Lessons learnt from the implementation of the EU Mediation Directive: the business perspective
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NOTE

Abstract
This briefing note deals with the use of mediation as a dispute resolution process by businesses. It analyses the impact of the Mediation Directive 2008/52/EC in the light of its three main objectives that are facilitation of access to alternative dispute resolution, promotion of mediation and balanced relationship between mediation and judicial proceedings. Moreover, recommendations are provided on how to enhance mediation uptake by SMEs.
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EXECUTIVE SUMMARY

Background

The background of this briefing note is the need for more effective dispute resolution mechanisms for businesses. Mediation is entrusted to provide smart access to dispute resolution but remain largely unexploited. Against this background, the European institutions adopted a Directive on certain aspects of mediation in civil and commercial matters in 2008\(^1\). Member States shall implement the Directive before 21 May 2011.

The Mediation Directive is not the only instrument developed at EU level to promote mediation. A European code of conduct for mediators\(^2\) has been developed by a group of stakeholders with the assistance of the European Commission and was launched in 2004.

Aim

The purpose of this paper is to give a description of the business approach to disputes and give trends on the development of the mediation market. The approach taken by the Directive and its implementation by some Member States is discussed in this note and information is given on possible action to further increase its impact.

KEY FINDINGS

- Large businesses tend to develop a dispute management process and are more likely to initiate mediation than SMEs that rather tend to look for a judicial issue to their dispute.

- The percentage of disputes referred to mediation by businesses is between 0.5% and 2%. Cross border mediation stand for less than 0.05% of European B2B conflicts.

- The main incentive for businesses to mediate is effectiveness. Dispute resolution must be quick, cost effective and the outcome must be favourable.

- About 25% of disputes are left unsolved by SMEs because they refuse to litigate. Mediation awareness of these companies would significantly reduce this percentage.

- The principle of confidentiality and the lack of clustering of mediators in mediation centres hamper the development of sound statistics about mediation use in Europe.

- The potential market for mediation is huge but is locked partly due to preconceptions. Both lawyers and corporations suffer from lack of awareness about mediation.

- A large number of Member States opted for applying the Directive provisions to both internal and international mediation processes.

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Some Member States developed accreditation systems to raise the quality of mediation services. There exist no homogeneous accreditation rules throughout Europe and that might challenge the enforcement of mediation compromises across borders.

The Directive facilitates the enforcement of mediation settlements. Mediation would gain efficiency if recognised mediation centres had the competence to issue an enforcement clause that would grant direct enforcement of mediation agreements.

The promotion of mediation foreseen by the Directive is a never ending task and statistics show that much remain to be done. Italy has taken recently a drastic path by imposing mediation in a number of matters. This option should be analysed in a few years in order to assess its benefits and drawbacks.

Public funding is needed to raise awareness about mediation but public authorities should refrain from subsidising mediation training which is a sustainable market.

It will take some time, probably a couple of years, before the Mediation Directive really impact the mediation market and before trends as to the place of mediation in business approach to disputes emerge.
1. BUSINESS APPROACH TO DISPUTES

Business approach to disputes varies significantly by company size and to certain extents by business sector and geographical scope.

Large businesses tend to integrate dispute management into the general corporate planning process. The legal team is more likely to understand the broader business issues facing its company and industry. SMEs are facing less disputes and the nature of the conflicts is usually less technical. Problems with payment are by far the main subject of SME disputes. When technical disputes arise, SMEs refer the case to an external lawyer.

There is therefore no surprise to see large companies more inclined to avoid risk involved with the uncertainty of judicial processes and to focus on preserving relationships by amicably settling disputes rather than just on winning cases. On the contrary, SMEs confronted to a one-off case are much more likely to focus primarily on reviewing contracts and agreements and to look for having their day in court.

When asked about their requirements for dispute resolution, businesses agree that it must be quick, the outcome must be favourable and it must be cost effective. The understanding of favourable outcome might however vary. For some companies the expected outcome is winning while for others maintaining relationship and fairness is of higher importance.

1.1. Knowledge and use of mediation by SMEs

The study “SME access to ADR systems” published by the European Commission in 2006 reported that only 2% of B2B disputes involving SMEs were settled through ADR (including but not exclusively arbitration and mediation). In only three countries (namely: Poland, Slovenia and England) B2B mediation was described as well established while five others (namely: Denmark, France, Germany, the Netherlands and Spain) were acknowledging growing interest. “The Cost of non ADR” study also funded by the European Commission and published in 2010 estimates the number of disputes referred to ADR to less than 0,5% in most EU countries.

