Provisional text

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 16 February 2017 (1)

Case C-75/16

Livio Menini
Maria Antonia Rampanelli
v
Banco Popolare — Società Cooperativa

(Request for a preliminary ruling from the Tribunale Ordinario di Verona (District Court, Verona, Italy))

(Reference for a preliminary ruling — Appeal against an order for payment — Directive 2008/52/EC — Mediation in civil and commercial matters — Article 1(2) — Scope — Directive 2013/11/EU — Alternative dispute resolution for consumer disputes — Article 1 — Obligation on the consumer to use a mediation procedure before referring the matter to a judicial body — Article 2 — Scope — Article 8(b) — Mandatory assistance of a lawyer — Article 9(2)(a) — Penalties for withdrawal from a mediation procedure)

I – Introduction

1. The Tribunale Ordinario di Verona (District Court, Verona, Italy) is hearing an appeal brought by two consumers against an order for payment obtained against them by a credit institution.

2. Under the Italian legislation transposing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, (2) the use of a mediation procedure, on the initiative of the parties making the appeal, is a precondition for the bringing of an appeal. The referring court finds, moreover, that the dispute in the main proceedings also falls within the scope of the Italian legislation transposing Directive 2013/11/EU on alternative dispute resolution for consumer disputes. (3) That court is unsure whether such a mandatory mediation procedure, although it complies with Directive 2008/52, is compatible with some of the provisions of Directive 2013/11.

3. In that context, the referring court asks the Court of Justice, first, about the definition of the respective scopes of those two directives. Secondly, it asks whether the provisions of Directive 2013/11 preclude a rule requiring a consumer to use a mediation procedure before he brings legal proceedings against a trader in respect of a service contract. Thirdly, the referring court asks the Court whether the detailed rules of the mediation procedure provided for by the Italian legislation, in so far as they

require the consumer to be assisted by a lawyer and impose penalties for withdrawal from that procedure without valid grounds, are in compliance with Directive 2013/11.

II – Legal context

A – *EU law*

1. Directive 2008/52

4. Article 1(2) of Directive 2008/52 provides that the latter applies, 'in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law'.

5. Article 3(a) of that directive 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 with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State'.

6. Article 5(2) of that directive provides that the directive 'is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after legal proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system'.

2. Directive 2013/11

7. Article 1 of Directive 2013/11 provides that the purpose of that directive is, 'through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution ["ADR"] procedures. This Directive is without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system'.

8. Article 2 of that directive provides:

'1. This Directive shall apply 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 Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.

2. This Directive shall not apply to:

...

(g) procedures initiated by a trader against a consumer;

...'

9. Article 3(1) and (2) of that directive reads as follows:

'1. Save as otherwise set out in this Directive, if any provision of this Directive conflicts with a provision laid down in another Union legal act and relating to out-of-court redress procedures initiated by a consumer against a trader, the provision of this Directive shall prevail.

2. This Directive shall be without prejudice to Directive 2008/52/EC.'

10. Article 4(1)(g) of Directive 2013/11 defines the 'ADR procedure' as being 'a procedure, as referred to in Article 2, which complies with the requirements set out in this Directive and is carried

out by an ADR entity'. An 'ADR entity' according to Article 4(1)(h) of that directive, 'means 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 in accordance with Article 20(2)'.

11. Article 5(1) of that directive provides: 'Member States … shall ensure that disputes covered by this Directive and which involve a trader established on their respective territories can be submitted to an ADR entity which complies with the requirements set out in this Directive'.

12. Article 8(b) of the same directive 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'.

13. 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'.

14. Under Article 20 of that directive:

'1. Each competent authority shall assess, in particular on the basis of the information it has received in accordance with Article 19(1), whether the dispute resolution entities notified to it qualify as ADR entities falling within the scope of this Directive and comply with the quality requirements set out in Chapter II and in national provisions implementing it, including national provisions going beyond the requirements of this Directive, in conformity with Union law.

2. Each competent authority shall, on the basis of the assessment referred to in paragraph 1, list all the ADR entities that have been notified to it and fulfil the conditions set out in paragraph 1.

...'

B – *Italian law*

1. Legislative Decree No 28/2010

15. Article 5 of 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 (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, 'Legislative Decree No 28/2010'), (4) which transposes Directive 2008/52, provides:

'1a. Any person who intends to bring legal proceedings concerning a dispute over joint ownership, property rights, division, inheritance, family contracts, leases, loans-for-use, business leases, claims for damages following a medical or health-related procedure, or defamation in the press or any other of the media, or over insurance, banking or financial contracts, shall be required, as a preliminary step, assisted by a lawyer, to carry out the mediation procedure within the meaning of the present decree or the settlement procedure within the meaning of Legislative Decree No 179 of 8 October 2007, or the procedure instituted under Article 128a of the Consolidated Law on banking and credit referred to in Legislative Decree No 385 of 1 September 1993, as subsequently amended, in respect of the fields regulated therein. Use of the mediation procedure shall be a precondition for bringing legal proceedings. ...

2a. Where the use of a mediation procedure constitutes a precondition for bringing legal proceedings, that condition shall be regarded as fulfilled if the first meeting with the mediator ends without agreement.

...

4. Paragraphs 1a and 2 shall not apply:

(1) in enforcement procedures, including appeal procedures, until a decision has been handed down on the requests for the grant and stay of provisional enforcement; ...'

16. Article 8(1) of that decree provides: 'at the initial and subsequent meetings [of the parties with the mediator], and until conclusion of the procedure, the parties must take part assisted by a lawyer'. Article 8(4a) states that 'where a party fails without valid grounds to participate in mediation, a court may infer evidence, within the meaning of the second paragraph of Article 116 of the Code of Civil Procedure, in the subsequent judgment. The court shall order any party who, in the cases mentioned in Article 5, has failed without valid grounds to participate in mediation to pay the State Treasury a sum equal to the single payment payable in respect of the proceedings'.

