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Judicial Training Project

Fundamental Rights In Courts and Regulation

CASEBOOK

EFFECTIVE CONSUMER PROTECTION AND FUNDAMENTAL RIGHTS

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Effective Consumer Protection and Fundamental Rights

Edited by Paola Iamiceli, Fabrizio Cafaggi and Mireia Artigot i Golobardes

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Scientific Coordinator of the FRICoRe Project:

Paola Iamiceli

Coordinator of the team of legal experts on Effective Consumer Protection:

Paola Iamiceli; Fabrizio Cafaggi

Project Manager:

Chiara Patera

Co-editors and co-authors of this Casebook:

Co-editors: Paola Iamiceli (Project Coordinator), Fabrizio Cafaggi and Mireia Artigot i Golobardes
Introduction: Fabrizio Cafaggi and Paola Iamiceli
Appendix: The Status of consumer: Chiara Angiolini
Ch. 1: Chiara Angiolini, Paola Iamiceli and Charlotte Pavillon
Ch. 2: Kati Cseres and Gianmatteo Sabatino
Ch. 3: Mateusz Grochowski, Chiara Patera and Federico Pistelli
Ch. 4: Chiara Angiolini, Sébastien Fassiaux and Cèlia Roig
Ch. 5: Chiara Angiolini, Charlotte Pavillon and Paola Iamiceli
Ch. 6: Chiara Angiolini and Paola Iamiceli
Ch. 7: Sandrine Clavel and Fabienne Jault-Seseke
Ch. 8: Mireia Artigot, Fernando Gómez and Sébastien Fassiaux
Ch. 9: Chiara Angiolini and Sébastien Fassiaux
Ch. 10: Tomàs Garcia-Micó, Carlos Gómez, Rosa Milà and Sonia Ramos

Note on national experts and collaborators:

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José Mª Blanco Saralegui
Aurelia Colombi Ciacchi
Silvia Ciacchi
Marta Fernandez De Frutos
Maud Lagelée Heymann
Federica De Gottardo
Ksenija Dimec
Rossana Ducato
Giuseppe Fiengo
Stéphanie Gargoullaud
Ilaria Gentile
Petri Helander
Thomas Horvath
Mareike Hoffmann
Pamela Ilieva
Monika Jozon
Meeli Kaur
Sil Van Kordelaan
Madalina Moraru
Viola Nobili
Michal Notovny
Sandra Passinhas
Charlotte Pavillon
Tobias Nowak
Valentina Rustja
José Mª Fernández Seijo
Markus Thoma

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Relevant CJEU cases in this cluster

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- Judgement of the Court (First Chamber) of 14 June 2017, *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, Case C–75/16 ("**Menini**") - link to the database for analysis of the lifecycle of the case
- Judgement of the Court (Fourth Chamber), 12 July 2012. *SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor — Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC)*, Case C-602/10 ("**Volksbank**")

Within this cluster, the first two cases can be taken as reference points for the judicial dialogue within the CJEU and between EU and national courts.

Main questions addressed

Question 1 — Is a pre-judicial mandatory out-of-court settlement procedure compatible with the EU Law principles of effective judicial protection (Article 47, CFREU) and of effectiveness (with respect to the rights conferred on individuals, especially under consumer law)? Are there general requirements for such mandatory out-of-court settlement attempts to be considered proportionate and compatible with the principle of effective judicial protection?

Question 2 — Are specific requirements [for compulsory ADR pre-judicial procedures involving consumers] pursuant to Directive 2013/11, with special regard to legal assistance and to the consumer's right to withdraw from the ADR procedure, compatible with consumers' right of access to justice?

Relevant legal sources

EU level

In *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08):

Article 34 'Out-of-court dispute resolution' of Directive 2002/22 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive).

In *Menini* (C–75/16):

Articles 1(2), 3(a), 5(2) of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

Articles 1, 2, 3 (1) and (2), 4 (1)(g), 5(1), (8)(b), 9(2)(a), 20 of Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) no. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

National level (Italy)

In *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08):

Legislative Decree no. 259 of 1 August 2003, relating to the Electronic Communications Code (GURI no. 214 of 15 September 2003, p. 3), providing for a pre-judicial mandatory out-of-court settlement procedure in litigation concerning this matter.

In *Menini* (C–75/16):

Articles 5, 8, of Legislative Decree no. 28 of 4 March 2010 implementing Article 60 of Law no. 69 of 18 June 2009 on mediation in civil and commercial matters (*Decreto Legislativo 4 marzo 2010, n. 28, recante attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali*). More particularly, Article 5 provides for a pre-judicial mandatory out-of-court settlement procedure in some civil and commercial matters, including (as relevant for consumer litigation): tort liability in healthcare, insurance, banking and financial contracts.

