

ALTERNATIVE DISPUTE RESOLUTION IN THE FIELD OF CONSUMER ENERGY SERVICES IN THE EU

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***Abstract.** Energy services have a particularly significant impact on the daily life and welfare of consumers. The importance of such services is high, and their regulation is also changing both at the EU and Member States level, especially after the adoption of the Third Energy Package¹, which is focused on improving the operation of retail markets to yield real benefits for both electricity and gas consumers. In order to implement the main or the most relevant goal of the EU, such as high level of consumer rights protection, resulting in consumer trust in business sector, proper and effective functioning of the EU internal market etc., it is essential to ensure clear and sufficient legal regulation, establish responsibility of the services providers, consumer rights and duties as well as promote more effective, faster and cheaper ways of solving consumer and business disputes. The authors of this article feel the lack of scientific analysis on this issue. Despite its importance, discussions take place at political or practical level, but no recent analyses exist as to why energy services sector is so fragmented and how it affects different conditions or rights of consumers in various Member States.*

1 The Third Energy Package or Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, which are two out of five legislative acts in the Package, OJ L 211, 14.8.2009.

This article also clearly supports the idea that the above-mentioned goals can be achieved by close and more fruitful cooperation between the EU and national competent authorities, participation in various ad hoc expert working groups and committees, such as the Vulnerable Consumers Working Group. This article reflects general ideas about the problems arising in the energy consumer services sector, the activity of the EU and national institutions, seeking to ensure fair and transparent provision of such services to consumers, it also contains an analysis of alternative dispute resolution (hereinafter – the ADR) methods and good practice of their application in the EU Member States. This article highly supports the application of alternative procedures in the field of energy services and sees them as a possibility to minimise increasing consumer problems, e.g. a new phenomenon – consumer energy poverty in the EU, which is defined as the situation where a household is unable to access a socially and materially necessitated level of energy services at home and pay for the provided services.

Keywords: *consumer, vulnerable consumer, energy services, alternative dispute resolution, switching, Third Energy Package.*

Introduction

Many politicians or policy enforcers loudly declare that consumers must be at the heart of energy policy and its forming processes. For this reason EU citizens should be guaranteed that they receive cheap, accessible and transparent supply of energy services. It is to be noted that currently, prices of energy services are really too high, i.e. in some EU Member States even from 7 to 20% of household expenses are dedicated to cover the expenses incurred for energy services. In reaction to that, consumers should use energy resources efficiently and economically. Accordingly, business sector must efficiently and economically produce energy. Recently, the EU has harmonised and liberalised its energy market in order to reduce the waste of energy, the lack of transparency typical for this sector and huge, clearly visible differences in prices of energy services among the Member States. It is not a secret that prices in particular are often used as a means to exert political pressure, but not as part of a free market. It is also obvious that certain EU Member States intervene in the market, by regulating prices, and their custody deters potential investment. After the transposition of the EU legislation into national law, whereby consumers are supplied with energy services of their choice, the proposed prices have improved significantly. However, despite the fact that the level of market liberalisation has progressed, it is still insufficient. Consumers of many EU countries are still facing significantly increasing bills.

Another truly important issue that has recently emerged in the energy sector is the definition of a “vulnerable consumer” and the increasing need to define it at the EU level. In reaction to this issue, the European energy regulators have conducted a research to answer the question how the Third Energy Package could strengthen consumer rights protection, i.e. this Package contains the requirement for the EU Member States to

establish and enforce the definition of “vulnerable consumers”, linking it to energy poverty definition. It is also worth noting that in 18 out of 27 EU Member States, this conception is formulated on one or another basis, however, often it is not directly formulated and clarified, but certain measures are applicable, and it is concluded that there is no need for its separate definition, because it falls within the sphere of social policy and such definition is not necessary in the field of energy sector, i.e. reference is made to social security legislation. Vulnerability (or not) of a consumer is often determined considering his or her financial resources.

Furthermore, it is clear that countries apply energy and social security measures in a complex manner. Disconnection of vulnerable consumers from energy networks is not allowed; they are entitled to receive financial support, social tariffs and other means. In conclusion to the above, the authors state that the existing definition of a vulnerable consumer is incomplete and fails to disclose properly how they should (or could) be protected. Common criteria of vulnerability could help finding and establishing a basis for fighting this problem. It is essential that the consumer himself consents in order to be called a vulnerable consumer.

The goal of this article is to tackle this important issue and to analyse it on the basis of the most relevant documents of the European Commission, working group initiatives and their reports, as there is a significant lack of scientific analysis of the reasons for this extreme fragmentation in the EU in the field of consumer energy sector and how ADR procedures could assist in this matter.

1. Strengthening Consumer Awareness and Protection: Good Practice of the UK

Significant differences exist among the EU Member States in terms of energy market regulation, consumer awareness initiatives and consumers that wish to be active market players. In order to improve something, we are looking for good practice, as it is popular to say nowadays that time is not worth wasting for a solution if one has already been discovered.

