

# The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe

*Steven Friel and Christian Toms, Brown Rudnick LLP*

Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (the Directive) came into force on June 13, 2008, and must be implemented by all European Union (EU) member states by May 21, 2011.<sup>1</sup> The Directive aims "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."<sup>2</sup>

## *Growing EU Support for Mediation*

Alternative dispute resolution (ADR) generally, and mediation specifically, have been on the radar of the EU authorities for a number of years. The Vienna Action Plan called for "the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts. In this context, the possibility of mediation as a means of solving family conflicts should be examined."<sup>3</sup> The narrow focus on family disputes has since been broadened to cover most civil and commercial disputes.

On October 15 and 16, 1999, the European Council held a meeting in Finland where it expressed the view that the enjoyment of freedom that is at the very heart of the EU requires a "genuine area of justice, where people can approach courts and

authorities in any Member State as easily as in their own."<sup>4</sup> It recommended that "[a]lternative, extra-judicial procedures should also be created by Member States."<sup>5</sup> In April 2002, the European Commission's Green Paper on ADR in civil and commercial law described ADR as "a political priority."<sup>6</sup> It considered that access to justice, a right enshrined in Article 6 of the European Convention on Human Rights, faced three problems: the volume of disputes brought before courts, the length of time taken by proceedings, and the cost. ADR is presented as one of the key solutions, complementing not competing with judicial procedures, with the following advantages: often better suited to certain disputes, advances social harmony since parties engage in a process of rapprochement rather than confrontation, a consensual approach increases the chance that relationships will endure, flexibility, and reduced costs.

In July 2004, the Commission launched a Code of Conduct for Mediators. In line with the philosophy of self-regulation, the Code is voluntary, but it has been adopted by a number of mediation experts and organizations, including the Centre for Effective Dispute Resolution. The Code sets out a number of principles under the following headings: competence, appointment, and fees of mediators and promotion of their services; independence and

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impartiality; the mediation agreement, process, and settlement; and confidentiality.

### *Provisions of the Directive*

#### *Definitions*

Article 3 broadly defines mediation and mediator as follows:

(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.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) "Mediator" means any third person who is asked to conduct a 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.<sup>7</sup>

A question often raised is whether national courts should be able to compel mediation. The Directive provides only for voluntary mediation, but Article 5(2) makes clear that the "Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions . . . ."<sup>8</sup>

This question was considered by the European Court of Justice (ECJ) in a judgment issued on March 18, 2010, in which it held that EU directives and general principles do not prevent national law from providing for mandatory out-of-court mediation procedures as a pre-condition for court proceedings, provided that they: do not result in a binding decision; do not cause substantial delay in bringing proceedings; suspend any time-bar period; and do not give rise to more than minimal costs.<sup>9</sup>

The case related to an Italian telecoms dispute. The defendants argued that actions before local magistrates' were inadmissible because the plaintiffs had not first attempted mediation under applicable rules. The ECJ found that there was no infringement of the principle of equivalence. In its view, although legislation had introduced an additional step for access to the courts, which could in itself prejudice the implementation of effective judicial protection, the ECJ determined as settled law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions (1) correspond to objectives in the public interest and (2) do not involve a disproportionate and intolerable interference with rights when considering the objectives pursued.

The aims of the Italian provisions were the quicker and less expensive settlement of disputes and a lightening of the court's burden, which were both legitimate public interest objectives. The imposition of an out-of-court settlement procedure appeared appropriate in light of these objectives. This ruling clearly indicates the ECJ's position on nationally imposed mandatory mediation.

#### *Scope of Directive*

The Directive applies in all member states, apart from Denmark, and applies only to cross-border disputes. The parties must, therefore, have their habitual residence in different member states, but the Directive's Recital 8 emphasizes that "nothing should prevent Member States from applying such provisions also to internal mediation processes."<sup>10</sup> States such as the United Kingdom do not in general

draw a distinction between domestic and cross-border disputes, and mediation provisions apply equally in both.

The Directive applies to "civil and commercial matters," but does not extend to "rights and obligations which are not at the parties' disposal under the relevant applicable law,"<sup>11</sup> for example the resolution of disputes concerning revenue, customs, administrative matters or *acta iure imperii* (i.e., acts of government). Mandatory obligations based on public policy, as arise in family and employment law, are also excluded. Article 5 of the Directive obliges member states to encourage the development and quality of mediation, Article 6 encourages national courts to refer litigants to mediation, and Article 9 calls for information about mediation and mediators to be made publicly available.

The objective of mediation is for the parties to settle their disputes amicably without reference to a tribunal, and the Directive makes clear that mediation "should not be regarded as a poorer alternative to judicial proceedings."<sup>12</sup> Article 6 therefore provides that member states must ensure that settlement agreements can be made enforceable. Enforceability is already provided for in a number of European jurisdictions, for example, by submission to a public notary, or using a court procedure known as homologation. Also, in the United Kingdom it is possible for agreements to be enshrined within a court judgment.