Article 141 of Legislative Decree no. 206 of 6 September 2005 on the Consumer Code, 'Legislative Decree no. 206/2005' (*Decreto Legislativo 6 settembre 2005, n. 206, 'Codice del consumo'*)

6.1. Question 1 – Mandatory ADR mechanisms and access to effective judicial protection.

> Is a procedural rule that makes the recourse to an out-of-court settlement procedure mandatory in order to bring an action before a judicial body compatible with the EU Law principles of both effective judicial protection (Article 47 CFREU) and effectiveness (with respect to the rights conferred on individuals, especially under consumer law)? Are there general requirements for such mandatory out-of-court settlement attempts to be considered proportionate and compatible with the principle of effective judicial protection?

The case

In the *Alassini* judgement (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), consumers lodging judicial complaints against electronic communications services providers failed to comply with the pre-trial out-of-court settlement procedure which Italian law sets as mandatory in order to bring a complaint to court. With regard to this procedural requirement, the referring judge was doubtful as to whether such a burden was compatible with the rights granted to consumers under Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), and especially with Article 34 of that Directive, pursuant to which Member States

"shall ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to

issues covered by this Directive […] without prejudice to national court procedures."

Similarly, in the *Menini* case (C–75/16) the national judge questioned the compliance of the pre-trial mandatory out-of-court settlement procedure in credit agreement-related disputes involving consumers with Directive 2013/11/EU on alternative dispute resolution for consumer disputes. The question was raised within the context of an opposition to an enforceable payment order and concerned, in the first place, the fact that under Italian law such ADR procedure was set as mandatory in order to access the judicial system. The national judge raised two further questions concerning the mandatory assistance by a lawyer during the ADR procedure and the limitations to the consumer's right to withdraw at will without consequences, both of which issues will be addressed in what follows.

Preliminary question referred to the CJEU:

In the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the referring judge put the following question to the CJEU:

"Do the Community rules referred to above (Article 6 of the [ECHR], [the Universal Service] Directive, Directive [1999/44], Recommendation [2001/310] and [Recommendation [98]/257]) have direct effect and must they be interpreted as meaning that disputes "in the area of electronic communications between end-users and operators concerning non-compliance with the rules on Universal Service and on the rights of end-users, as laid down in legislation, decisions of the Regulatory Authority, contractual terms and service charters" (the disputes contemplated by Article 2 of [the regulation annexed to] Decision No 173/07/CONS of the Regulatory Authority) must not be made subject to a mandatory attempt to settle the dispute without which proceedings in that regard may not be brought before the courts, thus taking precedence over the rule laid down in Article 3(1) of [the regulation annexed to] Decision No 173/07/CONS?"

In *Menini* (C–75/16) the national judges referred two questions to the CJEU. The first concerned the relationship between Directive 2008/52/EC and Directive 2013/11. The second comprised two parts, the first being as follows:

"In so far as it guarantees consumers the possibility of submitting complaints against traders to appropriate entities offering alternative dispute resolution procedures, must Article 1 (…) of Directive 2013/11 be interpreted as meaning that it precludes a national rule which requires the use of mediation in one of the disputes referred to in Article 2(1) of Directive 2013/11 as a precondition for the bringing of legal proceedings by the consumer (…)?"

Reasoning of the CJEU:

In *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), after first clarifying that the Universal Service Directive should not be construed as explicitly prohibiting a pre-judicial mandatory settlement procedure (*Alassini*, paragraph 42), the CJEU tackled the question of compliance of such mandatory schemes with EU law from two concurrent perspectives:

(i) compliance with the **principle of effectiveness**, because the Directive provides remedies for consumers whose exercise may be hampered by the compulsory ADR mechanism, thus jeopardizing the effectiveness of the substantive rights granted to consumers;

(ii) compliance with **Article 47** of the CFREU and the principle of effectiveness of judicial remedies, because the procedure may hinder access to judicial redress of consumers' rights violations, which in itself is a fundamental right recognized by EU law.

With respect to the first point, the CJEU recalled that, in accordance with the **general principle of procedural autonomy**, Member States are free to "*lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law*" provided that both the principle of equivalence (not under discussion in the present case) and the principle of effectiveness are respected. Regarding the latter, the Court acknowledged that "*making the admissibility of legal proceedings conditional upon the prior implementation of an out-of-court settlement procedure affects the exercise of rights conferred on individuals*" and therefore asserted that such limitations can be considered valid under EU law upon the condition that they do not "*make it in practice impossible or excessively difficult to exercise the rights which individuals derive from the* [relevant] *directive*". In order to test whether this is the case, the CJEU further stated six specific criteria:

(*a*) the procedure shall not result in a decision which is binding on the parties;

(*b*) the procedure shall not cause a substantial delay for the purposes of bringing legal proceedings;

(*c*) the procedure shall suspend the period for the time-barring of claims;

(*d*) the procedure shall not give rise to significant costs for the parties;

(*e*) the procedure shall not be accessible only by electronic means; and

(*f*) the mandatory requirement shall not prevent the grant of interim measures in exceptional cases where the urgency of the situation so requires.