The initiative of the consumer association “Which?”, actively working in the United Kingdom, represented by Jenny Driscoll, could be listed as a brilliant example. According to the data operated by this organisation, nine out of ten consumers in the UK are concerned about rising energy prices. These numbers could easily reflect a general situation in the other EU Member States. At the moment, different service suppliers differ only in terms of prices. Consumers do not think that switching to another service provider could help them improve their financial situation; furthermore, energy sector is a “boring” services area, therefore, consumers are not that much interested in their rights, duties or possibilities. The Government allocates less financial resources to promote or implement energy saving programmes and this task is often left to consumers. It is also quite obvious that consumers with less income are paying the largest bills, and they are unable to compare different tariffs. In reaction to the

above-mentioned problems and based on confidence granted to it by consumers, in February 2012 the consumer association “Which?”² launched the initiative called the Big Switch³. The Big Switch was aimed at using collective bargaining power of nearly 300,000 consumers to negotiate cheaper energy tariffs by effective bulk-buying on behalf of the group. “However, critics of the scheme have highlighted that the winning tariff is more expensive than the cheapest already on the market”⁴. It is good to see that after the campaign suppliers became more flexible; consumers who did not take part in the switch became more active and more interested in their rights, and possibilities appeared to obtain better or less complex conditions of consumer contracts. However, it is also worth noting that, according to Ann Robinson, the director of consumer policy at uSwitch.com, “the Big Switch was a brave and bold move, but the outcome is disappointing”⁵.

It is quite clear that one important issue is always forgotten, namely the question as to which contract is fair for the consumer, and how much they can save by switching from one supplier to another and what are consumer expectations in general. In addition, consumers cannot often imagine which part of their money paid for services goes for the development of technologies, and which part of the expenses suffered by the business side that is not even related to the services supplied they have to cover or compensate. It is also worth noting that typically energy supply chain is not a competitive business model, but a monopoly. Furthermore, it is clear that Europe is divided in two parts – the Western and the Eastern EU. It is important to note that in the Western part, competition in the energy sector is quite strong, consumers are rich enough and may choose their suppliers, at the same time, the Eastern part is relatively poor and its consumers have less possibilities or chances to change something about their situation, because consumers conclude standard consumer contracts with standard terms or conditions and are unable to influence them, they feel the lack of competent and active consumer associations and of concrete information etc., for these reasons it is very important to formulate the approach common for the entire EU, and not a fragmented view towards the problems arising in the market.

Consumer information, their awareness and empowerment, application of new technologies can reduce expenses of consumers in the field of electricity and gas services supply. But an important question still remains whether a consumer will ever be capable of taking rational decisions best suiting their interests in this sector. In order to reach this goal, it is important to react on the most important consumer needs and share the best practice among different EU Member States.

In the opinion of the authors of this article, it is also extremely important to pay attention to the fact that, as mentioned by the European Commissioner for Energy

2 Internet source: <http://www.which.co.uk/>.

3 Art.3 (7), Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

4 Telegraph. Internet source: <http://www.telegraph.co.uk/finance/personalfinance/consumertips/household-bills/9259665/Which-Big-Switch-energy-deal-disappointing.html>.

5 *Ibid.*

Günther Oettinger at the 5 Citizens Energy Forum held in London on 13-14 November 2012, in some countries additional taxes, charges and other payments constitute even up to 15% of the total service price. At the moment, the switch is also theoretically possible, but this still remains an unattainable goal for many consumers because suppliers create various barriers and problems without facing any negative or legal response. Therefore, it follows that only informed consumers can influence applicable tariffs, prices, selection of concrete services, and, in this context, ADR mechanisms could lead them to better defence of violated rights and legitimate interests. In the next part of the article, this topic is elaborated in more detail.

2. ADR and Consumer Energy Sector

As it was repeatedly stated, good results in the field of consumer rights protection are impossible to achieve without an efficiently functioning consumer redress mechanism. Initiatives to use ADR for the protection of consumer rights became more evident around 1990s. ADR institutions, ADR schemes or the so-called out-of-court mechanisms have been developed across Europe to help citizens faced with a consumer dispute but unable to reach an agreement directly with the trader. ADR schemes usually rely on a third party such as an arbitrator, mediator or an ombudsman to help the consumer and the trader reach a solution. The advantage of ADR is that it offers more flexibility than going to court and can better meet the needs of both consumers and professionals. Compared to going to court, these schemes are cheaper, quicker and more informal, which means they are an attractive means for consumers seeking redress.

However, these out-of-court mechanisms have been developed differently across the European Union. Some are the fruit of public initiatives both at central level (such as the consumer complaint boards in the Scandinavian countries) and at local level (such as the arbitration courts in Spain), or they may spring from private initiatives (such as the mediators/ombudsmen of the banks or insurance companies). Precisely because of this diversity, the status of the decisions adopted by these bodies differs greatly. Some are mere recommendations (such as in the case of the Scandinavian consumer complaint boards and most of the private ombudsmen), others are binding only on the professionals (as in the case of most of the bank ombudsmen); and others are binding on both parties (arbitration).

The Commission has been active in promoting the development of Alternative Dispute Resolution. In 1998 and 2001, the Commission adopted two Recommendations on consumer ADR. The first one applies to ADR schemes which either propose or impose a solution to resolve a dispute⁶. The second one applies to more consensual resolution of disputes. Some pieces of sectoral EU legislation, including those in the energy sector, contain a clause that either obliges or encourages Member States to

6 Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of court settlement of consumer disputes, OJ L 115, 17.04.1998, p. 31.

set up ADR schemes⁷. In April 2002, the Commission published the Green Paper on Alternative Dispute Resolution in Civil and Commercial law⁸ which sums up the ways or methods used in alternative dispute resolution in the EU, and initiated wide public consultations with the Member States as well as all stakeholders, seeking to enhance the use of mediation as a part of ADR⁹.

In addition, the Commission's proposal for a European Directive on Mediation in Civil and Commercial Matters aims to ensure a sound relationship between the mediation process and judicial proceedings, by establishing common EU rules on a number of key aspects of civil procedure. Finally, the European Consumer Centres Network (ECC-Net)¹⁰ provides consumers with information and assistance in accessing an appropriate ADR scheme in another Member State.

