The legality requirement of the ADR Directive: just another paper tiger?

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Articles

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I. Introduction

The EU Directive on alternative dispute resolution (ADR)[1] obliges Member States to facilitate access by consumers to out-of-court procedures and to ensure that business-to-consumer (B2C) disputes can be submitted to an ADR entity (Article 5). It aims at making available alternative ways of resolving disputes between consumers and businesses which are fast, simple and affordable. The ADR Directive sets out many requirements ADR schemes established under said Directive must comply with: expertise, impartiality, transparency, effectiveness, fairness and legality. This paper focuses on the legality requirement laid down in Article 11 paragraph 1 lit (a), which states that: '*Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer: (a) in a situation where there is no conflict of laws, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident*; (…)'[2]

This provision in a nutshell requires Member States to warrant that ADR rulings that bind the consumer do not derogate from mandatory law to his detriment. The requirement is limited to procedures that impose a decision on the consumer (such as binding consumer arbitration),[3] which constitute a minority of all out-of-court procedures.

The ADR Directive enhances the role of the law in ADR procedures.[4] In Wagner's words: '*to achieve the desired "high level of consumer protection"*' (…) '*the Directive envisages something like quasi-judicial proceedings so that the outcome of the process mimics or at least approximates the outcome that would have been reached in a court of law*'.[5] Article 11 further increases this role for ADR schemes that bind the consumer to the outcome of the procedure. The question is whether Article 11 paragraph 1 lit (a) can be expected to effectively achieve the high level of consumer protection aimed at by the ADR Directive.

This paper is structured as follows. Section II elaborates on the reason why the legality requirement has been introduced in the ADR Directive. Section III, focusing on the well-developed system of consumer ADR in the Netherlands, puts decisions imposing a decision on the consumer to the test of Article 11. Section IV discusses how the ADR Directive purports to enforce the legality requirement. Section V depicts the implementing measures of Article 11 in different Member States, including the Netherlands. The selected Member States are to some (yet differing) extent familiar with consumer ADR schemes which impose binding decisions on the consumer. Besides answering the central question, Section VI finally explores what measures could be taken to warrant the effectiveness of the legality principle of Article 11.

II. The rationale of the legality requirement of Article 11

1. A brief history of the legality principle in the context of ADR

The application of the principle of legality to consumer ADR schemes is not new and goes back to the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.[6] In the preamble of the Recommendation the legality principle is motivated as follows: '*Whereas the out-of-court bodies may decide not only on the basis of legal rules but also in equity and on the basis of codes of conduct; whereas, however, this flexibility as regards the grounds for their decisions should not lead to a reduction in the level of consumer protection by comparison with the protection consumers would enjoy, under Community law, through the application of the law by the courts*;'

Surprisingly, the draft ADR Directive did at first not incorporate the legality principle. We can only have an educated guess about the reasons why the principle was left out of the initial proposal. That choice, presumably, has been triggered by some effective lobbying by ADR entities fearing the requirement would hinder the flexibility that characterizes their decision-making. The Commission may have taken the stance that the obligation to 'apply' legal standards would go against the very nature of *alternative* dispute resolution. It may also have adopted the viewpoint that ADR entities already largely abide by those standards even when they rule in equity or on the basis of private regulation such as codes of

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1 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 [2013] OJ L165/63. This Directive is linked to the Online Dispute Resolution Regulation establishing a digital platform for out-of-court dispute resolution: Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/1.

2 Para 1 lit (b) and (c) relate to situations to which the Rome I Regulation respectively the Rome Convention of 19 June 1980 applies. This paper has no bearing on the relatively underdeveloped cross-border consumer ADR. The implications of these paragraphs in terms of legal knowledge of ADR entities however are considerable. See MBM Loos, 'Consumer ADR After Implementation of the ADR Directive: Enforcing European Consumer Rights at the Detriment of European Consumer Law', Amsterdam Law School Legal Studies Research Paper No 2015-42, (2016) 24 European Review of Private Law, Issue 1, 61-79.

3 N Reich, 'Party Autonomy and Consumer Arbitration in Conflict: A "Trojan Horse" in the Access to Justice in the EU ADR-Directive 2013/11?' (2014) 10 European Review of Contract Law 258-280.

4 Other provisions emphasizing the relevance of the law are: Recital 31, Art 6 para 1 lit (a), Art 8 lit b, Art 9 para 2 lit (b) sublit (iii) etc. See G Wagner, 'Private Law Enforcement Through ADR: Wonder Drug or Snake Oil?' (2015) 51 Common Market Law Review 175-176.

5 Wagner (n 4) 175.

6 [1998] OJ L115/31.

conduct (in which case the introduction of this requirement should in our view not be problematic).[7]

The legality requirement was added to the Directive after the European Economic and Social Committee (EESC)[8] and the European Parliament (EP)[9] had urged the Council to do so. Both entities were advocating the inclusion of the legality principle into the Directive to make the protection from the (not directly applicable) Rome I Regulation[10] available to consumers in cross-border ADR disputes. The conflict of law regime of the Rome I Regulation provides that consumer contracts are either governed by the law of the consumer's residence, or by the law chosen by the parties. Yet, a choice of law should not deprive the consumer of the protection afforded to him under the law of his country of residence.[11]

2. Article 11 entails a protection rather than a legality requirement

Why does the Directive require that an ADR decision that imposes a solution on the consumer grants the protection and rights bestowed upon him by national mandatory law? Article 11 departs from the assumption that *mandatory* law protects consumers ('*the protection afforded to him by the provisions that cannot be derogated from*'). Mandatory law comprises those rules that cannot be set aside by the parties to the contract. What qualifies as mandatory law varies across Member States.[12] Some mandatory provisions do not leave any room for private autonomy at the national level, because these provisions serve national interests encapsulated in the concept of public order. So-called 'semi-mandatory' law entails provisions that solely aim at protecting the weaker party.[13] Article 11 also pertains to those semi-mandatory provisions that may be deviated from to the benefit of the consumer. The legality requirement is all about doing justice to the consumer who is bound by an ADR decision and not so much about triggering a behavioral change from the professional.[14] Weber however stresses that ADR solutions which are oriented towards court rulings can send encouraging signals to the market and enhance compliant behavior with regard to ADR.[15]

The inclusion of the legality requirement seems to be justified if we go by earlier research. Hodges et al have stated that '*the merging position is that CADR (ie consumer ADR – CMDSP and MWK) is good for facts whereas courts are good for law. For relatively modest consumer claims, neither forum is particularly good at the other function. CADR should not decide issues of law.*'[16] Seemingly, ADR boards are not the appropriate forum for the (correct) application of mandatory law. So it looks like additional safeguards such as the legality requirement are needed to ensure that the consumer is granted the mandatory level of consumer protection. Yet, the legality requirement does not oblige ADR entities that impose solutions on the consumer to apply mandatory law as such. A national law requiring a binding ADR scheme to decide cases on the basis of equity or fairness does not directly interfere with the Directive. Conflict would only surface if a decision based on equity or fairness deprives the consumer of the protection afforded to him by mandatory law. In that respect Article 11 entails not so much a legality requirement as a *protection* requirement. Having said that, binding ADR schemes can only guarantee the level of protection embedded in mandatory law by at least (implicitly) acknowledging this law.