Although mediation services are offered in almost all areas of life such as victim/offender mediation, family mediation, workplace mediation and mediation in commercial sector, there is a consensus to say that the actual number of mediation cases is rather low in most areas.

There is however a difficulty to collect sound data about the number and area of mediation. The problem lies in the nature of the mediation process itself. The procedure is confidential and there is generally no obligation to register a mediation process or settlement with any competent authority. The only existing figures are compiled on limited statistical database.

What is more worrying is the lack of knowledge and false and pejorative preconception about mediation. According to the above mentioned 2006 EC study, the vast majority of SMEs (83%) that have been involved in disputes do not know what ADR is. The lack of

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3 EIM, SME access to Alternative Dispute Resolution systems, February 2006: http://www.kmuforschung.ac.at/de/Projekte/ADR/Final_report_ADR_SMEs.PDF.
Implementation of the Mediation Directive/business perspective

-awarement about mediation is far greater in SMEs than large companies. Businesses that took part in a mediation procedure are willing to use mediation again should they be confronted with a new dispute.

1.2. Reasons for using mediation

There is a number of reasons for using mediation. Money and time savings are the top ones quoted by businesses regardless of their size and geographic origin.

Businesses have no time for long procedures: “business must go on”. Late solutions hinder investments and sometimes even jeopardise the sustainability of the company. Attorney and bailiff’s costs related to judicial proceedings also tend to be high. In most cases, the mediation agreement is enforced voluntarily, which cuts drastically bailiff’s cost. And while lawyers are generally invited to take part and play an important role in commercial mediation, their participation is less dominant than in judicial proceedings. The preservation of the business relation can also save money as there is no need to terminate the contract and develop new business relations with a new supplier or customer from scratch.

Dispute wise businesses\(^5\) state further reasons for using mediation. They use mediation because it provides a more satisfactory process in which they would resolve the dispute themselves and keep control on the outcome. They mention as well the interest in keeping good business relationships and in getting a more durable resolution compared to litigation.

In some cases, the use of mediation has been made mandatory by contract, by the judge or by law. It seems that when parties are forced to mediate, the success rate drops down around 50% compared to a success rate above 70% when mediation is voluntary.

Primary reasons for using mediation:
- Saves money
- Saves time

Secondary reasons for using mediation:
- Provides a more satisfactory process
- Allows the parties to resolve the dispute themselves
- Gives more satisfactory settlements
- Preserves good business relationships between disputing parties
- Provides more durable resolution compared to litigation

Quoted essentially by larger companies:
- Use the expertise of the mediator
- Preserves confidentiality
- Became standard practice in industry
- Is desired by senior management
- Is more effective for managerial or technically complex dispute
- Avoids establishing legal precedents

\(^5\) A company is considered “dispute wise” when it demonstrates a willingness to take a more global view of the full spectrum of an organisation’s disputes. The concept “dispute wise” was developed by the American Arbitration Association, http://www.adr.org/sp.asp?id=29431.
Mandatory use:

- Is court mandated
- Is required by law
- Is required by contract

1.3. Costs of unresolved disputes of SMEs

Most SMEs try to resolve their dispute through negotiation. If no easy compromise can be achieved, the SMEs will either go to court, look for third party assistance (such as a mediator) or leave the dispute unresolved. About 25% of the disputes are left unsolved.

Leaving dispute unresolved entails direct costs such as unpaid invoices or uncompensated damages but also some other indirect costs such as lawyer’s fees and courts expenses. There are also some longer term costs which are loss of market and loss of a business relationship.

2. IMPACT OF THE MEDIATION DIRECTIVE

The objective of the Mediation Directive is threefold. First, it is to reinforce the quality and security of mediation. Second, it aims at promoting mediation as an autonomous dispute resolution process. Third, it is to ensure a balanced relationship between mediation and proceedings.

The Directive has a restricted scope of application. It envisages cross-border disputes in civil and commercial matters with a series of exceptions. Administrative matters fall notably outside the scope of mediation which leads to think that claims that would normally be decided by regulatory or supervisory authorities such as patents offices are not suitable for mediation. The European institutions should consider this since a new European patent system is under development and mediation is seen by many stakeholders including EUROCHAMBRES as an efficient alternative to solve patent disputes.