Alternative dispute resolution is understood as one of the key actions for re-launching growth and strengthening consumer confidence in the Single Market. Political support for this approach has been expressed at the highest level. The European Parliament and the Council have both endorsed the forthcoming EU legislative action in the area of ADR. Furthermore, the 2011 spring and the October European Council called for adoption of the proposals by the end of 2012 as part of the coordinated efforts to provide a new impetus to the Single Market.

As stated in the Commission Staff Working Paper "Executive Summary of the Impact Assessment", European consumers do not enjoy the same level of access to quality ADR schemes in the EU. Despite roughly 750 existing national ADR schemes, gaps still remain both geographically and sectorally¹¹. In addition, the lack of detailed information constitutes a significant barrier to consumers for the use of ADR. Businesses rarely provide consumers with information on the competent ADR scheme to deal with their dispute either at the point of sale or post-sale. Finally, ADR schemes do not always respect core principles such as transparency, impartiality and effectiveness, as laid down in the two Commission recommendations of 1998 and 2001¹².

On 29 November 2012, the Commission presented the Proposal on ADR directive¹³, which was the result of unification of two Recommendations 98/257 and 2011/310, and

7 Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109, 19.4.2001, p. 56.

8 Green Paper On Alternative Dispute Resolution in Civil and Commercial law. Brussels, 19.04.2002 COM (2002) 196 final.

9 *Ibid.*

10 Internet source: ECC-Net http://ec.europa.eu/consumers/ecc/index_en.htm.

11 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Alternative dispute resolution for consumer disputes in the Single Market, SEC(2011) 1408, SEC(2011) 1409, Brussels, 29.11.2011 COM(2011) 791 final.

12 Commission Staff Working Paper Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR) COM(2011) 793 final, SEC(2011) 1409 final, SEK (2011) 1409. P. 4.

13 Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European

which was so actively discussed both at the European Council Working Party on the Consumer Protection and Information and at EU institutional level, having in mind the informal trilogies seeking to find the best way to ensure consumer rights in the entire EU at the same – high-level – standard¹⁴. Neither in this Proposal nor in the Consumer Programme for 2014–2020 the Commission had clearly defined how ADR systems should be formed or financed, even though consumer associations representing their interests had repeatedly raised those issues as the most important and fundamental ones. Certain EU Member States are unable to cover all of the future expenses related to this new system and establish it, by strengthening consumer and business information or awareness, preparation of implementation reports etc. Of all these issues, the question of financial resources is the most important one, especially in view of the task to ensure independence and objectivity¹⁵.

In conclusion of the above, the authors would like to note that consumer rights have become a more important issue for all Europe merely at the very end of the last century. That explains the fact why consumer protection legislation and implementing measures, instruments or procedures standardised for all the EU countries are still lacking.

2.1. Problems Related to ADR and ADR Development Guidelines

The practice related to ADR in various EU Member States is fragmented. In some countries, the structure of dispute resolution in energy services sector is more developed, for example, as in the case of the United Kingdom, France¹⁶, contrary to other countries like Germany, where the sector does not receive enough attention.

Although during the last decade the development and application of ADR systems was very active, the necessary level has not been reached yet. In 2009, a study on ADR in the EU¹⁷ disclosed some of the following problems:

- (a) Constant lack of ADR both in separate sector-specific and geographical areas;
- (b) Lack of consumer and business-side awareness;
- (c) Failure to follow the main principles established in the Commission's Recommendations of 1998¹⁸ and 2001¹⁹;

Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR) COM(2011) 793 final, 2011/0373 (COD).

14 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)) (2012/C 181/17).

15 *Ibid.*

16 UK Energy Service Ombudsmen <http://www.ombudsman-services.org/energy.html>; French Energy Ombudsmen (Commission de la Médiation de la Consommation) <http://www.gdfsuez.com/en/mediator/>.

17 Study on the use of Alternative Dispute Resolution. Internet source: http://ec.europa.eu/consumers/re-dress_cons/adr_study.pdf.

18 Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ L 115, 17.04.1998, p. 31.

19 Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109, 19.4.2001, p. 56.

(d) Lack of ADR offers seeking to settle consumer disputes in the field of e-commerce.

Almost all of the stakeholders highlight that lack of provision of complete information which poses a very serious danger for ADR²⁰ and its use. A public consultation on ADR was conducted in 2011, during which, as stated above, all the stakeholders noted that it was essential to develop ADR²¹.

Customer complaints are considered a top level indicator, which can contribute to the monitoring of energy markets from a customer perspective and identifying market malfunctioning: the data on complaints is already monitored through the European Commission's Consumer Market Scoreboard and a dedicated expert group, the so-called European Regulators' Group for Electricity and Gas (ERGEG), which was established by the European Commission in 2009. The main goal of this group was to develop a harmonised methodology for classifying and reporting consumer complaints on a cross-sectoral basis around the EU.

Article 3 of Directive 2009/72/EC states that consumers have a right to conclude a contract with their electricity energy supplier which must clearly state:

- the data about the service supplier;
- the type of services to be provided, certain level of services provided, term of connection;
- package of technical assistance;
- means that could be used to obtain information, the most relevant information about all applicable tariffs and taxes;
- duration of the contract, the procedure for renewing or terminating the contract, switching terms etc;
- compensation or reimbursement of funds, if level of quality of the services provided is not fulfilled ;
- information concerning their rights as regards the means of dispute settlement available to them in the event of a dispute;
- applicable methods of ADR²².

Therefore, by introducing such provisions and requirements in the Third Energy Package, the aim is to promote a series of actions that will facilitate consumer choice and empower EU consumers in the energy market, including easier price comparison, more effective complaint handling procedures and better bills. This means that now

20 Commission Staff Working Paper, Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on Consumer ODR) COM(2011) 793 final, SEC(2011) 1409 final, SEK (2011) 1409. P. 4.