2. Legislative Decree No 130/2015

17. decreto legislativo 6 agosto 2015, n. 130, recante attuazione della direttiva 2013/11/UE sulla risoluzione alternativa delle controversie dei consumatori (Legislative Decree No 130 of 6 August 2015, transposing Directive 2013/11 on alternative resolution of consumer disputes, 'Legislative Decree No 130/2015'), (5) amended certain provisions of decreto legislativo 6 settembre 2005, n. 206, 'Codice del consumo' (Legislative Decree No 206 of 6 September 2005 on the Consumer Code, 'Legislative Decree No 206/2005'). (6) Article 1 of Legislative Decree No 130/2015, inter alia, replaced Article 141 of Legislative Decree No 206/2005, paragraphs 4 and 6 of which now provide:

'4. The provisions of the present title shall apply to voluntary out-of-court settlement procedures for the settlement, including via electronic means, of national and cross-border disputes between consumers and traders resident and established in the European Union, in the context of which the ADR entity offers a solution or brings the parties together in order to facilitate an amicable settlement and, in particular, to the mediation entities for consumer matters referred to in the special section under Article 16(2) and (4) of Legislative Decree No 28 of 4 March 2010, and to the other ADR entities set up or listed in the registers held and supervised by the authorities referred to in paragraph 1(i), following verification of the existence of the conditions and of the conformity of their organisation and their procedures with the present title.

…'

'6. The present title shall be without prejudice to the following provisions under which the out-of-court dispute resolution procedures are mandatory in nature:

(a) Article 5(1a) of Legislative Decree No 28 of 4 March 2010 ...'

III – The dispute in the main proceedings, the questions referred and the procedure before the Court

18. On 15 June 2015, Banco Popolare — Società Cooperativa obtained a court order against Mr Livio Menini and Mrs Maria Antonia Rampanelli to pay a sum of EUR 991 848.21. That sum corresponds to the debt balance owed under a current account credit agreement concluded between the latter and Banco Popolare. Mr Menini and Mrs Rampanelli appealed against the payment order to the Tribunale Ordinario di Verona (District Court, Verona) and sought to have its provisional enforcement suspended.

19. In support of the appeal, the latter claim that, despite their modest income, Banco Popolare repeatedly gave them credit under a number of successive agreements. That credit was intended to enable them to purchase an excessive number of shares, to a large extent in Banco Popolare itself or other companies within the same group. Banco Popolare, moreover, allegedly portrayed these as being safe investments.

20. The referring court is of the view that it will be necessary to dismiss the application for suspension of provisional enforcement. After that court has delivered the decision dismissing the application, the parties making the appeal must, in order for the appeal to be admissible, use a mediation procedure under Article 5(1a) and (4) of Legislative Decree No 28/2010 transposing Directive 2008/52 into Italian law.

21. That court holds that the dispute also falls within the scope of Legislative Decree No 130/2015, which transposes Directive 2013/11 into Italian law. The parties making the appeal have the status of 'consumers' within the meaning of Article 4(a) of that directive, having concluded with a 'trader', as defined in Article 4(b) of the directive, a 'service contract' within the meaning of Article 4(d) of the directive.

22. That court suggests, in essence, that Directive 2013/11 precludes the adoption of a mandatory mediation system for consumer disputes — which is, nonetheless, permitted under Article 5(2) of Directive 2008/52 –, such as that provided for by Legislative Decree No 28/2010.

23. First, recital 16 of Directive 2013/11 states that Member States should adopt a single ADR system for all consumer disputes. It would therefore preclude some consumer disputes being subject to a mandatory mediation system, whilst recourse to mediation for other consumer disputes would be voluntary. Article 5(1a) of Legislative Decree No 28/2010 provides for a mandatory system of mediation only for consumer disputes relating to banking, financial or insurance contracts.

24. Secondly, Directive 2013/11, although it allows traders to be required to take part in a mediation procedure, prevents Member States from imposing a similar requirement on consumers.

25. Accordingly, Article 5(2) of Directive 2008/52 conflicts with the system established by Directive 2013/11. The referring court suggests that this alleged conflict should be resolved by interpreting Article 3(2) of Directive 2013/11 in a way that avoids any overlap between the scopes of those two directives. Thus, Directive 2008/52 would only govern disputes to which Directive 2013/11 did not apply, namely, disputes that did not involve consumers, disputes concerning obligations arising from contracts other than sales or service contracts, and disputes excluded from the scope of that directive under Article 2(2) thereof (such as proceedings brought by traders).

26. That court points out, moreover, that Article 5(1a) and Article 8(1) of Legislative Decree No 28/2010 provide that it is mandatory for consumers to be assisted by a lawyer during the mediation procedure. Article 8(b) of Directive 2013/11 precludes this, however.

27. That court is also unsure whether Article 8(4a) of that decree complies with Article 9(2)(a) of that directive, since it allows a consumer to withdraw from the mediation procedure without suffering adverse consequences thereby in the context of subsequent legal proceedings only where there are valid grounds for withdrawing. According to the referring court, 'valid grounds' denotes objective reasons and does not include the consumer's dissatisfaction with the mediation procedure.

28. In those circumstances, the Tribunale Ordinario di Verona (District Court, Verona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In so far as it provides that Directive 2013/11 "shall be without prejudice to Directive 2008/52", must Article 3(2) of Directive 2013/11 be construed as meaning that it is without prejudice to the possibility for individual Member States of providing for compulsory mediation solely in those cases which do not fall within the scope of Directive 2013/11, that is to say the cases referred to in Article 2(2) of Directive 2013/11, contractual disputes arising out of contracts other than sales or service contracts, as well as those which do not concern consumers?

(2) 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, and, in any event, 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?'

29. The German and Italian Governments and the European Commission submitted written observations. The Italian Government and the Commission were represented at the hearing on

24 November 2016.

IV – Analysis

A – *The jurisdiction of the Court*

30. In their written and oral submissions, the interveners put forward two arguments calling into question the applicability of Directive 2013/11 in the dispute in the main proceedings and, hence, the relevance of the questions referred for a preliminary ruling as regards the resolution of that dispute and the jurisdiction of the Court to answer them.

31. First, the Italian Government observed at the hearing that the dispute in the main proceedings follows on from payment order proceedings instituted by a trader against consumers. Consequently, that dispute is covered by the exclusion from the scope of Directive 2013/11 provided for in Article 2(2)(g) of that directive.