The above statement of Hodges et al also reveals a tension between the harmonization of consumer protection law and the stimulation of out-of-court dispute resolution.[17] Mandatory *consumer* law of European origin aims at conferring upon consumers a level of protection which enables them to participate in cross-border trade and which can boost the internal market. To give effect to these goals, consumers can for example neither be bound by unfair contract terms[18] nor denied the right to obtain the repair or replacement of a product which is not in conformity with the contract of sale.[19] ADR entities are presumably not capable of ensuring the development of a uniform (be it minimum or maximum) level of consumer protection since they have difficulty in applying the law (correctly). Another obvious barrier to ensuring a uniform application of rules is the fact that ADR bodies cannot refer preliminary questions to the Court of Justice of the EU (CJEU). Article 11, however, does not purport to solve this tension. The Directive puts the emphasis on protecting the consumer and disregards the harmonized application of consumer protection law as such, since it does not require ADR schemes to apply the law directly. The Directive actually refers to *national* mandatory law: '*the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident*'. It goes without saying that national mandatory law also encompasses the measures implementing the protection rules emanating from the above-mentioned European directives.

As was stated before, Article 11 was inspired by the Rome I Regulation. The International Private Law (IPL) rules underlying Article 11 are meant to protect the consumer in *cross-*

7 See on the presumption of fairness of codes of conduct: CMDS Pavillon, 'The Interaction between the Unfair Commercial Practices Directive and Self-Regulation: The Case of Codes of Conduct' in WH van Boom, A Garde, NO Akseli (eds) *The European Unfair Commercial Practices Directive. Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014) 137-172.

8 Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) COM(2011) 793 final – 2011/0373 (COD), para 4.6

9 Position of the European Parliament adopted at first reading on 12 March 2013 with a view to the adoption of Directive 2013/…/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

10 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

11 Consumer directives such as the Unfair Contract Terms Directive (UCTD) define the overriding mandatory status of consumer rules in international private law in accordance with the Rome I regulation. Article 6 para. 2 UCTD obliges 'Member States to take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States'.

12 See MW Hesselink, 'Non-Mandatory Rules in European Contract Law' (2005) 1 European Review of Contract Law 56-62.

13 For a critical note on the consumer being a weaker party see: G Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights' in A Ogus and WH van Boom (eds), *Juxtaposing Autonomy and Paternalism in Private Law* (Hart Publishing 2011) 9-42.

14 Wagner (n 4) 168.

15 F Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes? – An Assessment of the Incentivizing Effects of the ADR Directive' (2015) 38 Journal of Consumer Policy 282.

16 CJS Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012) 415. Another reason for being reticent about letting CADR entities decide issues of law is their incapacity to make a preliminary referral to the CJEU (since consumer law is largely Europeanized).

17 H-W Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 Journal of Consumer Policy 292.

18 Directive 1993/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts [1993]OJ L 95/29.

19 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

border situations. Interestingly, paragraph 1 lit (a) copies a provision pertaining to the European conflict of law regime in order to cover purely domestic situations, where there is no conflict of law whatsoever. Most ADR disputes do not bear any cross-border dimension and the ADR Directive will assumingly mostly apply to purely domestic situations. It thus appears that the IPL-inspired Article aims at protecting the consumer in '*cross-fora*' situations: by opting for a binding extra-judicial solution, the consumer does not forfeit the protection bestowed upon him by national law as applied by judicial courts. This provision indirectly tackles potential discrepancies between self-regulatory standards, ie private regulation that ADR entities apply in their decision-making, and the applicable (mandatory) law.

3. The limited scope of applicability of Article 11

If the breach of mandatory law is detrimental to the consumer then the question arises why the legality requirement of the ADR Directive – unlike that of the Recommendation of 1998 – only applies to the overall limited amount of decisions that *impose a solution* on the consumer. Why should ADR entities be allowed to disregard the level of protection provided for by mandatory law insofar as the decision does *not* impose a solution on the consumer? In the latter case, the ADR body is only obliged to inform the parties, before agreeing or following a proposed solution, that the proposed solution may be different from an outcome determined by a court applying legal rules.[20]

An obvious reason for this differentiation is that inasmuch as the decision is *not imposed* on the consumer, he is entitled to ignore this decision. Another reason may be that acknowledging mandatory law goes at the expense of the time- and cost-efficiency of ADR procedures and that the drafters of the Directive have intended to contain this negative collateral effect of Article 11. It goes without saying that quality of content comes at a price: solutions must be tested against the law by legally trained ADR entities. The attractiveness of ADR for both business and consumer resides in its flexibility and accessibility in terms of costs. This leads us to wonder whether Article 11 somehow is designed to *discourage* binding ADR by restricting potentially costly additional requirements to this type of ADR.[21]

From the point of view of consumer protection and for the sake of consistency, an extension of Article 11 to all types of consumer ADR appears appropriate. The difference between binding ADR and non-binding ADR should in our opinion not be overemphasized. Even if the consumer is not bound by a decision, he might in practice often not have many other options but to accept it. As a matter of fact, the consumer is, as the weaker party, largely ignorant of his rights and hence he might not realize that the *proposed* solution breaches mandatory law. Even if he does, he may not be able to negotiate an alternative solution nor dispose of adequate means to take the dispute before a court. The inequality of knowledge and bargaining powers between business and consumer underlying the harmonization of European consumer law does not all of a sudden disappear when a solution is only being proposed to a consumer (instead of being imposed upon him). The quality of a non-binding decision therefore may be as important to the consumer as the quality of a binding one.