21 Working Group Report on Alternative Dispute Resolution in the Energy Sector. Report prepared for the 4th Citizens' Energy Forum – October 2011. [interactive] [accessed on 02-10-2012]. <http://ec.europa.eu/consumers/citizen/my_rights/docs/energy_adr_report_en.pdf>.

22 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC OJ L 211, 14.8. 2009, p. 55–93.

much depends on the EU Member States to fully, correctly and carefully transpose and implement this legislation, taking the national context into consideration. Energy policy makers and enforcers still need to work together and now this cooperation needs to be even closer. Moreover, the inclusion of a number of “core” consumer provisions in the Third Energy Package, which depart from the traditional mandate of energy regulators, will require establishing closer links between regulators and consumer and competition agencies to better enforce such provisions.

Seeking to implement the provisions of the Third Energy Package, the EU Member States have been invited to set up new safeguards for household customers, among which are the following:

- Single points of contact to provide information on their rights;
- Information in or with the bills about the means of dispute settlement;
- An important role in raising the awareness of customers is given to service providers, which should provide a good standard of service and complaint handling and implement redress schemes;
- Creation of independent mechanisms for the treatment of complaints and disputes;
- Financial compensation for customers; and
- Complaint monitoring²³.

All of the measures listed above serve as guidelines for the EU Member States.

Below are the main recommendations identified in the Guidelines of Good Practice (GGP) on Complaint Handling, Collecting and Classification, aimed at providing the Member States and national regulators with input on how to translate the Third Energy Package provisions into operational modalities²⁴:

- A single point of contact should deliver, in every country, free information and advice on consumer issues;
 - Customers should be provided, on their electricity and gas bills, with the relevant and exhaustive contact information in case they need to complain;
 - Customers should be able to choose between various channels to submit a complaint;
 - Alternative dispute settlement should be made available for all household customers, preferably without charge or as inexpensively as possible irrespective of the financial amount of the dispute;
 - Statutory complaint handling standards for the energy sector should be in place, including:
 - Written complaint handling procedures (within service providers and third parties) should be available to all customers;
 - Information on alternative dispute settlement body should be provided with the first acknowledgment of a complaint;

23 *Ibid.*

24 GGP on Customer Complaint Handling, Ref: E10-CEM-33-05, 10 June 2010; Working Group Report on Alternative Dispute Resolution in the Energy Sector. Report prepared for the 4th Citizens’ Energy Forum – October 2011. [interactive] [accessed on 02-10-2012]. <http://ec.europa.eu/consumers/citizen/my_rights/docs/energy_adr_report_en.pdf>.

- The use of a common complaint classification would permit national regulatory authorities (NRAs) that wish to do so, to make a comparison between service providers' quality of service performances;
- Final answer from a service provider should be issued as soon as possible, but within two months.
 - Redress schemes should be in place to allow compensation in defined cases;
 - It should be compulsory for service providers to report data on complaints to the NRA, when they are asked for it; and
 - The NRA or another third party body having responsibility for customer complaints should provide and publish reports on complaints²⁵.

2.2. ADR Institutions and their Functions in EU Member States

It is worth noting that ADR bodies are mainly sectoral, but in some cases they are horizontal. They can be public bodies or private organisations established by official mandate. On the basis of the information provided in the legislation or official websites, the following ADR models in the energy sector can be identified: public bodies or bodies funded from the state or private sector, etc. For example, a Public Energy Ombudsman exists in France and Belgium, where a public body acts as the ADR body and consumer advocate in disputes between individual consumers and energy companies. In both cases, these bodies will also be involved in active communication of energy consumer rights and the creation of “background awareness” i.e. market information in a consumer-friendly format, to make consumers more assertive in exercising their choice in energy markets.

Handling a wide variety of consumer disputes can give a good overview and consistency of the consumer energy sector. For example, in Sweden, the Consumer Dispute Settlement Board is a horizontal body that may also accept energy disputes. This ADR body receives public funding and is free of charge for companies and consumers. Private Energy Ombudsman appointed by public authorities also exists in the UK market. An independent body, not affiliated to any company or government services, is responsible for ADR in the field of energy. According to the regulation, all energy companies have to be members of ombudsman service The Board of Directors (mainly non-executive) is responsible for guaranteeing the Ombudsman's independence, integrity of schemes and making sure that companies cannot, in any way, influence the decision of the Ombudsman. In several EU Member States, energy regulators are directly involved in ADR, such as Ireland and Austria, acting as an independent and authoritative institution. In other cases, energy regulators have a role to play in ADR, for example in Italy, where the regulator supports the financing of the scheme that is run jointly by companies and consumer associations and is now called upon to guarantee the efficient functioning of ADR procedures. In other countries, such as France, they collaborate closely with the public energy ombudsman to improve the ADR process, improve market information for consumers (establishment of a single contact point)

25 *Ibid.*

and also to get feedback on market developments on the basis of ADR cases. Under the provisions of the Third Energy Package, energy regulators will have to guarantee an effective ADR process in energy.

The principle (and practice) of transparency of process and decisions made is closely linked to the independence and impartiality of an ADR body. Here too, good governance principles and procedures matter. Crucial elements are trustworthiness and the neutrality, objectivity and competence of the ADR body. To this effect, the parties to the dispute must be able to react throughout the process by requesting information, providing additional input and, where appropriate, asking for additional information regarding the mandatory decision or recommendation.