32. Secondly, the German Government and the Commission pointed out that the order for reference does not state whether the mediation procedure instituted by Legislative Decree No 28/2010 is in fact an 'ADR procedure', taking place before an 'ADR entity', as those terms are defined in Article 4(1)(g) and (h) of Directive 2013/11. At the hearing, the Italian Government stated that this was not the case. Since it does not meet those definitions, the mediation procedure provided for by that decree does not, according to the interveners, fall within the scope of that directive, as defined in Article 2(1) thereof.

33. I shall respond below to each of those two arguments in turn, bearing in mind the presumption of relevance attaching to questions referred for a preliminary ruling.

34. In that regard, I note that that presumption can be dismissed only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (7) Accordingly, that presumption can be rebutted, inter alia, if those questions are manifestly irrelevant for the purposes of deciding the dispute in the main proceedings. (8) In particular, the Court has no jurisdiction to answer a question referred for a preliminary ruling where the provision of EU law for which interpretation is sought is manifestly incapable of applying. (9)

1. The scope of the exclusion from the scope of Directive 2013/11 provided for in Article 2(2)(g) of that directive

35. Article 2(2)(g) of Directive 2013/11 provides that the latter does not apply 'to procedures initiated by a trader against a consumer'. Recital 16 of that directive states in that regard that it should not apply 'to complaints submitted by traders against consumers'.

36. That exclusion reflects the purpose of that directive, which, as is clear from Article 1 thereof, is to contribute to the proper functioning of the internal market, whilst guaranteeing a high level of consumer protection, by ensuring that consumers may, throughout the European Union, have access to ADR procedures that comply with certain quality requirements for the purposes of submitting complaints against traders. Directive 2013/11, on the other hand, does not aim to ensure the availability of such procedures for traders in order for them to make claims against consumers.

37. In my view, that exclusion also means that, in the case of a trader making a complaint against a consumer and obtaining a judgment in its favour before the courts, that directive does not require that a consumer wishing to challenge that judgment should be able, instead of lodging an appeal against it, to contest that judgment before an ADR entity.

38. Consequently, it seems to me that the exclusion provided for in Article 2(2)(g) of Directive 2013/11 does cover a situation in which a consumer contests a payment order made against him on the application of a trader.

39. It might be different, however, in a case where a consumer, at the stage of an appeal against the order, submits a separate claim against the trader which, as such, could have been the subject of separate legal proceedings. In particular, where a consumer pleads, at the appeal stage, the invalidity of the contract or of some of its clauses, the application to have that invalidity established (and possibly to obtain damages as a result) constitutes, in addition to a plea in defence put forward in the context of the payment order procedure, a separate claim by the consumer against the trader. (10) Directive 2013/11 requires, in my view, that the consumer should be able to bring that claim before an ADR entity. (11) The exclusion provided for in Article 2(2)(g) of that directive would not then come into play so far as such a claim was concerned.

40. The question whether a consumer who appeals against a judgment is making a separate claim in that context against the trader, which, as such, could have been the subject of legal proceedings, is a matter for the domestic law of each Member State. That assessment therefore comes within the exclusive jurisdiction of the national court.

41. In the present case, the factual background described in the order for reference and reiterated in point 20 of this Opinion indicates that Mr Menini and Mrs Rampanelli contended in support of the appeal that Banco Popolare infringed the relevant law by granting them the credit in question. It is for the referring court to assess whether or not such a contention constitutes a separate complaint by the consumers against the trader.

42. In those circumstances, I consider that, although that dispute follows on from a payment order procedure instituted by a trader against consumers, it is not obvious that the provisions of Directive 2013/11 for which an interpretation is sought are inapplicable to the dispute in the main proceedings and, hence, that the questions referred for a preliminary ruling are not relevant for deciding that dispute.

2. The status of ‘ADR entity’ within the meaning of Article 4(1)(h) of Directive 2013/11 and the resulting consequences

43. Article 4(1)(g) of Directive 2013/11 defines the ‘ADR procedure’ as being a procedure carried out by an ‘ADR entity’. An ‘ADR entity’ is defined in turn in Article 4(1)(h) of the directive by reference to the list drawn up in accordance with Article 20(2) thereof. That list, which must be prepared by the competent authorities of each Member State and transmitted to the Commission, contains all the ADR entities that have been notified to them and which, after verification under Article 20(1), comply with the quality requirements set out in that directive and in the national provisions implementing it. (12)

44. As is clear from Article 2(1) of Directive 2013/11, that directive applies only to procedures ‘which involve the intervention of an ADR entity’. Recital 37 of that directive states, in that regard, that the quality requirements which it lays down are designed to apply to ‘ADR procedures carried out by an ADR entity which has been notified to the Commission’. In other words, that directive governs only procedures taking place before an ADR entity as defined in Article 4(h) of that directive.

45. That limitation of the substantive scope of Directive 2013/11, far from providing a rigid definition of the directive’s scope, can be explained from the perspective of the overall structure of the system it introduces.

46. I note in that regard that Article 5(1) of that directive, read in the light of Article 4(1)(h) thereof, requires each Member State to ensure, in any dispute covered by that directive which involves a trader established on its territory, access for consumers to (at least) one extra-judicial entity offering the qualities required by that directive and appearing on the national list drawn up in accordance with Article 20(2) thereof.

47. Provided they comply with that obligation, it is permissible for Member States to set up other extrajudicial entities that do not necessarily offer those qualities and do not therefore appear on that list. Directive 2013/11 does not harmonise all national out-of-court procedures; it is intended solely to ensure that each Member State provides for at least one ADR procedure complying with the requirements it lays down.

48. In the present case, the order for reference does not state whether the mediation procedure provided for by Legislative Decree No 28/2010 took place before an 'ADR entity' within the meaning of Article 4(1)(h) of Directive 2013/11, that is to say, an entity appearing on the list drawn up by the Italian authorities in accordance with Article 20(2) of that directive. Nor does it state whether consumers have an opportunity to bring a consumer dispute as referred to in Article 5(1a) of Legislative Decree No 28/2010 before any other entities that may appear on that list. (13) At the hearing, the Italian Government stated that the mediation body having jurisdiction in the context of the procedure instituted by Legislative Decree No 28/2010 does not appear on that list.