The scope of Article 11 is also limited for it does not apply to a binding decision which has been issued by an ADR scheme that has *not been officially accredited* (this stems *a contrario* from Article 20). Since it is not mandatory for ADR schemes to apply for accreditation (this stems *a contrario* from Article 19), some will continue to be regulated by national law. An ADR scheme waiving accreditation will only have to face the consequences of not being publicly recognized as an ADR entity in the sense of the Directive. These consequences may be limited. The lack of public recognition will not necessarily lower the attractiveness of an ADR scheme that has proven to be very efficient in solving disputes. Moreover, consumers will generally not be informed of the requirements officially accredited entities have to meet. Non-accredited entities may continue to issue binding decisions without being subject to the quality requirements of the Directive. In the Netherlands, the very productive and well-known Dutch arbitration board for the building industry (the *Raad van Arbitrage voor de Bouw*), which can decide disputes between a consumer and a builder, has for instance not sought to obtain an accreditation.

III. The significance of the legality requirement: the case of the Netherlands

1. The actual impact of Article 11

The impact of Article 11 depends on the occurrence of binding ADR and on the applicability of mandatory law to the dispute at hand. Although few national ADR schemes issue decisions that are legally binding on consumers, there are some exceptions. In for instance the Netherlands, the UK, Spain and Ireland there are some ADR schemes that can impose a solution on consumers (often an arbitration court).[22]

ADR is well-developed in the Netherlands as is reflected by the successful complaints-handling system operated by the Consumer Complaints Boards.[23] The thousands of decisions (called binding 'advices') taken by those boards each year are generally binding on both parties – they have the force of an agreement between business and consumer.[24] The 'binding advice procedure' used by the Boards resembles arbitration to some extent, but there are differences.[25] In this paper we take the Nether-

20 This information would however not prove very useful if a consumer – provided he has a choice to bring his claim before a court – does not know what a court decision would entail (Article 9 para 2 lit (b) sublit (iii) ADR Directive).

21 The late professor Reich however reads in the Directive a more welcoming stance as to binding ADR. See N Reich, 'A 'Trojan Horse' in the Access to Justice – Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?' (2014) 10 European Review of Contract Law 258.

22 Each Member State has its own set of rules governing binding types of ADR, a common rule being that the consumer has agreed with taking the dispute before this particular ADR entity. In this paper, we will not delve into the ADR landscape existing in these Member States; we refer the reader to the excellent overviews provided by Hodges et al (n 16).

23 T van Mierlo, 'Self-regulation in the consumer field: the Dutch approach' in J Rutgers (ed), *European Contract Law and the Welfare State* (Europa Law Publishing 2011).

24 Both the consumer and the professional must have agreed to the binding nature of the ADR solution, although some professional branches are legally obliged to adhere to the ADR scheme. This obligation seems at odds with Art 47 of the Charter of Fundamental Rights of the EU.

25 A notable difference is that an enforcement order cannot be obtained. However, since the agreement has the force of a contractual agreement, a party may request performance before a court. The decision thus is binding; it is not possible to lodge an appeal against a decision made by the Complaints Board. The only way to have a decision tested is to submit it to an ordinary court within two months after it was issued. A judge can, however, only marginally test the decision, as provided for in Art 904, Book 7 of the Dutch Civil Code. This means that a judge will only annul a binding decision if the decision, according to standards of reasonableness and fairness, is unacceptable in connection with its content or its establishment under the given circumstances. This means that a decision by a Complaints Board will only be rejected by the courts if the Complaints Board has for example ignored the fundamental principles of procedural law, such as the right of both parties to be heard. See for more details on the binding advice procedure (http://ec.europa.eu/civiljustice/adr/adr_net_en.htm); MW Knigge and EN Verhage, 'The impact of the ADR Directive on article 7:904 par 1 DCC explored. What is 'unacceptable according to standards of reasonableness and fairness' after the implementation of the Directive?', Leiden Yearbook of Private Law (BWKJ), para 1-2, (Wolters Kluwer 2016).

lands as a case study to illustrate the expected impact of the inclusion of the legality requirement into the Directive.

If mandatory law rarely applies to disputes brought before ADR schemes, the *raison d'être* of the legality requirement can be questioned. A recent Dutch study has tested 260 publicly available[26] decisions imposed on consumers by Dutch ADR entities against Article 11.[27] This assessment, which is not random since it is based on decisions that have been (selected to be) published, among other things, analyzed the applicability of mandatory law to the disputes at hand. It was found that not every dispute pertains to an issue of law (but instead, for example, a disagreement about the reading of the energy meter). Further, if a dispute constitutes a legal dispute, the applicable law is not always mandatory in nature (the statutory provisions applicable to safe custody agreements – think of doghouses or bicycle storage – are for instance non-mandatory according to Dutch law). Mandatory law however applied to a large majority of the binding decisions under investigation (211/260).[28] In many cases the applicable mandatory rules were those regarding consumer sales (warranty and conformity issues) and unfair contract terms. The Dutch Complaint Boards are largely subject to two-sided general terms of contract (GTC) agreed upon by both traders and consumer organisations, which often form the benchmark the Boards apply in their rulings. These GTC generally mirror and sometimes outreach the level of protection warranted by law. They are however not exempt from testing against mandatory rules on contract terms.[29] The relevance of Article 11 should therefore not be underestimated as far as Dutch ADR is concerned.[30]

2. The rate of compliance with mandatory protection standards

The impact of Article 11 does not only hinge on its scope of application but also on the rate of compliance of binding ADR decisions with mandatory protection standards. The aforementioned Dutch study also determined how many of the consulted 211 (binding) decisions falling within the scope of mandatory law actually met the legality requirement of Article 11. The inclusion of this requirement into the Directive could have a substantial impact should binding decisions by ADR entities often fail to do so.

According to research by Hodges et al,[31] ADR entities are not at ease with the application of mandatory law. The fact that ADR entities have difficulty applying mandatory law does however not necessarily mean that the consumer is being denied the level of protection granted by mandatory law. A *breach* of mandatory law is detrimental to consumers but a mere 'departure from the law' or 'non-application' of such law may well benefit them. The non-use of mandatory law in the cases where this law applies does not automatically entail a denial of mandatory protection: many decisions are grounded on codes of conduct or two-sided general contract terms that comply with the law and sometimes even offer more protection than mandatory law (cf Article 3 paragraph 6 Consumer Rights Directive, hereafter CRD).[32] An ADR entity is entitled to raise the level of protection above the legal standards by making use of private standards. We do not deem it necessary to gear up binding ADR schemes towards making *direct use* of mandatory law, provided they (implicitly) acknowledge the mandatory protection standards. The Directive does not require ADR entities that impose solutions on consumers to apply the law directly, but merely asks that their decisions do not result in the consumer being deprived of the protection afforded to him by mandatory law.