With respect to the second point – **compliance with the right enshrined in Article 47 of the CFREU** – the CJEU recalled the long-standing assumption that fundamental rights shall not be construed as *unfettered prerogatives* and may be restricted, provided that such restrictions pursue objectives of general interest, are proportional to such aims, and do not excessively impair the substance of the rights guaranteed. This is what the Court specifically argued:

> "Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed" (see, to this effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgement of the ECHR in Fogarty v United Kingdom, no. 37112/97, §33, ECHR 2001-XI (extracts)). (*Alassini*, joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, paragraph 63)

In the specific case considered, the CJEU then stated that the imposition of a mandatory ADR mechanism pursued the general and legitimate objectives of offering a quicker and less expensive procedure for the settlement of disputes and reduced the burden on the court system, and that the test of proportionality was satisfied considering that "*no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives*", that "*it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives*", and that the procedure respected the six criteria set out in relation to the principle of effectiveness.

In the subsequent *Menini* case (C–75/16), the question of the validity of mandatory ADR procedures was raised with specific reference to Directive 2013/11 on alternative dispute resolution for consumer disputes. As in the *Alassini* judgement (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the Advocate General first clarified that the Directive should not be construed as explicitly prohibiting a pre-judicial mandatory settlement procedure and that, on the contrary, the obligation to use an out-of-court settlement proceeding may actually strengthen the effectiveness of the Directive. Secondly, the Advocate General recalled that the principle of procedural autonomy of Member States in the field of consumer law is constrained by respect of the right to an effective remedy and to a fair trial guaranteed by Article 47 of the CFREU, and she suggested that compliance of a mandatory pre-judicial procedure with the principle of effective judicial protection and Article 47 of the CFREU should be verified by taking into consideration the six tests stated in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08). **The test run in *Alassini* with regard to the respect of the principle of effectiveness was thus taken as reference as the general test applicable to verify whether Article 47 of the CFREU is respected in cases where Member States impose pre-trial mandatory ADR mechanisms**. In the subsequent judgement, the CJEU pointed out that the expression "on a voluntary basis" in Article 1 of Directive no. 2013/11 must be interpreted according to the context and the objectives pursued. The CJEU also stated that the same Article 1 asserts that Member States can render participation in an ADR procedure mandatory, provided that – the CJEU noted – the parties' right of access to judicial proceedings is maintained. Indeed, also the opinion of the Advocate General adduced this argument, recalling that the principle of procedural autonomy of Member States in the field of consumer law is constrained by the respect of the right to an effective remedy and to a fair trial guaranteed by Article 47 of the CFREU. The CJEU stated that "*although the first sentence of Article 1 of Directive 2013/11 uses the expression 'on a voluntary basis', it must be noted that the second sentence of that article expressly provides for the possibility, for the Member States, of making participation in ADR procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system*". In order to reinforce its interpretative choice, the Court directly referred to Article 3(a) of Directive no. 2008/52, where it defines mediation as "*a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute*" and then clarified that it "*is without prejudice to national legislation making the use of mediation compulsory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system*". The Court then referred to the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), and pointed out that: (i) the fact that the national legislation makes participation in

an ADR mandatory does not, but *could* – i.e. by introducing an additional step before accessing a court – contrast with the principle of effective judicial protection; (ii) nevertheless, fundamental rights may be restricted on the basis of "*objectives of general interest pursued by the measure in question*" and provided that proportionality is respected. Mandatory mediation procedure as a requirement to access a court may prove compatible with effective judicial protection, provided that it does not produce a binding decision, does not cause substantial delay for bringing judicial proceedings, that it suspends the period for the time-barring of claims, and that it does not give rise to costs for the parties. Therefore "*It is (…) for the referring court to establish whether the national legislation at issue in the main proceedings, in particular Article 5 of Legislative Decree No 28/2010 and Article 141 of the Consumer Code, as amended by Legislative Decree No 130/2015, does not prevent the parties from exercising their right of access to the judicial system, in accordance with the requirement of Article 1 of Directive 2013/11, in that that legislation meets the requirements set out in the previous paragraph*".