49. Assuming that that body was not listed — which is a matter for the referring court to ascertain –, I consider, in view of the above and like the interveners, that that mediation procedure does not come within the scope of Directive 2013/11. (14)

50. Those considerations do not, however, call into question the jurisdiction of the Court of Justice. In view of the uncertainty noted in point 49 of this Opinion, it is not obvious that the provisions of Directive 2013/11 for which an interpretation is sought are inapplicable to the dispute in the main proceedings and, hence, that the questions referred for a preliminary ruling are not relevant for deciding that dispute.

51. In any event, even if the mediation procedure provided for in Legislative Decree No 28/2010 did not come within the scope of that directive, this would not mean that the Court had no jurisdiction, since it would be necessary to consider that the Italian legislature had extended to that procedure, under its domestic law, the system provided for by that directive.

52. I note in that connection that where the national law of a Member State makes, directly and unconditionally, the provisions of EU law applicable to situations which do not come within the scope of those provisions in order to ensure identical treatment of those situations and of situations coming within the scope of EU law, the Court considers nonetheless that it has jurisdiction to interpret those provisions under Article 267 TFEU. That approach is justified in the interest of giving provisions of EU law a uniform interpretation. (15)

53. In the present case, the order for reference provides sufficiently precise evidence of such a renvoi to EU law. (16) It is clear from that order that the Italian legislation transposing Directive 2013/11 expressly includes within its scope the mediation procedure provided for by Legislative Decree No 28/2010. (17) In so doing, even if that procedure involves a body that does not appear on the list drawn up under Article 20(2) of Directive 2013/11, the Italian legislature did, at least, intend to regulate that procedure, in the same way as procedures taking place before duly listed ADR entities, by means of the national provisions transposing that directive.

54. In the light of all the above considerations, I take the view that the Court does have jurisdiction to answer the questions raised by the referring court.

B – *The relationship between Directive 2008/52 and Directive 2013/11*

55. By its first question, the referring court asks the Court for an interpretation of Article 3(2) of Directive 2013/11, which provides that that directive applies 'without prejudice to Directive 2008/52/EC'. That court seeks to ascertain whether the substantive scopes of those directives overlap or whether, on the other hand, Directive 2008/52 only governs cases to which Directive 2013/11 does not apply.

56. There is little doubt, in my view, that Article 3(2) of Directive 2013/11 permits some overlap of the respective scopes of that directive and of Directive 2008/52. In that regard, recital 19 in fine of Directive 2013/11 states that the latter 'is intended to apply horizontally to all types of ADR procedures, including [those] covered by Directive 2008/52'. As the Italian Government has stated, both those directives can govern the same dispute concurrently since, whilst Directive 2008/52 already regulates mediation procedures, Directive 2013/11 harmonises in more detail all ADR procedures. It therefore governs many aspects of those procedures which are not covered in Directive 2008/52. (18)

57. That being so, it is clear from the order for reference that the first question is based on the premiss that the dispute in the main proceedings is the scene of a conflict between those two directives. If that premiss is correct, it is necessary, in order to give a useful answer to the referring court, to provide clarification also regarding the rules applicable in a situation where the provisions of Directive 2008/52 and those of Directive 2013/11 come into conflict.

58. However, I doubt that that premiss is correct. As the Commission pointed out, such a conflict can arise only if a dispute falls simultaneously within the scope of both those directives and, in addition, the provisions of the two are genuinely incompatible. Neither of those conditions is met in the present case.

59. First, the dispute in the main proceedings does not fall outside the scope of Directive 2008/52, which, according to Article 1(2) of that directive, covers only cross-border disputes. (19) Those include, in essence, according to Article 2(1) of that directive, any dispute in which at least two of the parties are domiciled or habitually resident in different Member States. Since the parties making the appeal are domiciled in Italy and Banco Popolare is also established in that Member State, the dispute in the main proceedings does not meet that definition.

60. As recital 8 of Directive 2008/52 states, there is nothing to prevent Member States from applying that directive's provisions to internal mediation processes. The Italian legislature availed itself of that option by extending application of the provisions of Legislative Decree No 28/2010 to include national disputes. That recital cannot, however, have the effect of widening the scope of that legislative decree to include such disputes, contrary to the clear wording of Article 1(2) of that directive. As the Commission observed at the hearing, that recital merely recognises the option for Member States to apply, under their domestic law, provisions of EU law to situations that do not come within the scope of those provisions. (20)

61. Secondly, and in any event, I do not support the referring court's view that Article 3(a) and Article 5(2) of Directive 2008/52, in that they permit Member States to require the use of a mediation procedure before legal proceedings are brought, are incompatible with the system established by Directive 2013/11. Since that issue is the subject of the first part of the second question, I shall set out my reasoning later in my analysis. (21)

62. Given that the dispute in the main proceedings does not involve any conflict between the provisions of Directive 2008/52 and those of Directive 2013/11, there is no need to determine which of those provisions should take precedence.

63. For the sake of completeness, I would add, nonetheless, that, if such conflict did exist, Directive 2008/52 would prevail. Article 3(1) of Directive 2013/11 gives Directive 2008/52 precedence over other EU acts comprising provisions relating to alternative dispute resolution proceedings brought by a consumer against a trader, 'except where it explicitly provides otherwise'. Article 3(2) of that directive, read in the light of recital 19 thereof, constitutes such an explicit derogation in that it provides that that directive 'shall be without prejudice to Directive 2008/52'. That recital, besides stating that that directive prevails over Directive 2013/11, states that this is because Directive 2008/52 already sets out a framework specifically for systems of mediation for cross-border disputes.

C – *Compatibility with Directive 2013/11 of an obligation to use a mediation procedure*

64. In the first part of its second question, the referring court asks whether Article 1 of Directive 2013/11 precludes a national rule, such as Article 5(1a) of Legislative Decree No 28/2010, which makes the use of a mediation procedure on the initiative of the consumer a precondition for the bringing of legal proceedings by the consumer against a trader in respect of a contract for the provision of services.

1. No prohibition in principle on providing for an obligation on the consumer to use a mediation procedure

65. The Tribunale Ordinario di Verona (District Court, Verona) is unsure whether Article 5(1a) of Legislative Decree No 28/2010 is compatible with Article 1 of Directive 2013/11 for two separate

reasons.

