

FAMILY MEDIATION LEGAL FRAMEWORK IN THE EUROPEAN UNION: THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE IN THE EU

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Abstract

Family mediation is proposed as an alternative approach to conflict resolution, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. The purpose of this study is to generate significant data regarding family mediation legal framework in the European Union, and also to provide a different perspective on how family mediation is regulated by the EU. Accordingly, regarding to the extent and content of the Mediation Directive, this study reflects the fact that mediation is still in the process of development in the EU, and Member States have different regulatory approaches to it. Therefore, some articles of the Mediation Directive impose specific rules that Member States must reflect in their national legislation, while other articles are more vague and flexible and provide general rules by leaving it to the Member States the extent of the implementation of such rules. On the one hand, following the debate in the EU, this study tries to shed some light on the importance of the Mediation Directive, which its objective is “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings,” within the mediation process. On the other hand, it aims to analyze the fact that although the implementation of the Mediation Directive by the Member States has increased the use of mediation in general, it has still failed to achieve its main objective. For example, in one study, the respondents proposed a number of legislative and non-legislative measures that would be effective in increasing the use of mediation in the appurtenant Member States. Therefore, this study tries to obtain important data regarding the experience gained from transposing the Mediation Directive into national legal orders, and also to identify reasons why mediation is not used more frequently for both internal and cross- border disputes. In terms of legislative measures, the participants proposed the mandatory mediation in certain cases, the requirement of mandatory mediation information sessions before litigation, and the imposition of sanctions for parties’ refusals to attend mandatory mediation. Whereas in terms of non-legislative measures, the respondents proposed the establishment of a mediation advocacy education program for law schools, the development and implementation of pilot projects, and the creation of a uniform certification of mediators at the EU level. As it can be seen, the key word is *mandatory* and, indeed, the Study seems to support the adoption of a stronger model of mandatory mediation that would require the parties to mediate before they can approach the litigation process. As a conclusion, these measures show once again that in order for mediation to increase, a better regulation is needed. Although the above non-legislative initiatives are not compulsory *per se*, they, at the very least, involve a more serious engagement of the disputing parties with the mediation process.

Keywords: family mediation, mandatory, implementation, EU, mediation directive

1. INTRODUCTION

Family mediation is proposed as an alternative approach to conflict resolution, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. Therefore, family mediation began to be recognized as a unique area of practice that required specialized education and training, and it continues to improve thanks to the emergence of more and new schools of thought. Evidence based on the history and development of mediation show that this approach is an effective form of dispute resolution for the couples and other forms of disputes based on the creation of an agreement that works for their future. Furthermore, what happens with EU laws, their main purpose is to regulate the activity of the member states, by either imposing rules, on a broad or specific basis or by providing recommendations as to how this can be achieved.

In addition, there are countries that are not yet part of the EU but that have initiated a process of integration, with all the obligations for legal compliance and fulfillment of several requirements that this process encompasses. However, referring to the Mediation Directive in general, mediation is still in the process of development in the EU, and Member States have different regulatory approaches to it.

The purpose of this study is to generate significant data regarding family mediation legal framework in the European Union, and also to provide a different perspective on how family mediation is regulated by the EU.

2. The European Union Family Mediation Legal Framework

2.1. Background

The principle of access to justice is one of the most fundamental principles in the EU, underlining its overall legislation in different areas. In the Tampere meeting of 1999, the European Council (Council) called for “alternative, extra-judicial procedures to be created by the Member States”¹ of the EU, in order to facilitate better access to justice.

The year before, in 1998, the Council had adopted a recommendation on family mediation by means of which the member states were recommended to introduce or promote family mediation (*Recommendation*). The Council had recognized the growing number of family disputes and had expressed the need to protect the best interests of the child, especially in relation to custody and access. The *Recommendation* set out a series of principles of family mediation with the purpose of inspiring the member states to adopt any or all of such principles. However, the *Recommendation per se* did not impose any obligation on the member states to actually commit to the implementation or observance of such principles.

In 2002, the Commission initiated widespread consultations with the Member States on possible measures “to promote the use of mediation.” The Council had already adopted several conclusions with regard to a broader use of alternative dispute resolution methods in the area of civil law and commercial law. The aim was to determine basic principles that would enable the creation and function of extrajudicial procedures of settlement.