Conclusion of the CJEU:

In the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the CJEU decided the case on the grounds that:

"Article 34 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive) must be interpreted as not precluding legislation of a Member State under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by that directive, is conditional upon an attempt to settle the dispute out of court.

Nor do the **principles of equivalence and effectiveness** or the **principle of effective judicial protection** preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires".

Whereas in the *Menini* case (C–75/16), the CJEU ruled that:

"Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prescribes recourse to a mediation procedure, in disputes referred to in Article 2(1) of that directive, as a condition for the

admissibility of legal proceedings relating to those disputes, to the extent that such a requirement does not prevent the parties from exercising their right of access to the judicial system."

In summary, with respect to mandatory ADR schemes in matters related to consumer rights, Member States shall be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that such imposition does not prevent the consumer from accessing the judicial system in accordance with **Article 47** of the Charter of Fundamental Rights of the European Union. The following criteria, set out in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), could provide judges with guidance points when assessing whether national provisions on mandatory ADR schemes comply with Article 47 of the Charter, so that the procedure:

(a) does not result in a decision which is binding on the parties;
(b) does not cause a substantial delay for the purposes of bringing legal proceedings;
(c) suspends the period for the time-barring of claims;
(d) does not give rise to significant costs for the parties;
(e) is not accessible only by electronic means; and
(f) does not prevent the granting of interim measures in exceptional cases where the urgency of the situation so requires.

Impact on the follow-up case:

The *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) had a major impact on the subsequent debate between Italian legislators and the Italian judiciary, with the intervention of the Constitutional Court, and among Italian courts themselves.

In Italy, shortly before the decision of the CJEU in *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), the Italian legislator enacted legislative decree no. 28 of 4 March 2010, which introduced a mandatory mediation procedure that had to be attempted before bringing an action to court in certain specific civil matters.[36] Several courts[37] then addressed the question of the constitutionality of such a mandatory settlement procedure before the national Constitutional Court, on the grounds that such a procedure violated Articles 76 and 77 of the Italian Constitution on the government's legislative power, Article 24 of the Italian Constitution on the right of defence and the right to a cause of action, and Article 3 of the Italian Constitution on the right to equal treatment, since the lower courts deemed that there might emerge an unjust

[36] The mediation procedure was set as mandatory in litigation related to insurance, banking and financial agreements, joint ownership, property rights, division of assets, hereditary and family law, leases in general, gratuitous loans, leases of going concern, compensation for damages due to car/nautical accidents, medical liability or defamation/libel.

[37] Giudice di pace di Parma, 1.8.2011; Tribunale amministrativo regionale per il Lazio, 12.4.2011; Giudice di pace di Catanzaro, 1.9.2011 and 3.11.2011; Giudice di pace di Recco, 5.12.2011; Giudice di pace di Salerno, 19.11.2011; Tribunale di Torino, 24.1.2012; Tribunale di Genova, 18.11.2011.

disparity of treatment between the matters covered by mandatory settlement procedures and those that were not.[38]

On 24 October 2012, the Constitutional Court deliberated on the case and ruled that Article 5.1 of legislative decree no. 28/2010 was unconstitutional due to its violation of certain legislative procedural rules, without considering whether Article 24 was also violated.[39] In that judgement, the Constitutional Court acknowledged the CJEU's decision in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) but also stated that the decision's relevance, with respect to the role of out-of-court settlement procedures for the enhancement of access to justice, was limited to the specific area of communication service contracts, and that it could not be generalized. However, in a decision adopted before the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) with regard to compulsory mediation attempts in the field of communication services, the Constitutional Court had already considered that obligation compatible with the constitutional right to access judicial redress (Article 24, Italian Constitution), provided that the out-of-court procedure is interpreted as not precluding the recourse to interim measures[40].

Then, in 2013, the legislator amended the content of legislative decree 28/2010. It introducing a new Article 5.1*bis* formulated so as to reprise the mandatory settlement procedure,[41] no longer as an admissibility condition for the action before the court, but as a condition to proceed and bring the claim before a court.

On the same point, the Supreme Court intervened with decision no. 24711, 4 December 2015. The case concerned a contractual claim filed by a client against a communication services provider. The claim addressed the problem as to whether the mandatory settlement procedure should be interpreted as a condition for admitting the claim or for proceeding with the claim before the court. Whereas the wording of the CJEU decision rendered in the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) referred to the issue of admissibility, the Supreme Court interpreted the principles therein stated as referring "in substance" to the possibility to proceed with the claim and to the possibility for the claim to be admitted in court. The reference to the principle of effectiveness, as stated in Article 47, CFREU, is the legal basis for this interpretation. The Supreme Court concluded that, if an attempt of settlement has not been started by the client, the judge shall suspend the proceeding for the time needed for the

[38] Note that previous jurisprudence of the Constitutional Court had already deemed such a disparity compliant with constitutional principles. *See* Italian Constitutional Court, Ordinance no. 51/2009 (11 February 2009); Italian Constitutional Court, Ordinance no. 355/2007 (22 October 2007); Italian Constitutional Court, Judgement no. 403/2007 (21 November 2007); Italian Constitutional Court, Judgement no. 276/2000 (6 July 2000).