66. First, the referring court asks whether that directive requires Member States to provide for a single, uniform ADR system for all consumer disputes. Article 5(1a) has the effect of separating the ADR systems for such disputes since it provides for a mandatory mediation system in some consumer cases (namely, according to that court, those which relate to banking, financial or insurance contracts), whilst other consumer disputes are subject only to a voluntary mediation system. (22)

67. Neither the wording nor the purpose of Directive 2013/11 supports such a requirement. (23) As I noted in point 37 of this Opinion, that directive is, in essence, intended to ensure that consumers throughout the European Union have access to ADR procedures that comply with certain harmonised quality requirements for the purposes of submitting complaints against traders. Those procedures must be 'independent, impartial, transparent, effective, fast and fair'. That directive by no means seeks, in addition to that objective, to ensure the singleness or uniformity of the detailed rules of those procedures within the same Member State for all consumer disputes. That conclusion also stems from the minimal nature of the harmonisation effected by the same directive, which is clear from Article 2(3) thereof.

68. Secondly, the referring court asks whether it is only the trader, or also the consumer, who may be required to take part in a mediation procedure in order to resolve a dispute falling within the scope of Directive 2013/11. (24)

69. In that regard, as that court stated, the wording of Article 1 of that directive contains some ambiguity, at least on the face of it. The first sentence of that article notes the voluntary nature of use by consumers of ADR procedures in order to assert their rights against traders. The second sentence of that article reserves the option for Member States to adopt legislation making participation in such procedures *mandatory*, provided that such legislation 'does not prevent the parties from exercising their right of access to the judicial system'. The text of that provision does not state whether the term 'participation' refers solely to participation by the trader in an ADR procedure initiated by the consumer, or also applies to the initiation of such a procedure by the trader.

70. The use of the words 'the parties' suggests that that term includes the involvement of both the consumer and the trader in the ADR procedure. However, recital 49 of Directive 2013/11 focuses more on the involvement of the trader, since it states that although that directive requires only that the participation of traders in ADR procedures should be mandatory, it does not prevent Member States from laying down such a requirement, provided the parties' right of access to the judicial system is respected.

71. Since the letter of Article 1 of Directive 2013/11, read in the light of recital 49 thereof, does not therefore allow for an unequivocal interpretation, it is necessary to have regard to the objectives and context of that provision and of the rules of which it is part. (25)

72. With this in mind, I note, first, that the wider legislative context of which that directive forms a part confirms the compatibility between the voluntary nature of the mediation and the imposition on the consumer of an obligation to use it. Directive 2008/52 sheds a light on this which is relevant for the interpretation of Article 1 of Directive 2013/11. (26)

73. Article 3(a) of Directive 2008/52 defines mediation as a voluntary process, whilst stating that that process may not only be initiated by the parties but also be ordered by a court or prescribed by the law of a Member State. Article 5(2) of that directive maintains, along the same lines, the option for Member States to make the 'use' of mediation compulsory under their national legislation. That form of words indicates clearly that Member States may provide that the consumer is required to use a mediation procedure. (27) As stated in recital 13 of that directive, the voluntary nature of the mediation resides not in the freedom of the parties to choose whether or not to use that process but in the fact that 'the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time'.

74. I can find no evidence to justify assigning a different meaning to the voluntary nature of ADR procedures as provided for in Article 1 of Directive 2013/11. Consequently, that provision cannot be

interpreted as preventing Member States from making the use of an ADR procedure a precondition for the bringing of legal proceedings by a consumer.

75. I would point out, secondly, that, so far as the detail and nature of ADR procedures not governed by Directive 2013/11 are concerned, Member States retain their full legislative autonomy, provided the directive remains effective. (28) That consideration results from the minimal nature of the harmonisation it carries out. (29) Recital 15 of that directive states, moreover, that the ADR system the directive seeks to put in place is intended to 'build on existing ADR procedures in the Member States and respect their legal traditions'.

76. There is nothing to suggest that an obligation on the consumer to use an ADR procedure would undermine the achievement of the objective of Directive 2013/11, as set out in Article 1 thereof, and, hence, the effectiveness of that directive. On the contrary, that obligation is designed to strengthen the effectiveness of the directive by ensuring that that out-of-court procedure is systematically used. (30) In addition, since the aim of that obligation is allegedly to lighten the burden on the court system — an objective which the Court has recognised as being legitimate (31) –, it also promotes, indirectly, access for consumers to the judicial system, the importance of which is confirmed in that Article 1. In the light of this, it would be counterproductive to interpret that provision as preventing Member States from imposing such an obligation on consumers.

77. I note also that the provisions of Directive 2013/11 must give way to those of Directive 2008/52 where there is any conflict between those provisions. (32) In the case of cross-border disputes, Article 5(2) of Directive 2008/52 authorises Member States to make the use of mediation compulsory. It would be paradoxical if Member States were, on the other hand, prevented from doing so in the case of national disputes, to which only Directive 2013/11 applies.

78. In the light of all those considerations, I take the view that Article 1 of Directive 2013/11 should be interpreted as permitting Member States not only to require the trader to take part in an ADR procedure but also to compel the consumer to use such a procedure before bringing proceedings before a judicial body. That option is, however, limited by the condition, laid down in Article 1 in fine of that directive, that such an obligation must not deprive the parties of their right of access to the judicial system — a condition whose scope I shall consider below.

2. Scope of the condition that mandatory recourse to mediation must not prevent access to the judicial system

79. Recitals 45 and 49 of Directive 2013/11 clarify the scope of the abovementioned condition by stating that, in the light of the right to an effective remedy and the right to a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), ADR procedures should not prevent the parties from having access to a court. Recital 45 states that if it has not been possible for a dispute to be resolved through an ADR procedure whose outcome is not binding on the parties, the latter should subsequently be able to initiate judicial proceedings.

80. Even before the adoption of Directive 2013/11, the Court held, in *Alassini and Others,* (33) that an obligation to implement an out-of-court settlement procedure, as a precondition for the bringing of legal proceedings, was compatible with the principle of effective judicial protection laid down in Article 47 of the Charter, where that procedure:

– did not result in a decision which was binding on the parties; (34)

– did not cause a substantial delay for the purposes of bringing legal proceedings;

– suspended the period for the time-barring of claims; (35)

– did not give rise to significant costs for the parties; (36)

– was not accessible only by electronic means (37) (which it was, however, for the national court to ascertain), and

– did not prevent the grant of interim measures in exceptional cases where the urgency of the situation so required (which it was also for that court to ascertain).