In the Dutch study, a large majority of the sampled decisions falling within the scope of mandatory law did abide by the legality requirement of Article 11 ADR Directive (153/211). Those decisions did not '*result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident*'.

However, in no less than 58 of 211 cases falling within the ambit of national mandatory law in the Dutch study, the consumer was *possibly* denied the protection that he should have been granted on the basis of that law. In 40 cases, the facts at hand or the applicable legal rules were not clear, rendering a definite statement impossible. Case law of the CJEU and national case law are constantly evolving. For example, what is now known about the impossibility to revise an unfair clause[33] was not that obvious a few years ago. And general clauses such as the fairness clause laid down in Article 3 paragraph 1 of the Unfair Contract Terms Directive (UCTD) leave room for diverging interpretations. Other uncertainties pertain to the scope or applicability of certain rules to certain contracts (until the CRD it was not clear whether the right of withdrawal from distance contracts also applied to contracts for the supply of electricity) and to the hierarchical system of remedies available to the buyer of a faulty product under the Consumer Sales and Guarantees Directive (CSGD) (when does a consumer get the option to terminate the contract? And if he chooses to do so, is he obliged to pay some kind of compensation for the time he has been able to use the product?). In the remaining 18 cases, the infringement of the legality requirement appeared beyond doubt. In those cases consumers were clearly deprived of the mandatory protection under Dutch law: they were for example bound to contract terms that are on the national lists of unfair terms, offered a voucher when terminating the contract for non-conformity or denied the right to ask for a free replacement or repair of a defective product.[34]

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26 Dutch ADR practice is a convenient case study for reasons of accessibility to ADR decisions. Many binding decisions have been published in the Dutch Review of consumer law and trade practices (*Tijdschrift voor consumentenrecht en handelspraktijken*) and on the website of the Foundation for Consumer Complaints Boards.

27 The results of this research were published and commented on in CMDS Pavillon, 'Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk' [2015] Tijdschrift voor consumentenrecht en handelspraktijken 239-252.

28 Many specific – under Dutch law, nominate – contracts that are often concluded between businesses and consumers are governed by statutory mandatory rules: the travel agreement, construction or service provision agreement for example contain numerous mandatory provisions from which parties may not derogate to the detriment of the consumer.

29 CMDS Pavillon, 'Private Standards of Fairness in European Contract Law' (2014) 10 European Review of Contract Law 85-117. It is therefore not sufficient for an ADR entity to, for example, determine whether a contractual warranty applies; the ADR entity should also test whether the warranty does not *reduce* the rights of the consumer conferred upon him by mandatory law. One may wonder whether ADR entities are always aware of the need to test (two-sided) contract terms against mandatory rules. See in this context Hodges et al (n 16) 326, cited in the previous footnote.

30 The same presumably is true for ADR schemes in other Member States. We call into question the following statement by Hodges et al (n 16) 326 in a paragraph on arbitration in the British motor vehicle sector: 'The issues that arise under the New Car Code and Service and Repair Code relate principally to warranty issues. It is almost inconceivable that issues of law would arise.' Warranty issues often fall within the ambit of the Consumer Sales and Guarantees Directive, thereby becoming an issue of law.

31 Hodges (n 16) 326.

32 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304/64.

33 Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU:C:2013:341; Case C-26/13 *Kásler and Káslerné Rábai*, EU:C:2014:282.

34 Cf Pavillon (n 27) 243-248.

Although these decisions concern only a minority of the cases that were reviewed in the Dutch study, they give the legality requirement its full meaning. The legality requirement thus potentially raises the level of consumer protection in at least one Member State *provided that this requirement is enforced effectively*.[35] Hence, the follow-up question pertains to the effectiveness of the enforcement mechanism(s) envisaged by the ADR Directive. What does the Directive require from the Member States concerning the enforcement of Article 11 (section IV.1.) and are these measures likely to be effective (section IV.2.)?

IV. The enforcement of Article 11 envisaged by the ADR Directive and its effectiveness

1. Does the enforcement of Article 11 ask for an individual remedy?

Within the Directive, Article 11 is included in the Chapter on 'Access to and requirements applicable to ADR entities and ADR procedures'. The mechanism for enforcement of these quality requirements is laid down in Article 20. Article 20 paragraph 1 makes clear that the compliance with the requirements is a condition for the accreditation as an ADR entity under the Directive. A 'competent authority' appointed according to Article 18 by each Member State must assess whether the ADR entity meets the requirements. From Article 20 paragraph 2 stems that if an ADR entity no longer complies with the quality requirements, it will be removed from the list of qualified ADR entities. The ADR Directive thus envisages an enforcement mechanism that resorts under public law.

One could wonder whether the ADR Directive does not require more from the Member States in terms of enforcement. Should Member States not also introduce a means of redress for the *individual consumer* who is faced with a decision in breach of the legality requirement? An argument against this proposition is that the Directive does not explicitly mention such a remedy. However, the obligation *ex* Article 25 to – *effectively* – transpose the Directive might include the obligation for Member States to make such a remedy available.[36] If the enforcement mechanism *ex* Article 20 functions properly, it will only improve abidance by the legality requirement *in general*. A (series of) individual breach(es) of the requirement will be without (direct) consequences since the ADR entity will be given a period of three months to improve the situation after it has been notified by the competent authority that it does not comply with the requirements from the Directive. A consumer may, depending on domestic law, still be bound by a decision denying his rights and thus be 'deprived of the protection afforded to him' by mandatory law, in breach of Article 11. The introduction of an individual remedy would guarantee that the consumer can always take action in such a situation and thus *never* needs to miss the protection he is entitled to.[37]

Another argument demonstrating that the ADR Directive requires the introduction of an individual remedy is that Article 11 only applies to *binding* forms of ADR. The system of the ADR Directive seems to reflect the idea that it is not so problematic that an ADR entity hands down a decision which is not in accordance with mandatory law, *as long as the consumer is not bound by it* (see section II.3.). The aim of Article 11 would then not be to raise the level of observance of mandatory protection rules by ADR entities in general – an aim which would also be meaningful for non-binding forms of ADR – but rather to make sure that the consumer *is not bound* by decisions in breach of mandatory law.