Finally in 2008, nearly one decade later from the Tampere meeting, the European Parliament and Council adopted the so called *Mediation Directive*. The benefits that mediation provides to the parties are clearly stated in the Preamble of the *Mediation Directive*:

Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

2.2. Content of the *Mediation Directive*

The extent and content of the *Mediation Directive* reflect the fact that mediation is still in the process of development and promotion in the EU and Member States have different regulatory approaches to it. Therefore, some articles of the *Mediation Directive* impose specific rules that Member States must reflect in their national legislation, while other articles are more vague and flexible and provide general rules by leaving it to the Member States the extent of the implementation of such rules (Steffek, 2012).

2.2.1. Scope and Application

What was already mentioned in the Preamble is specifically stated in article 1 of the *Mediation Directive* pursuant to which “the objective of [the] Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.”

The application of the *Mediation Directive* is also limited, by article 2, to cross-border disputes and to civil and commercial matters with the exception of rights and obligations which are not at the parties’ disposal under the relevant national legislation. This means that if the law of a Member State requires a court decision to get a divorce but allows the parties to privately regulate other areas of family law, only the latter area will be covered by the *Mediation Directive*. However, the Member States are free to extend or limit the application of the *Mediation Directive* specific areas of civil and commercial law, including family law.

Application of the *Mediation Directive* is also limited to the type of mediation as defined under article 3(a):

‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

Mediator is also defined in article 3 as being:

...any third person who is asked to conduct mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

2.2.2. Quality of Mediation- Codes of Conduct and Training

Article 4, more than imposing rules to ensure the quality of mediation, reflects the aspiration that the EU has in having a harmonized practice of mediation between the Member States. For such purpose, the *Mediation Directive* asks the Member States to “encourage ... the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services” and the Member States have the discretion to use any means they consider appropriate to achieve such purpose. Article 4 also asks the Member States to encourage training of mediators as one of the ways of having an effective, impartial and competent mediation.

In its efforts to encourage adoption of and adherence to codes of conduct by mediators, in 2004 the EU adopted a European Code of Conduct for Mediators (*Code of Conduct*). The *Code of Conduct* sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. Although the *Code of Conduct* is directed to mediators involved in all kinds of civil and commercial mediation, it is left to the wish and discretion of the organizations providing mediation services to develop specific codes which are more apt to the types of mediation services they offer, as well as to specific areas of law, such as family law.

2.2.3. Recourse to Mediation

Article 5 tries to reconcile the delicate relationship between judicial proceedings and mediation. It is left to the discretion of the court before which a proceeding is commenced, to invite the parties to use mediation as a means of settling their dispute. It is also left to the discretion of the Member State to make mediation a compulsory step towards resolution of the dispute between the parties, or provide incentives, or impose sanctions, provided that this will not negatively affect the right of the parties to access the judiciary.

The content of this article, and the way it tried to deal – or not deal at all – with mandatory mediation, has been subject to discussion following the implementation of the *Mediation Directive*, as it will be seen here below.

2.2.4. Enforceability of Mediation Agreements

Article 6 is one of those articles by way of which the *Mediation Directive* is intended to set hard rules for the Member States to fulfill. Member States have the obligation to make sure that, upon consent of the parties (or one of the parties) the agreement resulting from the mediation process will be enforceable.

Paragraph 21 of the Preamble further specifies that:

In order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

2.2.5. Confidentiality

In article 7 it is recognized the importance that confidentiality has in a mediation process, and obliges the Member States to ensure that no evidence will be given by neither the mediators nor the persons involved in the administration of the process in judicial proceedings or arbitration with regard to any information arising from a mediation process.

Exception is made in two cases: (1) for reasons of public policy, in particular where protecting the best interest of a child or preventing harm to a person overrides the confidentiality requirement, or (2) where disclosure of the mediation agreement is necessary in order to enforce that agreement.

Notwithstanding article 7, the Member States are free to adopt stricter rules – but not gentler – for protecting confidentiality of the mediation process.

2.2.6. Information

The main reason why the EU decided to adopt the *Mediation Directive* was to urge the Member States to take the necessary steps to increase use of mediation within the alternative dispute resolutions framework. It goes without saying that use of mediation within the EU up to that moment had been relatively low compared to the judicial dispute resolution system. This has been because the parties themselves, including judging and lawyers, had often taken their decisions “under a *lack of information* about its characteristics, potential, requirements and practical implementation” (Steffek, 2012).

In order to increase information, article 9 asks Member States to provide the public with contact information for mediators and mediation organizations. In addition to that, Member States are also asked to inform the public on courts that make cross-border mediation agreements enforceable.

2.2.7. Transposition and Review

At the end of the day, the most important part of a directive in general, is the obligation it poses on the member states to implement it within their national legislations, by making it binding upon them. Article 11 requires the Member States to bring into force the laws, regulations and administrative provisions that are necessary to comply with the provisions of the *Mediation Directive* before 21 May 2011.