81. Although that judgment concerned national legislation requiring recourse to a settlement procedure, the reasoning adopted by the Court can be transposed to national legislations making recourse to other out-of-court procedures mandatory, such as the mediation procedure at issue in the main proceedings. Such legislations raise similar issues from the point of view of the right to effective judicial protection, since they introduce 'an additional step for access to the courts'. (38) They are all also likely to pursue legitimate objectives in the general interest, such as quick and less expensive handling of disputes and a lightening of the burden on the court system. (39)

82. Moreover, as recital 45 of Directive 2013/11 highlights, the condition laid down in Article 1 in fine of that directive is intended specifically to ensure that those ADR procedures comply with Article 47 of the Charter. Consequently, the circumstances taken into account by the Court in *Alassini and Others* (40) are also relevant for assessing whether an obligation to have recourse to an ADR procedure is compatible with Article 1 of that directive. (41)

83. Although it is for the referring court to make that assessment, it seems to me appropriate nonetheless to set out here some considerations that may assist that court in carrying out that task.

84. I note, first, that Article 141(4) of Legislative Decree No 206/2005, in the version resulting from Article 1 of Legislative Decree No 130/2015, provides that the procedures coming within the scope of that decree — among which is the mediation procedure provided for by Legislative Decree No 28/2010 –, are intended to bring about an amicable settlement or the proposal of a solution by the mediator or any other entity involved. Subject to confirmation by the referring court, the outcome of that procedure is not therefore binding on the parties.

85. Secondly, under Article 5(4) of Legislative Decree No 28/2010, there is an obligation to have recourse to mediation, in an enforcement procedure, only after a decision has been handed down on any requests for the grant and stay of provisional enforcement. Therefore, that obligation does not prevent, where appropriate and still subject to verification by the referring court, the grant of provisional measures.

86. I would add that the Italian legislation at issue in the main proceedings, in so far as it imposes penalties for withdrawal from the mediation procedure without valid grounds has one specific aspect — which was not at issue in *Alassini and Others* (42) — that may jeopardise the opportunity for the parties to assert their rights effectively before a court following that procedure. That problem will be examined in the context of the third part of the second question referred. (43)

D – *Compatibility of the detailed rules of the mediation procedure with Directive 2013/11*

1. The requirement to be assisted by a lawyer

87. The second part of the second question concerns, in essence, the compatibility with Articles 1 and 8(b) of Directive 2013/11, of a national legislative provision such as Article 8(1) of Legislative Decree No 28/2010, (44) which requires the parties to be assisted by a lawyer in the context of a mediation procedure.

88. The answer to that question is to be found without doubt in the wording of Article 8(b) of that directive, which provides that Member States may not lay down such a requirement in the context of ADR procedures coming within the scope of that directive. That consideration alone is sufficient to give a useful answer to the second part of the second question.

89. There is therefore no need to examine the argument, relied on by the Italian Government, that the requirement to be assisted by a lawyer during the mediation procedure, although it limits the rights laid down in Article 47 of the Charter, is necessary and proportionate for the achievement of an objective in the public interest. Since such a requirement infringes Article 8(b) of Directive 2013/11, it is not necessary to determine whether it complies with Article 47 of the Charter and Article 1 of that directive.

2. Penalties for withdrawal from the mediation procedure

90. In the third part of its second question, the referring court asks in essence whether Article 1 and Article 9(2) of Directive 2013/11 preclude a national legislative provision, such as Article 8(4a) of Legislative Decree No 28/2010, which states that parties must have valid grounds for not participating in a mediation procedure, otherwise they will incur penalties in the context of subsequent legal proceedings.

91. As stated in the order for reference, Article 8(4a) of Legislative Decree No 28/2010 penalises, inter alia, withdrawal from the mediation procedure by one of the parties, (45) where there are no valid grounds for so doing, and attaches adverse consequences to this for the party who has withdrawn in the context of subsequent legal proceedings. Thus, the court may, in the event of withdrawal without valid grounds, infer evidence from this when making its judgment. It must, moreover, impose a financial penalty on the party who has withdrawn.

92. As explained in the order for reference, Article 5(1a) and (2a) of Legislative Decree No 28/2010, read in conjunction with Article 8(4a) of that decree, institute the following system:

– The use of a mediation procedure is a precondition for the bringing of legal proceedings by the applicant (or, as in the present case, the party making the appeal) (Article 5(1a)).

– In order to meet that condition, it is enough for the parties to hold only one meeting with the mediator, even if that meeting ends without agreement (Article 5(2a)).

– However, although it is sufficient to have thus initiated an attempt at mediation in order to have access to the courtroom, withdrawal from the mediation procedure at a later stage entails, in the context of the legal proceedings, adverse consequences for a party who has withdrawn without valid grounds (Article 8(4a)).

93. Article 9(2)(a) of Directive 2013/11 provides that, in the case of a procedure ending with a decision proposed by the ADR entity, the parties must be able to withdraw from the procedure at any stage ‘if they are dissatisfied with the performance or the operation of the procedure’. (46) That provision adds, however, that, where the domestic law of a Member State provides for mandatory participation by the trader in ADR procedures, the right to withdraw shall apply only for the consumer. (47) The order for reference does not state, in that case, whether Legislative Decree No 28/2010 requires the trader to take part in the mediation procedure.

94. That provision means therefore that each of the parties — or at least the consumer — is completely free to withdraw from the procedure, at any stage, even on purely subjective grounds. National legislation attaching, in the context of subsequent legal proceedings, adverse consequences to withdrawal from the mediation procedure for the party who has withdrawn, such as those provided for in Article 8(4a) of that decree, restricts that freedom and therefore infringes Article 9(2)(a) of Directive 2013/11.

95. Furthermore, I consider that such legislation, by requiring recourse to an extrajudicial procedure whilst penalising withdrawal from it, limits the parties’ right of access to the judicial system to such an extent that it does not meet the condition laid down in Article 1 in fine of Directive 2013/11.