[39] The Article was enacted as a legislative decree implementing Directive 2008/52/EC by the Italian fovernment under mandate of the Italian parliament. The Italian constitutional court concluded that the Directive did not require Member States to set out-of-court procedures as mandatory and that no explicit mandate was given by the parliament in this regard. Hence the rule had to be considered as outside the scope of the government's powers and, thus, in violation of Articles 76 and 77 Italian Constitution. *See* Italian Constitutional Court, Judgement no. 272/2012, paragraphs 12.1-12.2.

[40] Italian Constitutional Court, Judgement no. 403/2007 (21 November 2007).

[41] The government first adopted the urgency decree n. 63/2013, which the parliament ratified on 9 August 2013, with Act no. 98/2013.

settlement within the legal time limitation, with no prejudice to the claim already filed before the court.

Even after the decision of the Supreme Court, however, the Italian jurisprudence was not settled. Some lower-instance courts continued to interpret national provisions in accordance with the CJEU's approach in *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) holding that the right to effective protection may be subject to restrictions to the extent these are proportionate to general interest goals pursued through the restriction (Trib. Lamezia Terme, Order 1 August 2011). Other courts went further and interpreted Article 111 of the Constitution on the right to a reasonable duration of judicial procedures as holding that mandatory mediation is inadmissible if it occurs after the judicial action has commenced; and therefore that a consumer claim brought before a court before any attempt of mediation has been started must be considered inadmissible without leading to a mere suspension of the proceeding (see judgements of Tribunal of Milan, sect. XI, of 24 September 2014 and 17 December 2015). This ruling implicitly departed from the conclusions adopted by the Supreme Court.

With regard to the *Menini case* (C–75/16)*,* the decision of 28 September 2017 of the Verona Tribunal implemented the CJEU judgement in the case examined here. It first stated that Directive no. 2013/11 could not apply to the case because the ADR body which should have managed the case was not inserted in the proper list or notified to the Commission, as instead laid down by Directive no. 2013/11.

In second place, the Tribunal upheld the principles laid out by the CJEU concerning the relationship between the mandatory ADR procedure and Article 47 of the Charter. In order to decide the case and assess the compliance of national provisions with the principle of the Charter, the judge mostly focused on aspects concerning legal assistance (see the 'Impact on the follow-up case' section related to the next question). However, the reasoning of the CJEU in the *Menini* case (C–75/16) appears to have widely influenced the stance of Italian courts regarding mandatory ADR procedures: thehe Milan Tribunal, with its decision of 18 July 2017, upheld the same principles as expressed in the *Menini* decision (C–75/16), although it did not mention it. With regard to a case concerning a provision requiring a mandatory conciliatory attempt before accessing a court, the Tribunal pointed out that the provision did not constitute a violation of Article 47 of the CFREU, provided that it did not lead to a binding decision, nor cause either excessive delay or excessive costs. The principle of proportionality was also used as the interpretative tool to distinguish a justifiable restriction of the right to access a court from an unjustifiable one. The Tribunal did not mention the *Menini* case, but it directly referred to the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), where it ruled that a mandatory conciliatory meeting in matters concerning phone communications did not constitute an infringement of the individual right to judicial protection.

In deciding a case of a mandatory out-of-court proceeding with the assistance of lawyers, the Tribunal of Verona, with its decision of 28 September 2017, in a case in which an out-of-court proceeding with the assistance of lawyers was mandatory, referred to the *Menini* decision (C–75/16) and to Article 47 CFR. The tribunal stated that the rules providing for mandatory defensive assistance are sources of unreasonable costs for the parties. They were therefore to be

disapplied because theywere contrary to Article 47 CFR. The same reasoning, with a different result, was adopted by the Verona Tribunal, in a decision of 27 February 2018, where the judge, through the disapplication technique, denied the mandatory character of out-of-court-proceedings.

More recently, the *Menini case* (C-75/16) and Article 47 CFR have been recalled in a decision of the Verona Tribunal of 14 December 2018, where that court referred to the Italian Constitutional Court a question with regard to national procedural rules which provided two mandatory out-of-court procedures in order to have access to the first-instance court. The parties filed two different but related claims, concerning compensation and succession law, which in the first-instance court's view were subject to two different mandatory out-of-court procedures. Though not related with consumer law, the case is particularly interesting with regard to the judicial dialogue dimension: indeed, the national court recalled *Menini* (C-75/16) and Article 47 CFR in order to strengthen its arguments based on the constitutional right granting access to court (Article 24, Italian Constitution). In its decision no. 266, 12 December 2019, the Italian Constitutional Court dismissed the claim, stating that it was inadmissible because not relevant to the decision on the present case.