As it is stated in the Working Group Report on Alternative Dispute Resolution in the Energy Sector, prepared for the 4th Citizens' Energy Forum held in London, "Transparency in the area of ADR has one additional dimension related to personal consumer data, its provision, reporting, registration or publication". As highlighted by energy regulators, detailed information about the subject of complaints that cannot be resolved within the company, can be an important indicator of market functioning and areas that require greater attention for the future. Consumer representatives have commented that improved reporting will also give signals as to whether ADR is a process that is worth entering into instead of litigation"²⁶.

The authors agree with the idea expressed in the above-mentioned report, namely that "detailed information about the outcomes of ADR in energy is important for consumer organizations involved in rating energy companies and could also be linked with any other information about the problematic conduct of certain companies"²⁷, especially "naming and shaming" activities. The registration and description of outcomes that demonstrate how a law is interpreted can signal to law makers and market oversight bodies whether legislation is becoming obsolete. The publication of such information is very important for consumers and those advising or representing them considering the possibility to apply ADR.

Information and awareness of ADR is also paramount for the existence of and access to such a scheme by interested parties. As stated in the report, "the format and channels used for this communication matter". The single point of contact and online tools generally will be helpful but will need to be supported by clear language specifying when a case is admissible, how to access the scheme and how a dispute is processed. Ease of access is also fundamental. It should be easy for consumers but also for customer services personnel, to understand how ADR works and how it can be accessed and what areas it covers. ADR should be preferably free of cost for consumers"²⁸. It is argued on the business side that the fee must be applied in order to

26 Working Group Report on Alternative Dispute Resolution in the Energy Sector. Report prepared for the 4th Citizens' Energy Forum – October 2011. [interactive] [accessed on 02-10-2012]. <http://ec.europa.eu/consumers/citizen/my_rights/docs/energy_adr_report_en.pdf>.

27 *Ibid.*

28 *Ibid.*

ensure the efficiency of the ADR service, but if it is applied, it should be minimal and not create barriers for consumers to access the ADR scheme.

In summary, it is possible to conclude that over the last 10 years or so, certain companies in some Member States and in the energy sector in particular, have put in place, in addition to the standard complaints service, a company mediation scheme, such as an autonomous company ombudsman reporting directly to the Board of Directors. These schemes have proved effective in resolving complaints of energy customers. Some have been notified to the European Commission by national authorities as out-of-court settlement bodies in accordance with the two ADR Recommendations. At the same time, however, impartial company mediators may nevertheless be employed by energy companies. Thus, in the eyes of the Commission services, they do not comply with the requirements of Article 3(13) of the Electricity Directive and Article 3(9) of the Gas Directive²⁹, which specify that an *independent mechanism* needs to be put in place to facilitate out-of-court settlement procedures. Regulators and consumer representatives agree with this assessment. Representatives of company mediators did not share the Commission's views, while industry associations did not have a common position of their members.

3. Regulation of ADR in Energy Sector and Principles in Lithuania

As regards the importance and complexity of consumer energy sector, the EU region of the Baltic States is always taken as an interesting example reflecting the reasons and problems related to uneasy implementation or transposition of common rules. This part of the article is dedicated to the analysis of the current situation in Lithuania as a part of this region and how consumer protection provisions deal with energy sector regulation.

Lithuania has a relatively stable and efficient legal base for consumer rights protection, the ADR system, and the competent institutions that investigate consumer complaints in line with the order and principles established by the Law of the Republic of Lithuania on Consumer Rights Protection³⁰. Energy sector disputes are settled via alternative dispute resolution process in line with the Law of the Republic of Lithuania on Energy³¹ and other related laws, depending on the specificity of the complaint as well as the institutions competent to settle it. One of the most important events in the energy sector is related to 3 March 2011, when the Third Energy Package came into force. According to the Third Package, the EU Member States are under a duty "to ensure that an independent mechanism such as an energy ombudsman or a consumer

29 Directives 2009/72/EC and 2009/73/EC.

30 Law of the Republic of Lithuania on Consumer Rights Protection. *Official Gazette*. 1994, No 94-1833; 2007, No 12-488.

31 Law of the Republic of Lithuania on Energy. *Official Gazette*. 2002, No XI-188.

body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements” (Electricity Directive, Article 3(13); Gas Directive, Article 3(9))³².

The Third Energy Package consists of 2 directives: Electricity Directive 2009/72/EC³³ and Gas Directive 2009/73/EC³⁴; 3 regulations: Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005³⁵.

The most important principle established in this Package is the principle of separation. The EU Member States could choose from the three alternatives to separate energy networks:

- Total separation of ownership;
- Transfer to the independent system operator;
- Transfer to independent transmission networks operator³⁶.

The Third Energy Package³⁷ aims to ensure that European citizens benefit from a truly competitive energy market and gives regulators in the energy sector new responsibilities and powers to deal with consumer issues, including both protection and empowerment. The package also contains a provision obliging Member States to set up an independent out-of-court dispute resolution scheme for energy complaints. This will enhance consumer confidence by giving them access to efficient means of resolving disputes and obtaining compensation in a cheap, simple and quick manner³⁸.

Because of those new provisions, Lithuania will have to cover the expenses related to the building of the new ADR structure and its governance. In addition, it is quite obvious that our country will be late to do so. A broad discussion must be initiated on the resources to be used for this purpose – be they private or state, or possibly mixed. Even though the Lithuanian environment is suitable for the development of the consumer rights protection system in line with the requirements established in the Third Energy Package, this process will require much time and efforts as well as financial and

32 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in gas and repealing Directive 2003/55/EC OJ L 211, 14.8.2009

33 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

34 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in gas and repealing Directive 2003/55/EC.