### *Confidentiality*

Confidentiality is fundamental to mediation. Parties are less likely to have full and frank discussions if the content might become public. Almost all mediators will insist on a confidentiality agreement which will place the parties and the mediator under binding obligations to keep all information exchanged during the process confidential. It is also usual that the process is "without prejudice" so if the mediation does not result in a settlement, neither party will be able to use the information in court proceedings.

The primary source of the confidentiality obligation is, therefore, likely to be contractual, but Article 7 goes some way to providing additional support:

Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned . . . ; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Some argue that more is necessary as a mediator could, if "the parties agree," still be compelled to testify in subsequent proceedings, falling short of the blanket ban envisaged in earlier drafts of the Directive. In England there has been a lot of discussion about whether mediators should be compelled to give evidence, particularly following *Farm Assist Limited v. Secretary of State for the Environment, Food and Rural Affairs (No 2)*.<sup>13</sup> In that case, one of the parties alleged that it had entered into a settlement due to economic duress from the other party. In a decision that shocked the mediation community, the English High Court was prepared to compel the mediator to give evidence despite six years having passed since the mediation. It had been assumed that English courts would uphold "mediation privilege."<sup>14</sup>

### *Effect of Mediation on Limitation and Prescription Periods*

Parties are less inclined to pursue mediation if still subject to judicial time limits. Often, therefore,

parties will enter into a "standstill agreement" and agree that time bar arguments will not arise from time spent mediating. Article 8 of the Directive appears to introduce a legislative version of the standstill, providing that parties who choose mediation should not be prejudiced by limitation or prescription periods.

### *Implementation of the Directive*

A directive is a legislative act of the European Union which, unlike self-executing directives, requires states to achieve a particular result without dictating how to achieve it. The Directive's implementation deadline is May 21, 2011.

The following is a summary of where some member states currently stand on implementation:

#### *Belgium*

Belgian law complies with the Directive. See Articles 1724-1737 of the Judicial Code.

#### *France*

French law was not initially compliant with Article 8 (limitation periods). This was rectified by the Time Limitations Act of 17 June 2008.

#### *Germany*

German law largely complies with the Directive, but action is required in respect of ensuring quality of mediation, enforceability of agreements, and mediators' rights to refuse to give evidence. It is understood that Germany may seek to encompass domestic as well as cross border mediations, and introduce incentives.

#### *Italy*

Italian law was already compliant. See Articles 185 and 420 of the Code of Civil Procedure and article 16.D Lgs 2003 n.5. Additionally, on March 6, 2011 Legislative Decree no. 28/2010 comes into force

which will make mediation of certain disputes mandatory.

#### *Poland*

Poland is compliant as it added a regulation concerning mediation to its Civil Code and Code of Civil Procedure in 2005.

#### *Romania*

Romania is compliant with the Directive. See Law 192/2006, which was prepared on the basis of a draft version of the Directive.

#### *Slovenia*

In May 2008, the Mediation in Civil and Commercial Matters Act implemented the Directive. It contains provisions on basic principles of mediation procedure, leaving the rest to self-regulation.

#### *Spain*

Mediation was not previously regulated under Spanish law. On February 19, 2010, the Spanish Government released a raft of bills including the Civil and Commercial Mediation Bill, which will bring Spanish law into line with the Directive. There has been some controversy over Spanish efforts to "professionalize" the mediation industry, including requirements that mediators have a college level education and purchase professional liability insurance.

#### *United Kingdom*

English law is compliant save in respect of Article 8. This will be addressed in the December 2010 civil procedure rules update. In terms of ensuring quality, the Civil Mediation Council launched a pilot scheme for the accreditation of UK mediators in 2006, and recently proposed two new accreditation schemes for mediators and providers. There is ongoing judicial debate over whether litigants should be compelled to mediate. The Civil Litigation Costs Review—the final Jackson Report on costs

published in January 2010—adopted the view that whilst mediation brings considerable benefits, and the courts should encourage it, it should not be mandatory.<sup>15</sup>

The Directive places mediation at the center of European cross-border dispute resolution. No longer can mediation be disregarded, and litigators will need to be familiar with it.

Although the Directive strictly applies only to cross-border disputes, it is also expected to impact domestic disputes, and disputes between parties within the EU and parties outside of it. This is because many member states are unlikely to distinguish cross-border disputes from others. Further, the Directive will have an intangible effect on the way that we handle disputes and the mindset of litigators is likely to change accordingly. This has already happened in England, where mediation has firmly taken root and end users are becoming increasingly familiar with it.

#### *The Future of Mediation: Lessons from England and the United States*

In the English and U.S. systems, mediation is in many cases no longer seen as optional; it is often practically compulsory.