96. That condition would lose its effectiveness if it was permissible for Member States, whilst formally recognising the right of parties to have access to a court, to jeopardise the possibility for those parties to validly assert their rights through the judicial system. Hence, that condition means, in my view, that withdrawal from the ADR procedure should not entail adverse consequences for the party who has withdrawn — at least if he is the consumer (48) — in the context of subsequent legal proceedings.

97. The Commission, however, has contended that, before finding that it is incompatible with Article 1 and Article 9(2)(a) of Directive 2013/11, the referring court should determine whether Article 8(4a) of that decree could be interpreted so as to avoid that incompatibility.

98. I note in that connection that, according to settled case-law, the national courts are bound to interpret their national law, so far as possible, in a manner that ensures conformity with EU law. (49) That obligation to interpret national law in conformity with EU law cannot, however, oblige those courts to give an interpretation of their national law *contra legem*. (50)

99. In particular, the Commission has contended, correctly, that compliance of Article 8(4a) of Legislative Decree No 28/2010 with the abovementioned provisions of Directive 2013/11 could be ensured by interpreting the concept of 'valid grounds' in a way that included dissatisfaction of the parties (or, at least, of the consumer) (51) with the performance or the operation of the mediation procedure. Although it is clear from the order for reference that that court considered a priori that the concept of 'valid grounds' refers only to objective considerations, (52) it is for that court to determine whether that Article 8(4a) may nevertheless be interpreted more broadly.

V – Conclusion

100. In the light of all the above, I suggest that the Court should answer as follows the questions raised by the Tribunale Ordinario di Verona (District Court, Verona, Italy):

1. Article 3(2) 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, must be interpreted as meaning that Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters applies to all disputes falling within the scope of the latter, as limited by Article 1(2) thereof, even if they also fall within the scope of Directive 2013/11, as limited by Article 2 of that directive.

2. Article 1 of Directive 2013/11 does not preclude national legislation which requires the use by a consumer of an alternative dispute resolution procedure, such as a mediation procedure, as a precondition for the bringing of legal proceedings by that consumer against a trader in respect of a service contract, provided such legislation does not prevent the parties from having access to the judicial system, which is a matter for the national court to determine.

3. Article 8(b) of Directive 2013/11 precludes national legislation which, in respect of disputes falling within the scope of that directive, as limited by Article 2 thereof, requires the parties to be assisted by a lawyer in the context of an alternative dispute resolution procedure, such as a mediation procedure.

4. Article 1 and Article 9(2)(a) of Directive 2013/11 preclude national legislation which penalises withdrawal without valid grounds from an alternative procedure, such as a mediation procedure, for the resolution of disputes falling within the scope of that directive, as limited by Article 2 thereof, by attaching to such withdrawal adverse consequences for the party who has withdrawn in the context of subsequent legal proceedings, unless the concept of valid grounds includes dissatisfaction on the part of the party who has withdrawn with the performance or the operation of the alternative dispute resolution procedure, which is a matter for the national court to determine.

   Where national law provides for mandatory participation by a trader in an alternative dispute resolution procedure, Article 1 and Article 9(2)(a) of Directive 2013/11 preclude such legislation only in so far as it penalises withdrawal by the consumer from the procedure without valid grounds.

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1 – Original language: French.

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2 Directive of the European Parliament and of the Council of 21 May 2008 (OJ 2008 L 136, p. 3).

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3 – Directive of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ 2013 L 165, p. 63).

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4 – GURI No 53 of 5 March 2010.

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5 – GURI No 191 of 19 August 2015.

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6 – GURI No 235 of 8 October 2005.

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7 – See, inter alia, judgment of 8 December 2016 in *Eurosaneamientos and Others* (C-532/15 and C-538/15, EU:C:2016:932, paragraph 28 and the case-law cited).

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8 – See judgment of 24 October 2013 in *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 38 and the case-law cited).

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9 – Judgments of 18 October 1990 in *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 40), and of 21 June 2012 in *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraph 17 and the case-law cited).

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10 – The Italian Government stated at the hearing that, under Italian law, the procedure for obtaining a payment order is not an adversarial procedure, since the debtor is not involved in it. On the other hand, the procedure for an appeal against such an order, initiated by the debtor, requires the appearance of the creditor. If that is the case, that circumstance shows that in that context it is only at the appeal stage that the consumer may put forward any claims he may have against the trader.

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11 – That requirement stems specifically from Article 5(1) of Directive 2013/11.

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12 – The preparatory work for Directive 2013/11 shows that those obligations to notify and list are intended to create a ‘quality label’ at EU level to enable consumers to identify entities meeting the minimum quality standards required by that directive (see report of the European Parliament’s Committee on the Internal Market and Consumer Protection of 16 October 2012 (A7-0280/2012, pp. 31 and 75), and the opinion of the Economic and Social Committee of 28 March 2012 (INT/609 – EESC 803/2012, pp. 4 and 5)). In line with this, the fourth subparagraph of Article 20(2) of that directive provides that, if an entity included on the national list of ADR entities no longer complies with the requirements laid down in that directive, that entity must, after a certain period of time, be removed from that list.

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13 – In that regard, nor does the order for reference state whether the two other procedures mentioned in Article 5(1a) of Legislative Decree No 28/2010 took place before entities contained in the list prepared by the Italian authorities or whether those procedures are available for consumers in a situation such as that at issue in the main proceedings.

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14 – That consideration does not prejudice the possibility of finding, in the event that a dispute falling within the scope of Directive 2013/11 cannot be brought in a Member State before any entity listed in accordance with Article 20(2) of that directive, that that Member State has failed to fulfil its obligation to ensure access for consumers to an ADR procedure under Article 5(1) of that directive.

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15 – See, inter alia, judgments of 18 October 2012 in *Nolan* (C-583/10, EU:C:2012:638, paragraphs 46 and 47 and the case-law cited) and of 16 June 2016 in *Rodríguez Sánchez* (C-351/14, EU:C:2016:447, paragraphs 61 and 62). That case-law developed following the judgment of 18 October 1990 in *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraphs 35 to 37), in which the Court held that it had jurisdiction to interpret a provision of EU law, in the context of a preliminary reference, where the national law of the Member State concerned refers to the content of that provision in order to regulate a situation which is purely internal to that State.