The Directive implies a minimum of harmonisation between Member States on the quality and guarantees of mediation (articles 4 and 7), the enforcement rules (article 6) and the effect of mediation on limitation and prescription periods (article 8).

2.1. Limitation to cross border disputes

The Directive imposes Member States to implement its principles in cross border mediation. At first glance, this approach may seem to limit the effect of the Directive to an extremely low number of cases. The EIM Business and Policy Research 2005 survey\(^6\) highlights that 91% of SME disputes are domestic and only 9% are international. An extrapolation of these figures combined with the one quoted under point 1.1 lead to the conclusion that the Directive applies to less than 0,05% of European B2B conflicts.

The limitation of the Directive was highly criticized by business organisations such as EUROCHAMBRES that stressed in 2005 that "first, such a limitation is giving raise to legal uncertainty. When agreeing on a mediation clause in a commercial contract, parties cannot

\(^6\) Quoted in EIM, SME access to Alternative Dispute Resolution systems, February 2006, table 12, http://www.kmuforschung.ac.at/de/Projekte/ADR/Final_report_ADR_SMEs.PDF.
always anticipate if the potential dispute will be purely national or not. Parties are therefore not in a position to know the applicable rules. Additionally, there could be some difficulties to determine what a cross border case is. Secondly, such a limitation would be contrary to the objective of promoting mediation as a general and widespread way to settle civil and commercial disputes and would be a hindrance to the smooth operation of the internal market. Thirdly, such a measure would impair the mandatory equality of treatment under the jurisdiction of different member States in that it would engender a dual discriminatory system." The European Commission also highlighted in a 2010 press release that "these measures can only be effective if put in place by Member States at national level".

However, and this is essential, the cross border scope of the Directive does not prevent Member States to apply the same provisions to internal mediation processes. It seems that most Member States which implemented the Directive decided as well to apply its principles to domestic disputes. This is definitely of benefit for mediation stakeholders.

The deadline for implementation of the Mediation Directive is 21 May 2011. Denmark has opted not to enforce this directive and is the only EU country that will not implement it. A number of countries such as Belgium, France, Germany, Greece, Italy, Portugal and Slovenia have decided to apply the principles of the Mediation Directive to both cross-border and domestic disputes. In England and Wales, the Ministry of Justice has stated that the Directive will apply only to cross-border disputes.

The application of different rules to domestic and cross-border mediation is confusing and it goes against the main objectives of the directive (security and promotion). It remains to be seen whether the Member States with dual rules will convert to the one rule approach at a later stage.

2.2. Reinforcing quality and security

The Directive doesn’t aim neither at setting up of a uniform regime for mediation nor at regulating the mediator profession. This would harm a process that is based on flexibility. The objective is rather to propose a framework that reinforces quality and security of mediation while respecting the principles of subsidiarity and proportionality.

2.2.1. Quality of mediation

Article 4 of the Directive requires the Member States to encourage “the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms” and to encourage “the initial and further training of mediators”. This provision does not require implementation per se. The mediation directive opts for a soft approach that respects the principle of subsidiarity. As a consequence, the quality of mediators can vary very much from one Member States to the other.

Some countries, like Belgium and Romania, adopted an accreditation system for mediators. An entity such as the Mediation Federal Commission in Belgium or the Mediation Council in Romania was entrusted to set up accreditation rules and to grant accreditations to

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mediators. The list of accredited mediators is published on a website or in the Official Journal and is updated on a regular basis.

This system has the benefit of enhancing the quality of mediation services supply. It guarantees that the mediator has a minimum of working experience (followed by a number of training sessions), maintains knowledge over the years through continuous professional development, enjoys good reputation, has no permanent conviction, etc. It is worth mentioning that both in Belgium and Romania, mere academic knowledge has been considered as not sufficient to ensure the development of appropriate skills.

The effect of accreditation is nevertheless not homogeneous. In Belgium, for example, there is no obligation for a mediator to be accredited but a mediation settlement facilitated by an accredited mediator benefits from specific enforcement rules and the interruption of limitation periods. In Austria, limitation periods are interrupted only in case the mediator is appointed from the list of mediators maintained by the Ministry of Justice.