In England, solicitors are obliged by their Code of Conduct to advise clients "whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes."<sup>16</sup> Prior to commencing litigation, parties are expected to engage in detailed correspondence and to seriously consider mediation. English judges will regularly ask parties whether they have considered mediation, and if not, why not. Likewise, at the end of a case, the parties' attitude to mediation will be taken into account when considering who should bear the costs. It is this area that has produced the more pro-mediation judgments.

In *Dunnett v. Railtrack Plc*, the claimant sought damages arising out of the death of three of her horses on the defendant's railway lines.<sup>17</sup> The

defendant rejected the claimant's proposal for mediation without giving it any consideration. Despite the claimant subsequently losing at each stage of the proceedings, the court declined to award the defendant its costs because of its out-of-hand refusal to mediate. The court observed that skilled mediators may achieve results satisfactory to both parties "beyond the power of lawyers and courts to achieve," including, for example, a simple apology. The court concluded:

It is hoped that any publicity given to this . . . judgment . . . will draw the attention of lawyers to their duties to further the overriding objective . . . and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court . . . they may have to face uncomfortable costs consequences.

In *Earl of Malmesbury v. Strutt and Parker*, an English aristocrat sued an estate agent for negligence.<sup>18</sup> The parties attempted to mediate, but it was alleged that one party did not take the process seriously. Later, when the court was considering costs, it was held that where a party adopts a "plainly unrealistic and unreasonable" stance during mediation, the court "can and should" take account of this when deciding the appropriate costs order. The court noted that "a party who agrees to mediation but then causes the mediation to fail by [reason of his] unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate."

If England is mediation-friendly, then the United States takes it a step further. William O'Brian, an Associate Professor at the University of Warwick who has practiced as a commercial litigator in the United States, has commented that "[i]n many jurisdictions in the U.S. today, courts will virtually force parties to go through mediation before their cases are heard."<sup>19</sup> The reasons for this popularity, according to O'Brian, include the huge costs of litigation, particularly disclosure and depositions, and the use of juries which adds to the uncertainty of the outcome.

The English and U.S. approaches to mediation will be of interest to others, particularly EU member states bound by the Directive, as English and U.S. traditions tend to spread. This is all the more likely in countries where litigation is slow, courts are overburdened, and where mediation might offer relief. In short, we can expect pan-European mediation to grow rapidly in popularity.

*Steven Friel is a Solicitor-Advocate and a partner in the London office of international law firm Brown Rudnick LLP. He is a graduate of Cambridge University and of the Inns of Court School of Law, and has a Master of Laws degree (with Distinction) in International Dispute Resolution from the University of London. He is an accredited mediator and a Member of the Chartered Institute of Arbitrators. Email: sfriel@brownrudnick.com.*

*Christian Toms is a Barrister and an associate in the London office of international law firm Brown Rudnick LLP. He is a graduate of Oxford University and of the Inns of Court School of Law. Email: ctoms@brownrudnick.com.*

<sup>10</sup> Directive 2008/52/EC, at recital.

<sup>11</sup> *Id.* at art. 1(2).

<sup>12</sup> *Id.* at recital 19.

<sup>13</sup> *Farm Assist Ltd. v. Sec'y of State for the Env't, Food and Rural Affairs* (No. 2), [2009] EWHC 1102 (TCC).

<sup>14</sup> Michel Kallipetis QC and William Wood QC, *Farm Assist: The Latest Developments in Mediation Privilege*, <http://www.themediator magazine.co.uk/features/13-expert-briefings/77-farmassist> (last visited Dec. 17, 2010).

<sup>15</sup> Rupert Jackson, *Review of Civil Litigation Costs: Final Report*, <http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf> (last visited Dec. 17, 2010).

<sup>16</sup> Client Care - 2.02, Guidance to Rule 2, Solicitors' Code of Conduct 2007, <http://www.sra.org.uk/code-of-conduct.page> (last visited Dec. 17, 2010)

<sup>17</sup> [2002] EWCA Civ 302.

<sup>18</sup> [2002] EWCA Civ 302.

<sup>19</sup> Ass'n for Int'l Arbitration, *Lessons for the European Union from Mediation in the United States, in THE NEW EU DIRECTIVE ON MEDIATION: FIRST INSIGHTS* (2008).

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<sup>1</sup> Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.

<sup>2</sup> *Id.* at art. 1.1.

<sup>3</sup> Action Plan of the European Council and the European Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice—text adopted by the Justice and Home Affairs Council of 3 December 1998 (1999/C 19/01).

<sup>4</sup> Council Presidency Conclusions (EC) of 15-16 October 2009, [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm).

<sup>5</sup> *Id.* Under the Directive, a mediator is not there to impose a settlement. This is distinct as from other ADR processes such as adjudication, expert determination and arbitration.

<sup>6</sup> European Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM (2002) 196 final (April 19, 2002).

<sup>7</sup> Directive 2008/52/EC, at art. 3.

<sup>8</sup> *See also* Directive 2008/52/EC, at recital 14.

<sup>9</sup> Joined Cases C-317/08 to C-320/08, *Alassini v. Telecom Italia SpA*.