A last argument underpinning our viewpoint that Article 11 should be interpreted as requiring a remedy for the individual consumer is that this interpretation seems to be in line with the case law of the CJEU, according to which Article 6 UCTD[38] and Article 5 paragraph 3 CSGD[39] must be regarded as provisions of equal standing to national rules which rank as rules of public policy.[40] This case law has consequences for the binding force of an arbitral award in which those provisions were not observed; depending on the applicable domestic law, recognition and enforcement of the award may be refused and/or the consumer may be able to annul the award.[41]

The legislation of many Member States already contains the possibility to set an arbitral award aside if it conflicts with public policy in line with Article 34 paragraph 2 UNCITRAL Model Law. The question then arises whether there is need for a *separate* individual remedy. One could take the stance that the general framework applicable to alternative dispute resolution, such as the general law on arbitration, suffices. Article 11 however encompasses more than EU consumer law. Mandatory consumer rules of national origin and mandatory rules not specifically aimed at protecting the consumer must also be regarded as 'provisions that cannot be derogated from by agreement' in the sense of Article 11.[42] We therefore deem the introduction of a specific remedy necessary. The Member States should make clear that the consumer may set aside the decision in *all* cases of breach of mandatory law, not only in those cases in which the breach concerns EU consumer law.

Assuming that the Directive indeed requires that Member States introduce a remedy for the individual consumer against a binding ADR solution in violation of mandatory law, new questions arise. What should the scope of this remedy be? Article 11 puts emphasis on the *result* of the decision by the ADR entity. It states that the solution imposed 'shall not result in the consumer being deprived of the protection afforded to him' by mandatory law. This deprivation can have many causes: the ADR entity may have misinterpreted a mandatory rule or may not have applied it at all. Another cause of non-compliance with Article 11 may lie in an erroneous establishment of the facts. A consumer may for instance be denied the protection afforded to him by manda-

35 At this point we would like to insert a disclaimer: the area of application of and compliance with Article 11 in the Netherlands might differ from that in other Member States.

36 According to the case law of the CJEU the obligation of Member States to implement a directive involves the adoption of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues. See Case C-336/97 *Commission v. Italy*, EU:C:1999:314, para 19; Case C-97/00 *Commission v. France*, EU:C:2001:149, para 9; Case 324/01 *Commission v. Belgium*, EU:C:2002:729, para 18.

37 Reich (n 21) 276-277 deemed an individual remedy necessary in case of an erroneous application of mandatory consumer law, in particular to prevent a consumer from being bound to an unfair arbitration clause. Such a remedy would in his words be in accordance with 'the spirit of Article 10(1)' of the Directive.

38 Case C-40/08 *Asturcom v. Rodríguez Noguiera*, EU:C:2009:615, in particular para 52. See also Case C-76/10 *Pohotovost' v. Korčkovská*, EU:C:2010:685, para 50.

39 Case C-497/13 *Faber v. Hazet Ochten*, EU:C:2015:357, para 56-57.

40 It appears that other consumer protection rules of EU origin might also be regarded as provisions of equal standing to national rules of public policy.

41 Case C-126/97 *Eco Swiss v. Benetton* , EU:C:1999:269; Case C-40/08 *Asturcom v. Rodríguez Noguiera* , EU:C:2009:615, para 53-54. See also Case C-76/10 *Pohotovost' v. Korčkovská* , EU:C:2010:685, para 53-54.

42 See also Knigge and Verhage (n 25) para 7; MW Knigge, 'Procederen bij een geschillencommissie na implementatie van de ADR-richtlijn. Een onderzoek naar het gewijzigde wettelijke kader' (2015) Tijdschrift voor consumentenrecht en handelspraktijken 259-269.

tory law because the entity did not take into account one of the facts advanced by the consumer. A remedy would in our opinion need to cover all of the cases in which the consumer in view of the facts available to the entity lacks the mandatory protection he is entitled to.

2. What can be expected as of the effectiveness of these enforcement mechanisms?

While the ADR Directive may well require the introduction of an individual hence private remedy, the focus of the Directive seems to be on the public enforcement of Article 11. Is the mechanism laid down in Article 20 likely to be effective in ensuring compliance with Article 11? Interestingly, the Directive seems to leave the evaluation whether an ADR entity complies with the requirement of Article 11 initially to the entity itself. Article 19 paragraph 1 lit (i) requires the entity to give the competent authority a reasoned statement on whether it qualifies as an ADR entity and complies with the quality requirements. Also, every two years it should make an assessment of the effectiveness of the ADR procedure offered by it and of possible ways of improving its performance (Article 19 paragraph 3 lit (h)). The information provided by the ADR entity forms the basis on which the competent authority in particular makes the assessment whether the entity qualifies as an entity under the Directive (see Article 20 paragraph 1). Obviously, it is questionable whether an ADR entity is capable of giving an objective analysis as to whether it granted consumers the protection of mandatory law in its decisions.

What is more, the list of information ADR entities must notify to the competent authority ex Article 19 does not contain any other provision that could be helpful in assessing compliance with the legality requirement of Article 11. The same is true for the annual activity report ADR entities need to publish on their websites according to Article 7 paragraph 2. The Directive does not entail any duty for ADR entities to provide information on the *content* of their decisions. Unless a Member State requires the entities to provide additional information in their national legislation, the competent authorities will presumably not receive any objective information that would allow them to independently assess whether the entities observe mandatory law.[43] It is therefore doubtful whether the public enforcement mechanism envisaged by the ADR Directive will be effective in ensuring compliance with Article 11.

3. It's all in the mix

The private enforcement of Article 11 we advocated in section IV.1. is not an *alternative* to the public enforcement mechanism envisaged by the ADR Directive. A private remedy – although desirable from the point of view of the individual consumer and his right to redress[44] – is in itself not an effective means to ensure compliance with Article 11.[45] The individual consumer will often not be *aware* of the fact that the decision imposed on the parties contravenes mandatory law. And if the consumer knows of the (possible) breach of the law, it is highly questionable whether he will seek another solution by taking the case to a court (or, if available, another ADR entity). The consumer chose ADR as a 'simple, fast and low-cost' solution to his dispute.[46] He might not be able or willing to afford the costs of legal proceedings.[47] Public enforcement therefore is paramount and public and private enforcement of Article 11 need to complement each other.

In order for public enforcement to be effective, the competent authorities should be provided with the information and budget necessary for this task. That the authorities should bear the costs is in our opinion justified as a consequence of the inclusion of Article 11 in the Directive. By granting accreditation, the competent authorities provide ADR entities with a quality mark indicating that these entities comply with the requirements included in the Directive, among which the legality requirement. Consumers (and businesses) may therefore expect observance of these requirements by the accredited entities and an adequate monitoring thereof by the competent authorities. That being said, the costs must be proportional to the aims to be attained. According to us, a thorough investigation of a *random sample* of binding solutions should suffice to reveal a lack of compliance and a potential need for additional investigations. We do not deem it necessary for the competent authorities to verify each and every binding solution.