The drawbacks of this accreditation system are that these regulations established entry access rules to the profession, which are not harmonised at EU level and where no mutual recognition mechanism has been adopted. In cross border disputes, special attention must be paid on how to enforce the mediation settlement. The claimant must initiate the court proceedings in the breaching party’s country. It is not clear whether a Belgian judge, for example, would ensure the enforceability of a mediation agreement facilitated by a British mediator that is not accredited.

2.2.2. Enforcement of settlements

Article 6 of the Directive is one of the three key elements of the mediation rules. It requests Member States to ensure enforceability of agreements resulting from mediation on request of the parties. It may be “enforceable by a court or other competent authority in a judgement or decision or in an authentic instrument”.

This provision entails implementation obligation for Member States and the obligation for the Commission to make publicly available information on the competent courts or authorities competent to receive such requests

This provision definitely enhances certainty for businesses that may be sceptical about the other side’s good faith. An enforcement tool is provided should only one side comply with the agreement reached at the end of mediation.

Mediation will be made a proper alternative to court proceedings and arbitration when mediation settlement agreement will be enforceable per se. With that objective, I would be in favour of declaring mediation settlement agreements enforceable when they are made under the guidance of recognised mediation institutions/centres. Such a proposal was discussed within the frame of the review of the German legislation on mediation, the mediation centre could have the competence to issue an enforcement clause that grants direct enforcement of mediation agreement.

It is worth noting that China introduced a similar rule to article 6 in August 2010 with the People’s Mediation Law. It stipulates that parties involved in a dispute can, upon their mutual consent, bring action to confirm the agreement reached in the mediation procedure.
2.2.3. Confidentiality of mediation

The Directive guarantees the confidentiality of mediation when stipulating that “neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence (...) regarding information arising out of or in connection with a mediation process” with exception where “the parties agree otherwise”, it is “necessary for overriding considerations of public policy” or when “necessary in order to implement or enforce the agreement”.

The confidential aspect of mediation is another key element of the Directive. Privacy is an important motivator for some businesses to choose mediation over the courts. Confidentiality is also conductive to more effective communication by the disputing parties. It provides a safe environment to disclose information and emotions. Confidentiality also reinforces mediator’s reputation, as it reinforces impartiality. Thanks to the confidentiality clause the mediation agreement is more definitive because it leaves little room for review.

Confidentiality is one of the defining features of the mediation process although in some circumstances the parties agree that the mediation should not be confidential in parts or in whole.

2.3. Promoting mediation

Article 5 of the Directive foresees that a court may “invite the parties to use mediation in order to settle the dispute” or “invite the parties to attend an information session on the use of mediation”.

The same article also leaves Member States the possibility to make the use of mediation compulsory or subject to incentives or sanctions as long as “such legislation does not prevent the parties from exercising their right of access to the judicial system”.

Various approaches have been adopted by Member States. An Italian decree effective since March 2011 foresees mandatory mediation procedure in insurance, banking and financial matters as well as other matters such as joint ownership, property rights, division of assets, hereditary and family law, leases in general, gratuitous loans, leases of going concern, compensation for damages due to car/nautical accidents, medical liability or defamation/libel. It also foresees that legal advisers have the duty to inform their clients about mediation. Italian’s lawyers, afraid that mediation entails drop in revenue, went on strike over the new rules. The Court of Justice of the European Union confirmed in a preliminary ruling issued in March 2010 that the EU Directives and general principles do not prevent national law from providing for mandatory mediation procedures.

The Department for Constitutional Affairs (DCA) in the UK has taken a totally different approach over the last 5 years. It set up percentage targets to reduce the proportion of disputed claims that reach the courts. Awareness raising events, such as the mediation week, were organised. Although mediation was not formally made mandatory, judges will, at the end of a case, take into account the parties’ attitude to mediation when considering

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who should bear the costs of the judicial proceedings. The Solicitors’ Code of Conduct also obliges solicitors to advise clients on alternative dispute resolution.

2.4. Ensuring sound relationship between mediation and judicial proceedings

The EU legislator set up minimum rules that ensure a balanced relationship between mediation and judicial proceedings independently of the way the mediation was initiated: strictly voluntary mediation, mediation mandated by a judge and entrusted to a third mediator or mediation decided and run by the judge him/herself.

“Parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration (...) by the expiry of limitation or prescription periods during the mediation process” stipulates article 8 of the Directive.

This is the third key element of the Directive. Negotiations between disputing parties can take time and most businesses do not really want to go to court while there is still a chance for negotiation but in the meantime do not want to lose the option to go to court.

