

ARTICLE

CONSUMER DISPUTES : A NEW RIGHT FOR CONSUMERS AND NEW OBLIGATIONS FOR TRADERS IN CONNECTION WITH ALTERNATIVE DISPUTE RESOLUTION

IT and Data Protection Intellectual Property, Media, and Art Law Competition, Retail and Consumer Law
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As announced by the French Government last May¹, the Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes has been transposed into French law by Ordinance no. 2015-1033 of 20 August 2015. This ordinance aims at increasing the use of out-of-court (amicable) dispute resolution mechanisms concerning disputes between traders and consumers. A new Article L.152-1 has now been inserted into the French Consumer Code, which lays down the principle of a "right to mediation" for consumers and the resulting obligation for traders to secure such right: "Any consumer has the right to have recourse, free of charge, to mediation in order to amicably settle a consumer dispute with a trader. In this regard, the trader ensures the consumer that mediation will be effectively available to settle the consumer dispute."

1. Scope

It should first be noted that Ordinance of 20 August 2015 supplements the measures initiated by the Hamon Act of 17 March 2014 by including into the French Consumer Code a legal definition of the term "trader". Trader shall thus mean "any natural persons, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession". (Article L.151-1 of the French Consumer Code). On the contrary, and for the record, a "consumer", as defined by the "Hamon Act", shall mean "any natural person who is acting for purposes which are outside his trade, business, craft or profession". (Preliminary article of the French Consumer Code). Therefore the various actors involved in mediation are now clearly defined and identifiable. This being recalled, the scope of this new mediation process is relatively broad as it applies to all domestic and cross-border (within the European Union) disputes between consumers and traders, relating either to sales contracts or service contracts, in all business areas, excluding disputes relating to (a) non-economic services of general interest; (b) health care services provided by health professionals; and (c) public providers of higher education. In addition, the mediation rules do not apply to (a) disputes between traders, (b) procedures launched before consumer complaint-handling systems operated by the trader, (c) direct negotiations between the consumer and the trader, and (d) procedures initiated by a trader against a consumer (Article L.151-3).

2. Rules of mediation

The rules relating to the implementation of the mediation process will be specified by a "décret en Conseil d'Etat" (Article L.152-1). At this stage thus, only very few practical details regarding the implementation of the mediation process are available except that :

- The mediation process is entirely free of charge for consumers (Article L.152-1) and confidential (Article L.152-3).
- Mediation can only be used provided that, *inter alia*, (i) the consumer has already attempted to resolve the matter directly with the trader through a written complaint; (ii) the consumer's grievance is not clearly unfounded or unfair; and (iii) the dispute has not already been considered by another mediator or by a court.
- The consumer must submit the dispute to a mediator within one year as of his written complaint to the trader (Article L.152-2).

The trader may use his own mediation services or propose to the consumer to submit the dispute to another mediator having jurisdiction over the dispute. When a mediator that has jurisdiction over all businesses operating in his business area exists, the trader must always allow the consumer to use this mediator (Article L.152-1). In addition, when a public mediator is qualified to carry out the mediation procedure, any other conventional mediation is, as a rule, save in exceptional circumstances, excluded (Article L.152-5).

3. Status of the mediator

The ordinance provides a certain number of safeguards codified under Articles L.153-1 - L.153-3 of the French Consumer Code to ensure, *inter alia*, the quality, independence and impartiality of the mediator.

A commission of assessment and control of consumer mediation is created in this respect.

This commission will maintain a list of mediators, including public mediators, complying with the requirements provided by the French Consumer Code in Articles L.153-1 - L.153-3.

4. New obligations on traders: information and assistance to consumers

In order to secure the right to mediation of consumers, traders shall:





- always propose to consumers the possibility of an amicable settlement via mediation, but cannot impose contractually such possibility to consumers (Article L.152-1);

- submit, pursuant to conditions determined by a *décret en Conseil d'Etat*, the relevant mediator(s) contact details (Article L. 156-1);

- concerning online sale traders, they shall also inform consumers on the measures implemented to create on their website an "online dispute resolution" (ODR) platform pursuant to Article 14 of Regulation (EU) no. 524/2013 of 21 May 2013 (Article L.156-2). Under Article 14 of this regulation, an electronic link to such ODR platform shall be included on the traders' website with specific information in this respect in their general terms and conditions of sale.

In practical terms, such new obligations on traders should imply necessary adjustments of their general terms and conditions of sale and of their e-commerce website.

Any failure to comply with such obligations shall be punished by an administrative fine of EUR 15,000 for legal persons (Article L.156-3), it being noted that, according to us, French courts could also considered any non-compliance with such obligations as an unfair/misleading commercial practice giving rise for offenders to higher criminal penalties (in particular criminal fines).

However, the provisions of this new ordinance will only take effect within two months as of the publication of the *décret en Conseil d'Etat* supposed to clarify the practical rules of mediation and the information to be provided to consumers in this context. Traders will have then a specific delay to comply with their new obligations.

1 Press release published by Caroline Delga dated 19 May

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