35 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

36 Iškauskas. Č. Trečiasis energetikos paketas: Rusijos ir ES dvikova. Geopolitika (13), 02 03 2011. [interactive]. [accessed on 29-08-2012]. <<http://www.geopolitika.lt/?artc=4529>>.

37 Directives No. 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.

38 Member States have to transpose the provisions of the Directives by autumn 2011.

human recourses from the Lithuanian public and private sectors. However, it seems that those efforts are not only a waste of time or money and that they will bring benefits to consumers and will make the ADR systems more accessible.

3.1. ADR Institutions and their Functions

After reviewing the current situation at the EU level, the authors of this article seek to present the Lithuanian picture. As established in Article 34 of the Law of the Republic of Lithuania on Energy³⁹, the following bodies settle complaints and disputes in the energy sector:

1. The National Energy Inspectorate holds a preliminary extra-judicial hearing of complaints concerning malfunctioning of energy facilities and breakdowns of equipment and metering instruments, breaches of the requirements of maintenance, energy quality, accounting of and payment for energy, accidents, interruption, suspension or restriction of energy supply⁴⁰,

2. The State Control Commission for Prices and Energy holds a preliminary extra-judicial hearing of complaints concerning acts or omissions of energy enterprises in supply, distribution, transmission, storing of energy, failure to grant them a right to use networks and systems, connection, balancing of energy supply flows, application of prices and tariffs⁴¹,

3. The State Consumer Rights Protection Authority of the Republic of Lithuania holds a preliminary extra-judicial hearing of complaints by natural persons concerning application of unfair conditions in the sale or service agreements⁴².

Analysis of the activity of ADR institutions allows stating that the complaints lodged by consumer and energy companies are investigated according to the established ADR roles. Complaints and requests falling outside the competence of the above-mentioned institutions are settled by the Authority. At this point, we could treat the Authority as the most important ADR institution. Furthermore, in 2007 the amended Law on Consumer Protection as well as its previous version established that consumer disputes with commercial subjects had to be settled via alternative dispute resolution procedure at the institution that could be established for the purpose of ADR. It is also important to note that in Lithuania, all ADR institutions in the energy sector are established by the State. No private ADR institutions have been established in Lithuania yet.

The authors of this article find that the present practice showing that ADR institutions are only founded by the State and with their functions and activities clearly defined by the law is not always positively affecting the whole system. These institutions also have other tasks and ADR creates overload that lowers the quality of procedures, their specialists do not always have the necessary competence and knowledge of ADR procedures and of their speedy and professional settlement.

39 Law of the Republic of Lithuania on Energy, *supra* note 29.

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

The main problems that have become more evident in recent years are the following: recommendations and decisions taken by ADR institutions are not binding; the lack of legal obligations to provide information to ADR bodies leads to failure to comply with their decisions; the number of disputes settled amicably is decreasing. It is also important to pay attention to the fact that consumers often face the provider's unwillingness to reimburse the money paid for the unused services. One of the most important issues influencing the effectiveness of ADR is the legal power of the decision taken. A recommendation allows not to follow it and not to settle the dispute amicably⁴³. Therefore, it can be stated that the measure foreseen in the Law on Consumer Protection – public announcement on the official website of the Authority www.vvtat.lt. It⁴⁴ – is not an effective way to ensure consumer rights. The data on consumer complaints investigated at the State Consumer Rights Protection Authority of the Republic of Lithuania (hereinafter – the Authority), State Energy Inspectorate (hereinafter – the Inspectorate) and National Control Commission for Prices and Energy (hereinafter – the Commission) is presented in the table below:

Institution	Number of investigated consumer complaints in 2010		Number of investigated consumer complaints in 2011	
	Total	ADR	Total	ADR
Authority	322	24	588	11
Inspectorate	784	784	746	746
Commission	744	1	911	1

The authors of this article also present the dynamics of consumer complaints and requests in 2010-2011 settled and investigated by the Authority, the Inspectorate and the Commission (in number of units).

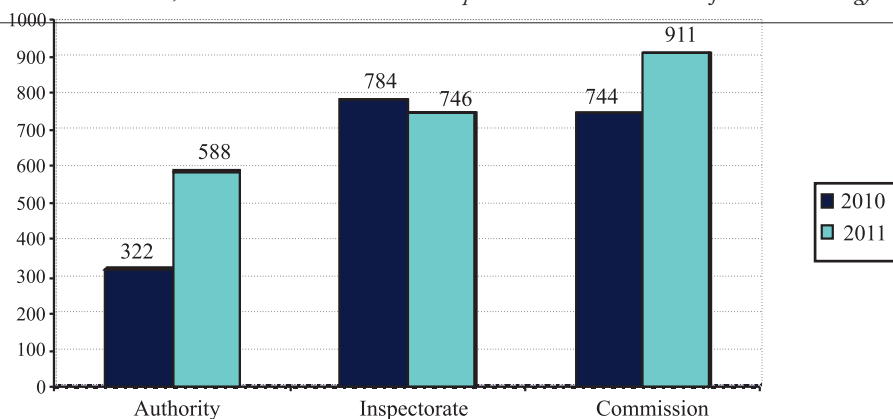
All institutions investigate consumer complaints in line with national and internal rules adopted by the legislator and the institutions themselves⁴⁵. Alternative dispute resolution takes place according to the provisions of the Law on Consumer Protection and the Rules of the Authority⁴⁶. Below the authors present the data on consumer complaints received by different competent authorities:

43 Activity report of the State Consumer Rights Protection Authority of the Republic of Lithuania for 2011, accessed at Internet source: www.vvtat.lt.