Elements of judicial dialogue:

A first and significant horizontal judicial dialogue within the CJEU can be noted in relation to the *Alassini* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) and the *Menini* (C–75/16) cases, because the reasoning applied to the latter largely draws on the reasoning developed in the former – so much so that it is likely the tests applied in *Alassini* will consolidate as a general standard that may be applied to any case of a mandatory ADR mechanism implemented by Member States, and possibly not only with respect to matters related to consumers' protection. The *Volksbank* case (C-602/10) should be taken into account. The case concerned the interpretation of Article 24 of the consumer credit directive (Directive 2008/48), according to which Member States shall ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place. The referring court asked whether that article must be interpreted as precluding a rule that, as regards disputes concerning consumer credit, allows consumers to have direct recourse to a consumer protection authority, which may subsequently impose penalties on credit institutions for infringement of that national measure, without previously having to use the out-of-court resolution procedures provided for by national legislation for such disputes. The CJEU stated that Article 24 of Directive 2008/48 provides that out-of-court dispute resolution procedures should be adequate and effective, and that it is for Members States to lay down the details of those procedures, including whether they are mandatory. The CJEU, recalling by analogy *Alassini* (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08), considered that imposing an obligation of prior recourse to an out-of-court dispute resolution procedure could strengthen the effectiveness of Directive 2008/48 in so far as it ensures that such a procedure is systematically used. However, relying on the wording of Article 24 of consumer credit directive, the CJEU stated that Member States maintain discretion as regards the regulation of out-of-court resolution of disputes concerning consumer credit agreements, also with respect to its mandatory nature. Therefore, the CJEU stated that Article 24(1) of Directive 2008/48 must be interpreted as not

precluding a national rule that, as regards disputes concerning consumer credit, allows consumers to have direct recourse to a consumer protection authority, which may subsequently impose penalties on credit institutions for infringement of that national measure, without having to use beforehand the out-of-court resolution procedures provided for by national legislation for such disputes.

A second element of judicial dialogue is apparent in the references made by the Italian Constitutional Court and by the Italian Supreme Court to the *Alassini* case (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) in matters not directly related to litigation concerning communication services, as well as by other Italian lower courts. It is clear, in fact, that the CJEU ruling acquired importance in Italy in the general debate concerning whether a compulsory out-of-court procedure fosters or instead impairs effective judicial protection, rather than being limited solely to matters related to communication services.

In this respect, the case law that followed the CJEU's decision shows how consistent interpretation of it was made by different courts and the different outcomes that it might trigger: (1) the Constitutional Court used consistent interpretation in order to clarify that compulsory proceeding was not an obligation emerging either from EU law or from the CJEU decision, but rather was the result of choices by the national legislator; (2) the Supreme Court limited the consequences deriving from the CJEU's decision in favour of compulsory proceedings, distinguishing between admissibility (as addressed by CJEU) and a procedural precondition; (3) some lower courts derived a more stringent approach to admissibility from the CJEU's reasoning.

Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

Poland

In Poland the Supreme Court (*Sąd Najwyższy*) referred a request for a preliminary ruling to the CJEU[42] and it recalled the *Alassini* case (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) to argue that Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) should be construed as a limitation on effective judicial protection and that such right (as ascertained in *Alassini,* joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) is not absolute and can be restricted under certain circumstances.[43] In the CJEU's decision, reference to *Alassini* (joined Cases C-317/08, C-318/08,

[42] Polish Supreme Court (*Sąd Najwyższy*), Decision of 18 February 2015 (III SK 18/14), and Request for a preliminary ruling from the *Sąd Najwyższy* (Poland) lodged on 21 May 2015 — *Prezes Urzędu Komunikacji Elektronicznej, Petrotel sp. z o.o. w Płocku v Polkomtel sp. z o.o.* Case C-231/15.

[43] The question referred to the CJEU was as follows: "*Must the first and third sentences of Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) be interpreted as meaning that — in the event that a network provider contests a decision of the national regulatory authority setting call termination rates in the network of that undertaking (MTR decision), and that undertaking then contests a subsequent decision of the national regulatory authority amending a contract between the addressee of the MTR decision and another undertaking so that the rates paid by that other undertaking for call termination in the network of*

C-319/08 and C-320/08) was made only by analogy to the exercise of national procedural autonomy in the area of appeal as being subject to compliance with the requirements arising from the principles of equivalence and effectiveness (see paragraph 23).