Although at first sight the mechanism laid down in the ADR Directive for the enforcement of Article 11 does not seem to be effective, much depends on the implementing measures within Member States. The next section focuses on the transposition of Article 11 and on the chosen public and private enforcement mechanisms in a number of selected Member States that are familiar with binding ADR schemes such as consumer arbitration *and* that have transposed or are intending to transpose Article 11. These Member States include the Netherlands, the United Kingdom, Ireland and Spain. We do not aim at depicting the peculiarities of the national schemes in question[48] and will only discuss the implementing measures regarding Article 11 that have been taken in the said Member States.

V. The enforcement of Article 11 in view of its transposition into national law

1. The Netherlands

The ADR Directive had to be implemented before July 9th 2015.[49] The Dutch government has timely transposed the ADR Directive by building on the already existing successful system of extrajudicial redress for consumer disputes. The Consumer Complaint Boards, along with the Financial Services Complaints Institute Foundation (Kifid) and the Foundation of Health Insurance Complaints (SKGZ) have been accredited as ADR entities under the ADR Directive.[50] The

43 The ADR Directive aims at minimum harmonization, see Recital 38.
44 The downside of introducing a private remedy for the consumer is that it may add another (expensive and time-consuming) stage to the procedure between the consumer and the trader, whereas the aim of the Directive is to offer a simple, fast and low-cost solution for disputes between consumers and traders. It might also be less attractive for traders to agree to ADR, if they know that the consumer has extensive possibilities to challenge the decision if it is not in his favor. However, in the interest of protection of the consumer we believe it justified that the consumer is able to set aside a decision in which he did not receive the protection he is entitled to. In view of national reforms and budgetary cuts that tend to impair the access to the judiciary, the quality of ADR decisions should be top-notch.
45 See on the (in)effectiveness of a private enforcement of consumer law also WH van Boom and MBM Loos, 'Effective Enforcement of Consumer Law in Europe. Synchronizing Private, Public, and Collective Mechanisms', 2008, in particular 1, 5-6. Electronic copy available at: <http://ssrn.com/abstract=1082913>.
46 See Recital 5 ADR Directive.
47 Cf Reich (n 21) 276.
48 We refer to that extent to the excellent overviews provided by Hodges et al (n 16).
49 Article 25 ADR Directive.
50 See for the accreditation of the Consumer Complaint Boards *Staatscourant* 2015, 45980; for the accreditation of Kifid *Staatscourant* 2015, 19487; for the accreditation of SKGZ *Staatscourant* 2015, 19094 and *Staatscourant* 2015, 19487. See also Parliamentary documents *Tweede Kamer*, 2013-2014, 33 982, nr 3, 3-5.

Dutch legislator has opted for a framework law containing the many quality requirements an ADR entity must meet in order to be accredited as an ADR entity under the Directive, including the legality requirement of Article 11, which was implemented into Article 10 of the framework law. The non-compliance with these requirements may eventually lead to the withdrawal of the accreditation as an ADR entity. This implicitly follows from Article 17 paragraph 4 of the framework law. The framework law does however not establish any further sanctions for breaching the requirements, nor does it specify how the requirements are to be enforced.

This framework law does not directly bestow rights on individuals. When it comes to Article 11, the framework law however surprisingly makes an incursion into civil law. It encroaches on the Dutch civil code (DCC) by amending a provision that appears to contradict the legality requirement of Article 11. As a matter of fact, Article 902 of Book 7 of the DCC deems a decision taken to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests, valid even it proves to be in breach of mandatory law; unless it would also be in breach of good morals and public policy. The binding decisions of the Dutch Complaint Boards qualify as decisions taken to terminate an uncertainty or dispute. The Dutch legislator therefore chose to exclude decisions made by ADR entities recognised under the Directive from the scope of application of this Article.[51] If such a decision violates mandatory law, it is no longer held valid and it may *a contrario* be challenged.[52]

The amendment of the DCC clearly puts the emphasis on the *breach of mandatory law* (irrespective to whose detriment that breach is) instead of the *derogation from mandatory protection rules* to the detriment of the consumer. The breach of mandatory law to which Article 902 of Book 7 of the DCC refers does not necessarily amount to an infringement of Article 11.[53] Such a breach will not automatically result in the consumer being deprived of the level of protection conferred to him by mandatory law considering that the consumer can be adequately protected even if mandatory law is misinterpreted or misapplied and/or the deviation of mandatory law can even be to his benefit and hence to the detriment of the professional party.

Some of the decisions that were put to the legality test in the Dutch study show that an inaccurate interpretation or application of mandatory law does not necessarily harm a consumer.[54] In the event of an unfair contract term, the ground on which the term is being declared null and void does not matter to the consumer. If an ADR entity bases the voidness of the term on the erroneous interpretation of a mandatory information duty to the benefit of the consumer, the consumer gets the same protection he would have been afforded had the correct provision – the unfairness-test – been applied: the contract term does not bind him. Although it does not prejudice the *individual* consumer, a misunderstanding of the law may indeed be detrimental to consumers in the long run. From the perspective of consumer protection *at large*, this category of decisions asks for adequate legal training to prevent possible *future* violations of Article 11.

A deviation of mandatory law may even benefit the consumer.[55] Some decisions in the Dutch study for example uphold stricter informational duties than stated in the law or impose a sanction that is not provided for by the law. If a decision benefiting the consumer can be challenged by the professional party on the basis of a breach of mandatory law, the amendment of Article 902 of Book 7 DCC may have counterproductive effects from the point of view of consumer protection. This depends on how a breach of mandatory law in the sense of this provision is defined. Since it is often possible to deviate from semi-mandatory law to the benefit of the consumer, many decisions offering the consumer more protection would not be held invalid. It goes without saying that the professional must have agreed with the deviation of semi-mandatory law but we assume that his voluntary adherence to an ADR scheme amounts to such an agreement. A major problem in that regard is that the adherence to a binding scheme is compulsory in some branches. Those professionals might be able to challenge a decision based on an incorrect reading of the law, thereby impairing the level of protection of the consumer.

2. The United Kingdom

In the United Kingdom, the Directive has been transposed by means of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.[56] Regulation 9 paragraph 4 provides that an application to become an ADR entity under these Regulations can only be approved if the requirements set out in Schedule 3 have been met or will be met within a reasonable period of time. In Schedule 3, Article 11 deals with the legality of decisions imposed on the consumer. This provision copies Article 11 ADR Directive almost verbatim. Interestingly, Regulation 13 paragraph 3 explicitly states that removal of the approval as an ADR entity is only possible if the failure to meet a requirement is *sufficiently serious*. The fact that only one or a few of its decisions are not in accordance with mandatory law is therefore most likely not a sufficient reason to withdraw the accreditation of the ADR entity. Another point worth noting is that the competent authorities have been granted the competence to require *additional* information from an ADR entity next to the information included in Article 19 ADR Directive (see Regulation 9 paragraph 2 lit (b)). The competent authorities could therefore, in theory, ask for information on the content of the decisions taken by the entity in order to verify whether this entity offers the consumer the correct level of protection.