Although statistics demonstrate that mediation procedures are about ten times quicker than courts decision in Europe, this provisions is definitely enhancing trust of businesses in mediation. Parties are never sure that the counterpart is not trying “one more time” to cheat them with a false desire to negotiate a mediation compromise. It is therefore very important for them to keep the option of judicial proceedings.

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3. FURTHER OBSERVATIONS

3.1. European mediation market

Although mediation is not new, the mediation market is still in its launching phase. The problem is less the offer than the demand. In most EU countries, the number of mediators trained outnumbered by far the demand for mediation.

The Directive tries to address both aspects. Article 4 should raise the quality of the offer while articles 5 and 10 are deemed to raise awareness about mediation. While most Member States worked hard to ensure quality of mediation, a lot remains to be done to raise awareness. The Directive, no doubt, contributed in putting mediation on the agenda of EU policy makers for a while. A number of mediation events where organised in view of its implementation and there has been an increase of media clipping and publication on this theme.

For many lawyers, ADR is the acronym of “Alarming Drop in Revenues”. But the legal profession is not the only one reluctant to mediation. The businessman or woman needs also to be familiar with the concept. The lawyers and the public need to be (re)educated. Legal advisors are a service industry, endeavouring to provide customers with a service that best suits their needs. The client’s true needs are met through the provision of an effective resolution of the dispute, as can be provided by mediation. Representing clients at mediation is increasingly recognised as special skills and bar associations should ensure that their members are adequately trained. The same goes for the large public. Events should be regularly organised in order to hear presentations, see mock mediations and talk to experienced mediators. Media campaigns should be organised to break stereotypes about mediation.

Legal protection insurance company could also play a role in developing the market. They would be the first to benefit from it. Yet it must be made sure that legal protection insurance includes mediation costs.

3.2. Public funding

Public funding is needed to encourage the development of the market. The market is too weak in most Member States to organise awareness campaign that will change mentality. There is also a constant need for studies that compare efficiency of judicial and mediation procedures.

However, public funding is not needed when it comes to training mediators. This mediation training market is sustainable already today and the funding of such training risks to create market distortion.
3.3. Reinforcing mediation institutions

Mediation centres are generally created by business organisations such as Chambers of Commerce or by associations of mediators. They tend to raise the quality of the mediation services by developing codes of conduct and mediation standards. By clustering, mediators create more visibility of their professional activity.

Mediation centres are in a position to gather information about mediation procedures such as the duration of the mediation session or the entire proceeding, the amount at stake, the success rate, etc. This is not the case when mediations are performed by isolated mediators.

A possible way to reinforce such recognised centres could be to entrust them to make the mediation agreement enforceable in an authentic instrument. This option is left open by article 6.2 of the mediation directive.

Mediation centres could also be benchmarked against a number of performance indicators that would be in line with the end-user needs. Such performance indicators would be the average time for solving the procedure, the average cost, the satisfaction of the customers, the success rate, the involvement of qualified mediators, transparency and the availability of quality control mechanisms.

3.4. Discriminatory VAT rules

In a number of countries, lawyers are not VAT taxable. Mediators that are lawyers and the ones that are not lawyers will therefore invoice differently. Non-lawyers mediators or mediation Centres (even when subcontracting the mediation to a lawyer) will invoice the mediation fees with VAT. In B2B mediation cases, this will have no impact as businesses normally recover VAT but this has an important impact when a private person is involved in the case as this last will not recover VAT. A mediation case involving a private person will be about 20% less expensive when fees are charged by a lawyer mediator.

There is a need for the set-up of a uniform VAT regime for mediation services.
CONCLUSIONS

The adoption of the Mediation Directive shed light on a dispute resolution mechanism that is, however, still to be discovered by most businesses. The Directive tackles a number of points which are crucial for the enhancement of trust and security for mediation users. Once the Directive is fully implemented by all Member States, that particular objective will be met.

The remaining challenge is the promotion of mediation. Although this key element of the Directive does not require specific implementation by Member States, this is probably the most difficult objective to reach. Italy chose the option of mandatory mediation in a large range of matters. In the United Kingdom, judges gave strong incentive to mediate by taking into account the parties’ attitude to mediation when considering who should bear the costs of the judicial proceedings.

It will take some time, probably a couple of years, before the Mediation Directive really impacts the mediation market and before trends as to the place of mediation in businesses’ approach to disputes emerge.
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