6.2. Question 2 – Further EU specific requirements for ADR mechanisms involving consumers.

> When are requirements concerning access to ADR pre-judicial procedures (e.g., legal assistance) and the right to withdraw from them (e.g. need to show a valid ground for withdrawal) compatible with the consumers' right of access to justice?

The case

In the *Menini* case (C–75/16), as already said above, the national judge questioned compliance of the Italian pre-trial mandatory out-of-court settlement procedure in disputes with consumers involving credit agreements with Directive 2013/11/EU on alternative dispute resolution for consumer disputes. The question was raised in the context of an opposition to an enforceable payment order. Compliance with EU law was not questioned only on the ground that the mandatory procedure might excessively limit access to justice by consumers (see above), but also on the ground that, under Italian, law assistance by a lawyer is mandatory and in the following judicial proceedings the judge may apply a special fee to the succumbing party who withdrew from the ADR procedure without a valid reason ("*giusta causa*"), so that the consumer may not, in fact, be completely free to withdraw at will from the procedure at any stage.

Preliminary question referred to the CJEU:

The second part of the second question in the *Menini* case (C–75/16) was as follows:

"In so far as it guarantees consumers the possibility of submitting complaints against traders to appropriate entities offering alternative dispute resolution procedures, must Article 1 … of Directive 2013/11 be interpreted as meaning that it precludes a national rule which requires the use of mediation in one of the disputes referred to in Article 2(1) of Directive 2013/11 […] as precluding a national rule that requires a consumer taking part in mediation relating to one of the abovementioned disputes to be assisted by a lawyer and to bear the related costs, and allows a party not to participate in mediation only on valid grounds?"

the addressee of the MTR decision correspond to the rates set in the MTR decision (implementing decision) — the national court, having found that the MTR decision has been annulled, cannot annul the implementing decision in view of the fourth sentence of Article 4(1) of Directive 2002/21/EC?"

Reasoning of the CJEU:

The reasoning of the Advocate General in her opinion strictly applied the wording of Article 8(b) of Directive 2013/11 to conclude that compulsory assistance of a consumer by a lawyer in an ADR pre-judicial procedure is contrary to Directive 2013/11,[44] and that the consumer shall always be completely free to withdraw from the ADR procedure at any stage, even on purely subjective grounds, and that such a decision shall not adversely impact the consumer in the following judgement.[45]

Therefore, in this case, the Advocate General did no explicitly consider the relevance of Article 47 of the CFREU or the relevance of the principles of equivalence, effectiveness, dissuasiveness, or proportionality in order to suggest the answer to the question posed. On the contrary, she highlighted that the Directive obliges Member States not to impose the assistance of a lawyer, as well as to let consumers withdraw without consequences from the ADR procedures. At the same time, she stated that it is understood that parties who are not consumers may otherwise be compelled not to abandon the procedure without a valid reason, and that the Directive does not completely exclude a lawyer's assistance (which would not be in the best interest of consumers), but rather only the imposition of such assistance.

As far as the judgement is concerned, the Court considered some provisions that constitute an unjustified restriction of access to justice. In particular, the Court ruled that "*as regards the obligation, on the part of the consumer, to be assisted by a lawyer in order to initiate a mediation procedure*", Article 8(b) of Directive 2013/11 provides that the Member States are to ensure that the parties have access to the ADR procedure without being obliged to retain a lawyer or a legal advisor. Moreover, the Court examined the compliance with EU law of a provision allowing the consumer to withdraw from the mediation proceeding without penalties only if he or she demonstrated the existence of a valid reason, and stated that "such a limitation restricts the parties' right of access to the judicial system, contrary to the objective of Directive 2013/11".

Conclusion of the CJEU:

The CJEU thus concluded that:

> "That directive (i.e. n. 2013/11) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, in the context of such mediation, consumers must be assisted by a lawyer and that they may withdraw from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision."

[44] See *Menini*, Opinion, paragraphs 87–89. Article 8(b) of Directive 2013/11 expressively requires Member States to ensure that the parties have access to the ADR procedure "*without being obliged to retain a lawyer or a legal advisor*".
[45] See *Menini*, Opinion, paragraphs 93-94. Article 9(2)(a) of Directive 2013/11 provides that "*in ADR procedures which aim at resolving the dispute by proposing a solution, Member States shall ensure that 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. They shall be informed of that right before the procedure commences. Where national rules provide for mandatory participation by the trader in ADR procedures, this point shall apply only to the consumer*".