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16 – The case concerned is different in that respect from those in which the Court found that it had no jurisdiction or that the questions referred were inadmissible due to the lack of evidence of a direct and unconditional renvoi to EU law (see, inter alia, judgments of 21 December 2011 in *Cicala* (C-482/10, EU:C:2011:868, paragraphs 23 to 30) and of 16 June 2016 in *Rodríguez Sánchez* (C-351/14, EU:C:2016:447, paragraphs 65 to 67), and orders of 9 September 2014 in *Parva Investitsionna Banka and Others* (C-488/13, EU:C:2014:2191, paragraphs 30 to 36) and of 12 May 2016 in *Sahyouni* (C-281/15, EU:C:2016:343, paragraphs 30 to 33)).

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17 – Article 141(4) of Legislative Decree No 206/2005, in the version resulting from Article 1 of Legislative Decree No 130/2015.

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18 – See, in particular, Articles 5 to 17 of Directive 2013/11.

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19 – Article 2(1) of Directive 2013/11 provides, on the contrary, that the latter applies to both cross-border disputes and domestic disputes.

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20 – See, in that regard, point 53 of this Opinion.

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21 – Points 65 to 79 of this Opinion.

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22 – See point 24 of this Opinion.

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23 – In particular, recital 16 of Directive 2013/11, which the referring court relied on in support of that position, justifies neither the existence of an obligation for each Member State to provide for a single, uniform ADR system for all consumer disputes, nor even the alleged preference of the EU legislature for such a system. That recital states simply that that directive applies to all consumer disputes (apart from those excluded from the directive's scope under Article 2(2) thereof).

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24 – See point 25 of this Opinion.

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25 – See, inter alia, judgment of 16 July 2015 in *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 35).

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26 – As was held in the judgment of 6 October 1982 in *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 20), the provisions of EU law as a whole may be part of the context in which one of the provisions of that law belongs.

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27 – See, in that regard, Resolution of the European Parliament of 13 September 2011, on the implementation of the directive on mediation in the Member States (2011/2026 (INI), paragraphs 7 and 8). The Parliament recognises in that resolution, expressly referring to the Italian example, that Article 5(2) of Directive 2008/52 allows Member States to make an attempt at mediation a precondition for the bringing of legal proceedings.

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28 – See, by analogy, judgments of 18 March 2010 in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 44) and of 12 July 2012 in *SC Volksbank România* (C-602/10, EU:C:2012:443, paragraphs 94 and 95).

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29 – Article 2(3) of Directive 2013/11.

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30 – See judgment of 18 March 2010 in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 45).

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31 – Judgment of 18 March 2010 in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 64).

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32 – See point 64 of this Opinion.

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33 – Judgment of 18 March 2010 (C-317/08 to C-320/08, EU:C:2010:146, paragraph 67).

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34 – I note in that connection that if the bringing of legal proceedings was conditional on the prior use of an ADR procedure whose outcome was binding on the parties, that procedure would in effect replace legal proceedings and thus prevent the parties from asserting their rights before the courts.

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35 – Article 12 of Directive 2013/11 now precludes the parties being deprived of a legal remedy due to the expiry of the time bar during the ADR procedure.

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36 – Article 8(c) of Directive 2013/11 now requires ADR procedures to be accessible for consumers free of charge or at a nominal fee.

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37 – Article 8(a) of Directive 2013/11 now requires that ADR procedures should be accessible both online and offline.

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38 – See judgment of 18 March 2010 in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 62).

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39 – See judgment of 18 March 2010 in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 64).

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40 – Judgment of 18 March 2010 (C-317/08 to C-320/08, EU:C:2010:146, paragraph 67).

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41 – Some of those circumstances correspond, moreover, to requirements stemming from other provisions of Directive 2013/11 (see footnotes 35 to 37 of this Opinion).

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42 – Judgment of 18 March 2010 (C-317/08 to C-320/08, EU:C:2010:146).

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43 – See points 91 to 100 of this Opinion.

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44 – Article 5(1a) of Legislative Decree No 28/2010 also provides that the applicant must be assisted by a lawyer for purposes of the mediation procedure.

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45 – At the hearing, the Italian Government contended that, in the light of Article 5(2a) of Legislative Decree No 28/2010, 'failure to participate' does not cover a situation in which the applicant, having initiated a mediation procedure, withdraws from it. That concept covers, on the contrary, a situation in which that party refrains from initiating such a procedure by refusing to arrange even a first meeting. Subject to confirmation by the referring court, I find that interpretation difficult to reconcile with Article 5(1a) of that decree, which provides that the application for legal proceedings is inadmissible if the applicant has not initiated a mediation procedure. Hence, Article 8(4a) of that decree cannot, it seems to me, penalise such conduct unless a court has been duly seised of the matter.

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46 – Since the mediation procedure provided for in Article 141(4) of Legislative Decree No 206/2005 is intended to bring about the proposal of a solution to the parties (see point 85 of this Opinion), that procedure is of the type envisaged in Article 9(2)(a) of Directive 2013/11. ADR procedures whose outcome is binding on the parties are, for their part, covered by Article 9(3), which provides that the rights referred to in Article 9(2), including the right to withdraw, apply only to the consumer. The latter has therefore, in any event, the right to withdraw from the procedure at any stage if he is dissatisfied with the performance or the operation of the procedure.

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47 – Thus, if a Member State obliges a trader to take part in the ADR procedure, that Member State may require the continuing involvement of the latter in that procedure. However, if a Member State does not oblige a trader to take part in the ADR procedure, but the trader takes part in it voluntarily, the latter cannot be a 'captive' of that procedure. The Member State must therefore guarantee him the right of withdrawal provided for in Article 9(2)(a) of Directive 2013/11.

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48 – See point 94 of this Opinion.

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49 – See, inter alia, judgments of 5 October 2004 in *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 113 and the case-law cited) and of 15 January 2014 in *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraphs 38 and 39).

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50 – See, inter alia, judgment of 19 April 2016 in *DI* (C-441/14, EU:C:2016:278, paragraph 32 and the case-law cited).

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51 – See point 94 of this Opinion.

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52 – See point 28 of this Opinion.