The Regulations do not contain any individual remedy in case of breach of the legality requirement by the ADR entity. The consumer who seeks redress therefore has to fall back on the general English legislation on arbitration. Under the Arbitration Act 1996, a party can challenge an arbitral award in case the arbitral tribunal did not have substantive jurisdiction (Section 67) or on the ground of serious irregularity affecting the tribunal, the proceedings or the award (Section 68). Most relevant here is Section 69 of the Act, which enables parties to make an appeal to the court on a question of law arising out of an award made in the proceedings.[57] The parties may, however, exclude this right (Section 69 paragraph 1). Furthermore, an appeal is only possible provided strict condi-

51 Even though ADR decisions in violation of mandatory consumer law of EU origin were already held invalid in view of the Asturcom-ruling that put consumer law on 'equal standing to national rules which rank, within the domestic legal system, as rules of public policy.'

52 There are different possibilities to challenge a decision in breach of mandatory law under Dutch law. See Knigge and Verhage (n 25) para 7; Knigge (n 42) 257-259.

53 The contrary however is true: an infringement of Article 11 constitutes a breach of mandatory law.

54 Pavillon (n 27) 249-250.

55 Pavillon (n 27) 249-250.

56 Regulations 2015, no 542. See <legislation.gov.uk>.

57 See also section 45, which provides that the court may, on application of a party, determine a question of law arising in the course of the proceedings.

tions are fulfilled. An appeal can only be made with the agreement of all the other parties to the proceedings or with the leave of the court (see Section 69 paragraph 2). Although parties may agree up front to an appeal to the court, most rules of consumer arbitration schemes only provide that a party may ask leave to appeal under Section 69 of the Arbitration Act 1996.[58]

Leave to appeal by the court will only be given under the conditions mentioned in Section 69 paragraph 3. The court needs to be satisfied that, inter alia, on the basis of the findings of fact in the award the decision of the tribunal on the question is *obviously wrong* or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt. Section 69 of the Arbitration Act 1996 thus does not seem to offer a remedy in each and every case in which the consumer was deprived of the protection afforded to him by mandatory law. As was argued in section III.2., many mandatory protection rules – especially general clauses – are unclear. This lack of clarity makes a deviation from the law anything but 'obvious'.

3. Ireland

In Ireland the ADR Directive has been transposed by means of the European Union (alternative Dispute Resolution for Consumer Disputes) Regulations 2015. The legality requirement is seen as a condition that a dispute resolution entity needs to meet in order to be accredited as an ADR entity (see Regulation 7 paragraph 3 lit (b), Regulation 8 paragraph 4 and 5 and Regulation 16). Since the contravention of the Regulations is inserted in the Consumer Protection Act 2014, the Irish competent authority presumably can also use the powers conferred to them by that Act in order to enforce the compliance with the quality requirements. The information ADR entities are required to notify to the Irish competent authority is listed in Schedule 1 and in Regulation 10 paragraph 3. These information requirements are a direct transposition of the duties mentioned in the ADR Directive – additional requirements are not included. The Regulations do not contain any private remedy for the consumer in case the ADR entity does not grant him the protection he deserves. From the Arbitration Act 2010, which adopts the UNCITRAL Model Law for Ireland, it follows that it is possible to set an award aside if it is in conflict with public policy (see Article 34 paragraph 2 UNCITRAL Model Law). There are no other possibilities for review as to the substance of the award.

4. Spain[59]

In Spain, the ADR Directive has not yet been implemented. A draft transposition bill, the *Anteproyecto de Ley de Resolución Alternativa de Conflictos de Consumo* has however been published. Article 11 will be transposed by means of Article 8 of the bill. Article 8 first of all clarifies that, in case the ADR entity takes a binding decision, the case is decided *on the basis of the law*. This means a change to the existing practice, in which arbitrators base their decisions on equity unless parties explicitly opt for a decision on the basis of the law.[60] Furthermore, Article 8 of the *Ley* entails that in no case, the decision may deprive the consumer of the protection afforded to him by the applicable mandatory law. An ADR entity needs to fulfill the requirements laid down in the bill in order to be accredited (see Article 29 and 33).

Article 20 and 28 contain the information ADR entities need to provide the competent authority with. The bill gives the competent authority the possibility to request *additional information* next to the information included in Article 19 ADR Directive (see Article 28 paragraph 5). The competent authority might therefore, if it wishes to do so, use this competence to require information on compliance with the legality requirement. Whether the Spanish competent authority will be capable of *objectively* assessing compliance remains to be seen: Cortes observes that it appears that the same public body, the *Agencia Española de Consumo, Seguridad Alimentaria y Nutrición* (AECOSAN), will be appointed as competent authority and will provide the main ADR entity.[61]

The bill does not contain any remedy for the individual consumer in case an ADR entity breaches mandatory law. Under the general law on arbitration (*Ley 60/2003 de Arbitraje*) an award may be set aside on the limited grounds mentioned in Article 41 of this law, such as, in particular, an infringement of public policy (see Article 41 paragraph 1 lit (f)). There are no other grounds for review as to the substance of the award.

5. Some observations on the transposition of Article 11 into national law

The above shows that the investigated Member States mostly rely on public enforcement of Article 11. Having said that, it is remarkable that none of them clarifies in its legislation how this enforcement should take place. To be able to withdraw the accreditation of an ADR entity breaching the legality requirement, the competent authority needs to establish this breach. The legislation in the Member States under review does not contain any clear provision as to how the authority can exercise supervision on the compliance with the legality requirement. The following questions need to be addressed. Should ADR entities provide the competent authority with information on their abidance with Article 11 and if so, should they make all their decisions available for supervision? How will the supervising authority approach the enormous amount of binding decisions that are being issued each year? And how will the authority cope with the legal uncertainty that makes the establishment of the breach of the legal requirement a complex endeavour? If the ADR entity does not agree with the interpretation that the competent authority gave to the law leading to the revocation of the accreditation, what steps can it undertake? The lack of clear guidance on how supervision should take place makes it questionable whether enforcement will be effective in the Member States under scrutiny.