Impact on the follow-up case:

With its decision of 28 September 2017, the Verona Tribunal stated that the parties could participate in the mediation procedure without the assistance of a lawyer or legal counsellor, in accordance with the rulings of the CJEU. The Tribunal also pointed out that requesting mandatory legal assistance – as is the case in the Italian legislation – does not respect the CJEU ruling according to which the mandatory mediation procedure must not generate new costs for the parties. Therefore, the Tribunal concluded that the provision requesting mandatory legal assistance violates the principle of effective judicial protection (Article 47 of the CFREU) as well as Articles 6 and 13 of the ECHR. The focus on the relation between the ADR procedure and the cost to be sustained by the parties drew the attention of the Italian courts as a guiding criterion in order to assess the compliance of such procedures with Article 47 of the Charter. In particular, the decision of 27 February 2018 dealt with the costs deriving from legal assistance in a conciliatory procedure and judged that the national provisions did not comply with the CJEU ruling in *Menini* (C–75/16), since the mandatory ADR proceeding gives rise to new and high costs for the parties.

Impact on national case law in Member States other than that of the court referring the preliminary question to the CJEU

Italy

Recently, the Court of Appeal of Venice (10 December 2020, no. 3527) has applied the principles outlined in *Menini* (C-75/16).

The case concerned the possibility of enforcing a measure taken at the end of a mediation process without the assistance of a lawyer. In particular, the appellant asked the court to consider the mediation as null and void for breach of Article 8(1) of Legislative Decree 28/2010, which states that "at the first meeting and subsequent meetings, the parties shall attend with the assistance of a lawyer".

According to the Court of Appeal of Venice, this Article must be interpreted together with the following Article 12, which provides that "If all the parties participating in the mediation are assisted by a lawyer, the agreement [...] constitutes grounds for enforcement [...] In all other cases, the agreement is approved by the court [...] after ascertaining its formal regularity and compliance with mandatory rules and public order".

The contradiction between these two provisions is in fact only apparent, since legal assistance in the context of mediation procedures is permitted but not mandatory. No consequences or sanctions are foreseen in the event that one of the parties is not assisted by a lawyer. Therefore, the compulsoriness only concerns the initiation of the mediation procedure. Article 12 specifically regulates the case in which not all the parties are assisted by a lawyer, entrusting to the authorisation of the president of the court the enforceability of the measure. According to

the Court of Appeal, the decision not to provide for the mandatory assistance of a lawyer stems from the intention to keep the national legislation compatible with the European rules. The CJEU (*Menini*) has held that the adoption by Member States of national legislation providing, in disputes involving consumers, for recourse to compulsory mediation is compatible with European law only on condition that no legal assistance is required, and that the consumer may withdraw from the procedure at any time, without any justification.

The voluntary nature of the mediation procedure does not therefore relate to the freedom of the parties to use the procedure or not, but to the fact that the parties may manage the procedure independently, without the necessary assistance of a lawyer, and terminate it at any time, even without justification.

Among the disputes examined here, the issue concerning the requirement of legal assistance in settlement procedures has given rise to a parallel debate involving both courts and legislator. Indeed, due to the possible impact of the settlement procedure under law 28/2010 on the follow-on judicial proceedings, including the executory proceedings, legal assistance has been conceived as a necessary means for litigants' protection (see Consiglio Stato, 17.11.2015).

6.3. Guidelines for judges emerging form the analysis

The *Menini* (C–75/16) and the *Alassini* (joined Cases C-317/08, C-318/08, C-319/08 and C-320/08) cases exhibit a shared pattern in their reasoning, as is also shown both by the incorporation of *Alassini*'s guidelines in the Opinion rendered by the Advocate General in the *Menini* case (C–75/16) and by the reference that national courts have made to both cases in order to assess similar issues.

Further to the two judgements, with respect to mandatory ADR schemes in matters related to consumer rights, Member States shall be free to set certain procedures as mandatory in accordance with the principle of procedural autonomy, provided that such imposition does not prevent the consumer from accessing the judicial system in accordance with **Article 47** of the Charter of Fundamental Rights of the European Union. This test is to be conducted having regard to the following criteria requiring that the procedure:

(a) does not result in a decision which is binding on the parties;
(b) does not cause a substantial delay for the purposes of bringing legal proceedings;
(c) suspends the period for the time-barring of claims;
(d) does not give rise to significant costs for the parties;
(e) is not accessible only by electronic means; and
(f) does not prevent the granting of interim measures in exceptional cases where the urgency of the situation so requires;
(g) allows the consumer to withdraw from the proceeding without penalties even if he or she does not demonstrate the existence of a valid reason.

Furthermore, according to *Volksbank* (C-602/10), the principle of effectiveness of out-of-court procedure does not require Member States to lay down that procedure as mandatory.