As a follow up measure, article 10 sets a May 2016 deadline for the European Commission to prepare and submit a report on the current status of the application of the *Mediation Directive* in the Member States. If necessary, the report shall also propose amendments to the *Mediation Directive*.

2. 3. Aftermath of the *Mediation Directive*: The EU Mediation Paradox

Regardless of the clear benefits of mediation, the implementation of the *Mediation Directive* has not been successful. The disconnection between the benefits and the very limited use of mediation in the Member States has been named the “EU Mediation Paradox”.

The first red flag with regard to the modest results that the *Mediation Directive* appeared to have produced was raised by the European Parliament in 2011. According to the European Parliament Resolution (2011), the resolution adopted in that occasion called for further action on increasing awareness of mediation and further encouraged the Member States to develop programs promoting the main advantages of mediation: cost, success rate and time efficiency.

One year later, in 2012, the concerns about the actual implementation of the *Mediation Directive* were raised and discussed in a Parliamentary debate initiated by the Committee of Legal Affairs near the European Parliament. One of the questions asked was: “How does the European Commission intend to address the problem that the Directive’s objectives have *clearly not been met*?”

The answer to that and other questions raised in the debate was that the European Union and the Member States must persevere in making mediation known to the public. More specifically the Vice-President of the

Commission at the time said:

'[J]ustice delayed is justice denied', and we have a very big backlog in many of our Member States. Mediation is one possible means of getting rid of the backlog, especially in smaller cases where you do not necessarily go through a lengthy court procedure but, of course, access to justice is a fundamental right.

I do not believe that mediation can simply replace a court procedure; it is an alternative, but in order to become a real alternative it has to be known and ... it has to become a cultural choice. For this we need time.

The Member States and the Commission need to work hand in hand to make sure more information about mediation is available. ... [I]n order to be successful this approach will involve training for mediators and also for lawyers, to ensure that they do not necessarily see mediation as opposed to their professional interests.

In order to accelerate the process, and in line with the follow-up provision under article 11 of the *Mediation Directive*, the Vice-President of the Commission informed the parliamentarians present in the debate that a study was going to be conducted that would focus on the promotion of mediation, "because it is very clear that if we have an interesting law, but nobody knows that it exists and lawyers and the judiciary are not utilising it, then it does not serve the use we want it for."

Therefore, following the debate and the previous discussions within the EU, the study was conducted and published in 2014. The official purpose was to "obtain national-level feedback regarding the experience gained from transposing the *[Mediation] Directive* into national legal orders, and to identify reasons why mediation is not used more frequently for both internal and cross-border disputes."

Furthermore, 816 experts from all over the EU contributed to the preparation of the Study, by answering to a series of questionnaires in relation the Member Country they belonged to. The Study showed that although the implementation of the *Mediation Directive* by the Member States has increased the use of mediation in general, it has still failed to achieve its objective as stated in article 1, that is "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."

According to the Study, 13 countries, composing 46% of the Member States, have reported less than 500 mediations per year, while only 4 countries (14% of the Member States) have reported more than 10,000 mediations per year. The remaining 11 countries (39% of the EU countries) reported between 500 and 10,000 mediations per year.

Of all the Member States, only Italy has reported more than 200,000 per year, which is considered as the only case where the *Mediation Directive* has had a very positive impact and resulted successful. The Study has proved what has been continuously stated in terms of the many societal benefits that mediation has. In terms of time, the average duration of court litigation in the EU countries is 566 days, while the average duration of court litigation when it is preceded by mediation (at 70% success rate) is nearly 213 days. In terms of money, the average cost of court litigation in the EU countries is \$13,000 while the average cost of court litigation when it is preceded by mediation (at 70% success rate) is \$8,600.

It must be borne in mind that the above results might be higher or lower in the specific Member State, depending on the population, internal legislation, economical development and culture of litigation.

2.4. Proposed solutions: Mitigated Mandatory Mediation and the 'Balanced Relationship Target Number Theory'

The respondents to the Study proposed a number of legislative and non-legislative measures that would be effective in increasing the use of mediation in the appurtenant Member States.

In terms of legislative measures, the most preferred ones are:

- Make mediation mandatory in certain cases
- Require mandatory mediation information sessions before litigation
- Impose sanctions for parties' refusals to attend mandatory mediation

As it can be seen, the key word is *mandatory* and, indeed, the Study seems to support the adoption of a stronger model of mandatory mediation that would require the parties to mediate before they can approach the litigation process. The strongest preference would be that for an "opt-out" model, as in the case of Italy, instead of an "opt-in" one.