44 *Ibid.*

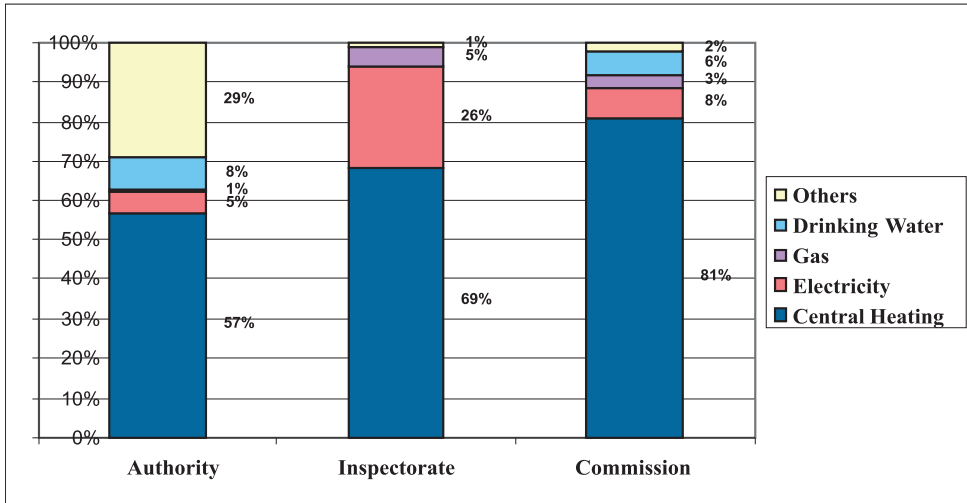
45 Consumer Complaints Settlement and Service Rules approved by the Order No. 1-141 of the General Director the State Consumer Rights Protection Authority of the Republic of Lithuania on the 1st October 2009, O.J., 2009, No. 120-5189.

46 Work Regulation of the State Consumer Rights Protection Authority of the Republic of Lithuania approved by the Order No. 1-169 of the General Director on the 30th September 2008, O.J., 2008, No. 117-4471.



Institution	Investigated consumer complaints in 2010		Investigated consumer complaints in 2011	
	Total	ADR procedures	Total	ADR procedures
Authority. Total:	322	24	588	11
Central heating	101 (31%)	–	335 (57%)	1 (9%)
Electricity	40 (12%)	1 (4%)	27 (5%)	–
Gas	8 (3 %)	–	8 (1%)	–
Tap water	51 (16%)	15 (63%)	48 (8%)	8 (73%)
Others	122 (38%)	8 (33%)	170 (29%)	2 (8%)
Inspectorate. Total:	784	784	746	746
Central heating	459 (58%)	459 (58%)	516 (69%)	516 (69%)
Electricity	281 (36%)	281 (36%)	192 (26%)	192 (26%)
Gas	43 (6%)	43 (6%)	37 (5%)	37 (5%)
Other (Oil)	1	1	1	1
Commission. Total:	744	1	911	1
Central heating	545 (73%)	1	738 (81%)	–
Electricity	48 (6%)	–	76 (8%)	1
Gas	43 (6%)	–	24 (3%)	–
Drinking-water	65 (9%)	–	53 (6%)	–
Others	43 (6%)	–	20 (2%)	–

The diagram below makes it possible to see the fragmentation (percent) of consumer complaints and requests received in 2011 by the Authority, the Inspectorate and the Commission:



The above analysis of ADR institutions operating in the Lithuanian energy sector and their decisions/results allows stating that two out of three ADR institutions adopt mandatory decisions. Enforcement of decisions framed as recommendations is complicated because of the lack of awareness on the part of businesses and their wish to cooperate. This calls for certain legal steps that need to be taken and the means to solve this problem. It is also worth noting that even where the laws foresee the types of decisions that the ADR institutions can take, these ADR institutions fail to provide such information in their internal documents or official websites and for this reason consumers entertain doubts as to the type of decision to be possibly taken by one or another institution. It is not surprising that this fact negatively impacts consumer trust in the whole ADR protection system as well as their legal and justified expectations related to the effectiveness and efficiency of decisions.

In conclusion to the above, it is possible to state that in order to solve the problem related to non-enforcement of decisions take by ADR bodies, it is essential to adopt additional legal regulation establishing mandatory enforcement of decisions, because consumers face certain difficulties and it is very expensive to defend their rights in court, if an energy service supplier does not follow the decision adopted by an ADR body. It is also very important to establish the legal duty for commercial entities to enforce the decision adopted by an ADR body and to provide all the information as well as evidence concerning the particular dispute with the consumer.

Conclusions

Alternative dispute resolution is an effective way for consumers and businesses to quickly and efficiently resolve disputes without going to court. Alternative dispute resolution procedures can make access to justice easier for consumers and provide them with a faster and less costly way to defend their rights. The particular forms of ADR are conciliation/negotiation, arbitration and mediation. One of them is of obligatory nature in terms of the decision adopted in the process of ADR, and the others only entail recommendations.

It is worth noting that the initiative to adopt a legal act at the EU level that would provide clear guidelines on the use of ADR and on the criteria that it should fit is a very fresh one and could be dated as late as 29 November 2011⁴⁷. However, even though a definition of ADR exists in the EU alongside with the principles that it should follow, nevertheless, some deficiencies persist, such as financing of ADR, lack of compliance with the principles applied to recommendations, gaps in the scope of ADR, lack of information provided to consumers and poor quality of ADR.

The provisions of the Third Energy Package introduced the duty on EU energy services providers to present information on the bills, including the information about competent ADR institutions as well as the methods used by them. That, according to business sector representatives, increases costs and imposes additional administrative burden. However, this issue also has its positive side – thereby it is ensured that a consumer receives necessary information about ADR which possibly promotes ADR mechanisms, makes them more accessible and inspires their development.