The Dutch implementation act is the only implementing measure that pays attention to the consequences for the individual consumer of a breach of mandatory law. The implementing legislation of the other Member States does not mention any remedy for the consumer. The law of Ireland and Spain already provide the possibility to set aside an arbitral award if it conflicts with public policy (in line with

58 See eg Rule 1.2 of the ABTA Arbitration Scheme Rules, March 2015 edition (see <abta.com>); Rule 3.11 of the Estate planning Arbitration Service (see <idrs.ltd.uk>); Rule 3.11 of the Independent Arbitration Service for domestic consumers (Renewable Energy), January 2015 Edition (see <idrs.ltd.uk>); Rule 3.11 of the Funeral Arbitration Scheme, 2011 Edition (see <idrs.ltd.uk>).

59 The authors would like to thank Dr Marco de Benito, professor at IE University, Madrid, for the useful information he provided for this section.

60 See *Real Decreto 231/2008*, Article 33. See also P Cortes, 'The Impact of EU law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', [2015] ERA Forum, 16, 134; Hodges, Benöhr and Creutzfeld-Banda (n 16) 215.

61 Cortes (n 60) 136.

Article 34 paragraph 2 UNCITRAL Model Law). In view of the CJEU's consistent line of jurisprudence stating that consumer law provisions of EU origin must be regarded as provisions of equal standing to national rules of public policy, the public policy provision indeed offers a means of redress to the consumer. However, Article 11 also pertains to *national* mandatory law and we argued in section IV.1. that existing public policy provisions are an appropriate though *insufficient* means of individual redress.

VI. Conclusion and suggestions for improvement

The conclusion of this paper is not an optimistic one: it is doubtful whether Article 11 will help achieve a high level of consumer protection as it is designed to do (section II). This is not to say that the legality requirement, in spite of its limited scope, has no potential: in the Dutch case study mandatory law was applicable in the large majority of the investigated decisions imposing a solution on the consumer and in these decisions the legality requirement was not always met (section III). However, to ascertain that Article 11 is more than a paper tiger, the provision needs to be enforced. Neither the ADR Directive (section IV) nor the transposition legislation in the investigated Member States (section V) seems to have put much thought into the effective enforcement of the legality requirement. We would therefore like to make some suggestions for improvement.

1. Warranting the effective enforcement of Article 11

In our opinion, the Directive should be more explicit about the actual *enforcement* of the legality requirement and the sanctions tied to its breach. As was seen in section IV, it is unclear whether the public enforcement of Article 11 by means of the mechanism laid down in Article 20 is sufficient, or whether the ADR Directive also requires Member States to introduce a remedy for the individual consumer. This lack of guidance from EU-level is surprising in the light of the far-reaching enforcement measures that are expected from Member States in other areas of consumer law. We point at the clear-cut EU jurisprudence on the *ex officio* application of consumer law and at the strict public enforcement guidelines set up by the 2004/2006 Regulation. In our opinion, the protection of the consumer requires the introduction of a remedy for the individual consumer. Member States opting for such a remedy should however be careful when drafting the provision. They should make sure that the professional is not able to tackle a decision that, by misinterpreting the law, *favours* a consumer.

What is more, if a professional instigates a judicial procedure after an ADR solution has been reached (to enforce the award for example), the national court should in our view assess *of its own motion* whether the legality requirement has been met. It goes without saying that national courts are obliged to test binding ADR decisions *ex officio* against European consumer protection law.[62] Moreover, there is in our view no valid reason why domestic consumer protection rules should be treated differently since the protection requirement itself is laid down into a consumer directive and therefore of European origin.[63]

Although the introduction of an individual remedy may complement the public enforcement by the competent authorities, it is by no means an alternative to it. Consumer protection and business confidence in ADR require that accredited ADR entities actually possess the qualities the accreditation stands for. Public enforcement is therefore paramount and should be adequately financed. In order for the public enforcement to be effective, an amended Directive should devote more attention to how competent authorities must assess compliance with Article 11, in view of both the effectiveness and the proportionality principle. For instance, a duty for the ADR entities to provide the competent authority with information specifically aimed at the enforcement of Article 11 could be added to Article 19. And the amended Directive could specify whether every, or only a sample of the decisions ought to be verified. For the time being, national implementing measures should clarify how the competent authorities are to effectively supervise compliance with Article 11.

2. Enabling compliance with Article 11

Enforcement is not the whole story; compliance also needs to be effectively *supported*. The Directive however does not sufficiently facilitate the compliance with the legality requirement. Some of the other quality requirements laid down in the Directive may have a positive effect on the compatibility of binding decisions with mandatory law. Article 6 paragraph 1 lit (a) for example requires Member States to ensure that the natural persons in charge of ADR possess a 'general understanding of law'. Article 6 paragraph 6 compels Member States to encourage ADR entities to provide *training* for natural persons in charge of ADR and monitor any such training schemes. Article 16 and 17 stimulate *cooperation* between ADR entities among themselves and between ADR entities and national authorities entrusted with the enforcement of Union legal acts on consumer protection. These requirements however need to be abided by, and what has been demonstrated regarding the lack of an enforcement mechanism for Article 11 is equally true for the other quality requirements.

What is more, even if they are complied with, these requirements might not be sufficient to ensure the observance of the mandatory level of consumer protection. Additional measures are in our opinion necessary. Binding decisions should preferably be taken by ADR entities that have a legal scholar or practitioner with expertise in the field of private law on board. In the Netherlands, the Complaint Boards always comprises one member of the judiciary. Schooling should be mandatory. Second, ADR entities should embrace openness as regards the compliance with the legality requirement. They should for instance explicitly acknowledge the legality requirement in their rules and codes. Decisions should also be published and made accessible. The consumer should be informed that binding decisions may not differ from judicial rulings as far as mandatory protection is concerned (cf Article 9 paragraph 2 lit (b) sublit (3)). This would increase the awareness of both the consumer and the ADR entity itself. Finally, there ought to be a possibility for ADR entities to refer legal questions to a court or at least to gain advice when confronted with an uncertain legal matter.[64] With other words, the paper tiger that is Article 11 needs to grow real teeth. ■

62 I Brand, 'De invloed van Europees recht op alternatieve wijzen van geschillenbeslechting (ADR)' (2015) Maandblad voor Vermogensrecht 211.

63 A preliminary question whether domestic mandatory protection rules should also be applied *ex officio* in the same way as European consumer rules has been answered positively by the Dutch Supreme Court: ECLI:NL:HR:2016:236.

64 Knigge and Verhage (n 25) para 8, see also Loos (n 2) para 13-14.