protection of personal data.

An ADR entity may, with the prior written consent of the Council, maintain or introduce procedural rules that allow it to refuse to deal with a given dispute on grounds that:

- (a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matters directly with the trader;
- (b) the dispute is frivolous or vexatious;
- (c) the dispute is being or has previously been considered by another ADR entity or by a court however so described;
- (d) the value of the claim falls below or above a pre-specified monetary threshold;
- (e) the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which is not less than one year from the date upon which the consumer submitted the complaint to the trader;
- (f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity:

Provided that the Council is to determine whether to give its consent or not, within seven working days from the receipt of a request from the ADR entity. In such instances the Council will inform in writing the ADR entity concerned about the reasons for its decision.

Where in line with its procedural rules an ADR entity is unable to consider a dispute, the ADR entity is to provide all the parties to the dispute with a reasoned written explanation of the grounds for not considering the dispute within three weeks from the receipt of the complaint file:

Provided that such procedural rules are not to significantly impair the consumer's access to ADR procedures, including in the case of cross-border disputes.

Where in line with paragraph (d), an ADR entity is permitted to establish pre-specified monetary thresholds in order to limit access to its ADR procedures, those thresholds are not to be set at a level at which they significantly impair the consumers' access to complaint handling by the ADR entity.

An ADR entity is to make publicly available on its website, on a durable medium upon request, and by any other means it may consider appropriate, clear and easily understandable the information enlisted in regulation 8 (1) of these Regulations. Provided that the Council may from time to time require ADR entities to carry such information on such other means as it may consider appropriate; and with regard to annual activity reports, with regard to both domestic and cross-border disputes, the ADR entity is to provide the information referred to in regulation 8 (2) of these Regulations.

The Council is to ensure that ADR procedures are effective and that the said procedures fulfil the requirements established in regulation 9 of the Regulations.

An ADR entity is to ensure that in ADR procedures:

- the parties have the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party or parties, any statements made and opinions given by experts, and of being able to comment on them;
- the parties are informed that they are not obliged to retain a lawyer or a legal advisor, but they may seek independent advice or be represented or assisted by a third party at any stage of the procedure;

- the parties are notified of the outcome of the ADR procedure in writing or on durable medium, and are given a statement of the grounds on which the outcome is based.

In ADR procedures which aim at resolving the dispute by proposing a solution, the ADR entity is to ensure that:

- a) the parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure, and in doing so, is to ensure that the parties are informed of such a right before the procedure commences, provided that where the ADR procedure requires that the participation of the trader is mandatory this requirement is only applicable to the consumer;
- b) the parties, before agreeing or following a proposed solution, are informed that:
 - they have the choice as to whether or not to agree to or follow the proposed solution;
 - participation in the procedure does not preclude the possibility of seeking redress through court proceedings;
 - the proposed solution may be different from an outcome determined by a court applying legal rules;
- c) the parties, before agreeing to or following a proposed solution, are informed of the legal effect of agreeing to or following such a proposed solution;
- d) the parties, before expressing their consent to a proposed solution or amicable agreement, are allowed a reasonable period of time to reflect.

Where ADR procedures provide that their outcome becomes binding on the trader once the consumer has accepted the proposed solution, the above-mentioned a) to d) are to be read as applicable only to the consumer.

An agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

Where the ADR procedure aims at resolving the dispute by imposing a solution, then in such an instance the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and they specifically accepted this. Provided that specific acceptance by the trader is not required if the ADR procedure provides that solutions are binding on the trader.

In an ADR procedure which aims at resolving the dispute by imposing a solution on the consumer in a situation where there is no conflict of laws:

- the solution imposed does not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by the agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident;
- where the law applicable to the sales or service contract is determined in accordance with the provisions of Article 6 (1) and (2) of Regulation (EC) No 593/2008, the solution imposed by the ADR entity does not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which he is habitually resident;

- where the law applicable to the sales or service contract is determined in accordance with the provisions of Article 5 (1) to (3) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the solution imposed by the ADR entity does not result in the consumer being deprived of the protection afforded to him by the mandatory rules of the law of the Member State in which he is habitually resident.

“Habitual residence” mentioned above is to be determined in accordance with Regulation (EC) No 593/2008.

Parties who, in an attempt to settle a dispute, have recourse to an ADR procedure the outcome of which is not binding on them, are not subsequently prevented from initiating judicial proceedings in relation to that dispute as a result of the expiry of limitation or prescription periods as provided for under national law during the ADR procedure. Provided that this is to be without prejudice to provisions on limitation or prescription contained in international agreements to which Malta is a party.

Disclaimer: Since these are user guidelines, they only provide a summary of the legal instrument (the Regulations) and of the obligations therein contained. Therefore these user guidelines do not in any manner provide a replacement of the legal instrument itself. Moreover any oversight, error or omission in these user guidelines will not exempt the users from their legal obligations, including compliance obligations, as required and established in the published legal instrument (the Regulations).