ADR institutions operating in the EU energy sector are usually governmental bodies financed from the state budget. ADR institutions are mixed or private. Private ADR structure exists only on the UK market. This enables consumers to choose the ADR service providers that best fit their needs. ADR applied in the EU countries differs in terms of the number of institutions and the limitation of their functions as well as their field of practice. In all the EU Member States, ADR is functioning only in electricity and gas sectors and only in several countries it also exists in the field of central district heating. Participation of energy institutions in ADR activity is mandatory in some cases, and in some it is a mere recommendation. Public ADR institutions have some advantages, because, in contrast to the decisions adopted by private entities, the decisions of the former may have a mandatory nature. It is worth noting that state institutions are less flexible, as their ADR activity is regulated by laws and is more bureaucratic.

It is also worth noting that not in every EU country consumers must firstly apply to the service provider with a complaint; for this reason disputes can be referred to the ADR institution directly. This shows that the procedure for lodging consumer complaints/requests is flexible enough. Almost in every case lodging a consumer complaint/

47 Consumers: the Commission puts forward proposals for faster, easier and cheaper solutions to disputes with traders; press release published by the European Commission on 29/11/2011, Reference: IP/11/1461.

request is free of charge, with some minor exceptions. Certain ADR institutions provide classified data on consumer complaints and their examples; furthermore, the law establishes a duty for energy suppliers to indicate contact details as well as the data on the competent ADR and to describe the types of services they provide. This makes access to ADR easier for consumers and improves the whole process.

Abundance and intricacy of the Lithuanian laws and legal instruments that protect the rights of consumers in the energy sector, excessive variety of features in ADR institutions operating in the energy and other sectors, differences in complaint application forms, uncertainties regarding the implementation of binding decisions that are difficult to understand for consumers result in many consumers not knowing where to turn to for a violation of their rights and not wanting to defend their rights. This reduces their access to justice.

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Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

ALTERNATYVUS VARTOTOJŲ GINČŲ SPRENDIMAS ENERGETIKOS PASLAUGŲ SEKTORIUJE. ES IR LIETUVOS PATIRTIS

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Santrauka. *Energijos paslaugos turi ypatingą poveikį kasdieniniam vartotojų gyvenimui ir jo gerovei. Tokių paslaugų svarba yra didelė, o jų teisinis reglamentavimas nuolat kinta tiek ES, tiek ir jos valstybių narių lygiu, ypač priėmus Trečiąjį energetikos paketą⁴⁸, kurio pagrindinis siekis – gerinti mažmeninių elektros ir dujų, tiekiamų vartotojams, rinkų veikimą ir siekti kuo didesnės vartotojų teisių apsaugos šiame sektoriuje. Siekiant įgyvendinti pagrindinius šiame teisės akto pakete įtvirtintus uždavinius jie glaudžiai siejami ir su kitu ES tikslu – aukštu vartotojų teisių apsaugos lygiu. Jis įmanomas tik tada, kai vartotojai pasitiki rinka, verslo subjektais, o tai užtikrina tinkamą ir efektyvų ES vidaus rinkos veikimą, todėl būtina užtikrinti, jog būtų taikomos tik aiškios ir tinkamos teisės normos, nustatančios paslaugų teikėjų atsakomybę, pareigas, vartotojų teises ir pareigas, o vartotojų ginčai sprendžiami pasitelkiant veiksmingesnes, greitesnes ir pigesnes alternatyvaus ginčų sprendimo formas. Straipsnio autoriai mano, kad trūksta mokslinės šios srities analizės. Nepaisant šio klausimo svarbos, jis analizuojamas tik politiniu ar teisės nuostatas taikančių specialistų lygiais, tačiau nėra atliekami naujausi tyrimai vartotojų energetikos sektoriuje, kuris yra be galo fragmentiškas ir formuoja skirtingas sąlygas ar teises vartotojams skirtingose ES valstybėse narėse. Šiame straipsnyje palaikoma idėja, kad nurodyti tikslai gali būti pasiekti tik stiprinant glaudų ES institucijų ir valstybių narių bendradarbiavimą, dalyvaujant įvairių ad hoc ekspertų darbo grupių, komitetų, tokių, kaip, pvz., Pažeidžiamų vartotojų darbo grupė, veikloje. Šiame straipsnyje pateikiamos bendrosios mintys apie problemas, su kuriomis susiduria energetikos paslaugų vartotojai, naujausias ES ir valstybių narių iniciatyvas šioje srityje, kuriomis siekiama užtikrinti sąžiningą ir skaidrų energijos paslaugų tiekimą vartotojams, analizuojamas alternatyvaus ginčų sprendimo formų pritaikymas šiame sektoriuje kylantiems ginčams spręsti ir geroji ES valstybių narių praktika. Manytina, kad alternatyvaus ginčų sprendimo formų pritaikymas energetikos paslaugų srityje galėtų ženkliai sumažinti vartotojų problemas, ypač*

48 The Third Energy Package or Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, which are two of five legislative acts in the Package. OJ L 211, 14.8.2009.

tokias, kaip naujasis reiškiny – vartotojų energetinį skurdą ES, suprantamą kaip situaciją, kai namų ūkis neišgali įsigyti socialiai ir materialiai būtino energijos paslaugų lygio ir nepajėgia atsiskaityti bent už jų minimumą.

Reikšminiai žodžiai: vartotojas, pažeidžiamas vartotojas, verslo subjektai, energetikos paslaugos, alternatyvus ginčų sprendimas, Trečiasis energetikos paketas.

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