In terms of non-legislative measures, the most preferred ones are:

- Establish a mediation advocacy education program for law schools
- Develop and implement pilot projects
- Create a uniform certification of mediators at the EU level

These measures show once again that in order for mediation to increase, a better regulation is needed. Although the above non-legislative initiatives are not compulsory *per se*, they, at the very least, involve a more serious engagement of the disputing parties with the mediation process.

In light of the above, the one solution coming out from the Study is the “regulatory intervention introducing, not simply allowing, a mitigated model of mandatory mediation, at least in certain categories of cases.” This would require the necessary amendment of the *Mediation Directive* and specifically of already discussed article 5 which, as it is, leaves it to the discretion of the Member States whether to introduce any form of mandatory mediation in their national practice and legislation.

The other solution coming out from the Study, which does not prejudice the previous one – is the so called ‘Balanced Relationship Target Number Theory’. This theory is based in article 1 of the *Mediation Directive* and suggests that Member States are required to ensure a *balanced relationship between mediation and judicial proceedings*. In order to achieve this balanced relationship, Member States must determine a clear target number which is the minimum percentage of mediated cases towards litigated cases. Failure to determine and achieve the ‘balanced relationship target number’ would amount to a *de facto* lack of compliance with the *Mediation Directive* (De Palo, 2012).

When asked whether a ‘balanced relationship between mediation and judicial proceedings’ existed in the respective Member States, all the respondents to the Study answered “no”, including Italy.

3. CONCLUSIONS

In terms of mediation in general, and family mediation in particular, what works for one country may not work for another. Whether mandatory family mediation, in its mitigated form or not, is one of these successful practices, will depend on a series of factors, such as legal and historical background, legislative will and openness to change. As it can be seen, the key word is *mandatory* and, indeed, the study seems to support the adoption of a stronger model of mandatory mediation that would require the parties to mediate before they can approach the litigation process. As a conclusion, these measures show once again that in order for mediation to increase, a better regulation is needed. Although the above non-legislative initiatives are not compulsory *per se*, they, at the very least, involve a more serious engagement of the disputing parties with the mediation process. With regard to cultural differences, however, it is hoped that recent legislative and other changes will strengthen the field and create accessible options for couples to resolve their disputes. Despite these differences, many of which still exist, the development of mediation continued and expanded in many countries of the world.

REFERENCE LIST

Charter of Fundamental Rights of the European Union, 7 December 2000, 2000/C 364/01.

Decreto Legislativo in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, 28/2010, GU 53/2010.

EC, Commission Directive 2008/52/EC of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136.

EC, *Convention on the Exercise of Children's Rights*, ETS No. 160: 1996/2000.

EC, Council of Europe, Committee of Ministers, Recommendation R (98)1 (1998), online: Council of Europe

EC, European Council Presidency Conclusions, online: European Parliament

EC, European Parliament Study of 15 January 2014 on Rebooting’ the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, online: European Parliament

EC, European Parliament Resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts

EC, Proceedings of the 4th Conference on Family mediation in Europe, 1998(2000) Council of Europe Publishing 109

EC, Sitting of Tuesday, 11 December 2012, online: European Parliament

European Code of Conduct for Mediators, 2 July 2004, online: European Judicial Network

Legge 28/1997 "Disposizioni per la promozione di diritti e di opportunità per l'infanzia e l'adolescenza", GU 207/1997

Sentenza Corte Costituzionale 131/2010, GU 16//2010.

Sentenza Corte Costituzionale 24/2012, GU 272/2012.

Secondary Material

De Palo, G, *The EU Civil and Commercial Mediation Paradox and a Possible Solution* (2012), European Union Agency for Fundamental Rights

De Palo, G & Keller, R. Lauren, *The Italian Mediation Explosion: Lessons in Realpolitik*, (2012), Wiley Online Library

Guaglione, L, "*Affidamento condiviso tra mediazione familiare e poteri del giudice, in Corti pugliesi*" (2007), Edizioni Scientifiche Italiane 28

Impagnatiello, G, *La mediazione familiare tra Corte Costituzionale e legislatore delegate*, (2009) Mediares 163

Scalise, M, *Mediazione familiare e mediazione civile perchè la prima è facoltativa e la seconda obbligatoria*, (2012), online: Giustizia e Mediazione Civile

Steffek, F, *Mediation in the European Union: An Introduction*, (2012), online: European Justice