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DRAFT REPORT

on the implementation of 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 (the ‘Mediation Directive’)
(2016/2066(INI))

Committee on Legal Affairs

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EXPLANATORY STATEMENT - SUMMARY OF FACTS AND FINDINGS

I. Aim

The Mediation Directive has as its objective the facilitation of access to alternative dispute resolution and the promotion of the amicable settlement of disputes, by the promotion of the use of mediation as well as of a balanced relationship between mediation and judicial proceedings.

According to Article 11 of Directive 2008/52/EC, the Commission is required to submit a report to the European Parliament, the Council and the European Economic and Social Committee on the application of the Directive, considering the development of mediation throughout the European Union and the impact of the Directive in the Member States.

The Legal Affairs Committee contends that an implementation report based on the Commission's report would represent a timely opportunity to assess the impact that the Mediation Directive, as implemented and enforced by Member States, has had on citizens and businesses since its entry into force and to make concrete recommendations.

II. Sources of information

This own initiative report on the implementation of the Mediation Directive 2008/52/EC is based on information gathered from different sources, including:

- A 2016 compilation of in-depth-analyses from Policy Department C in the context of a workshop of the Committee on Legal Affairs on the implementation of the Mediation Directive on 29 November 2016;
- A 2016 European Implementation Assessment from the European Parliament Research Service on the implementation of the Mediation Directive and its application in the Member States since 2008;
- A 2016 report from the Commission and the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters;
- A 2013 study on the implementation of the Mediation Directive carried out on behalf of the Commission and updated in 2016;¹

III. Main findings

Based on the comparative sources of information above, it becomes clear that:

- almost all Member States opted to extend the Directive's requirements to domestic cases;²
- a number of Member States allow the use of mediation in civil and commercial

¹ http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=DS0216335.

² Only three Member States, namely Ireland, the Netherlands and the United Kingdom, have chosen to transpose the Directive with respect to cross-border cases only.

matters, including family and employment matters, while not explicitly excluding mediation for revenue, customs or administrative matters or for the liability of the State for acts and omissions in the exercise of State authority;¹

- all Member States foresee the possibility for courts to invite the parties to use mediation, with fifteen Member States² introducing the possibility for courts to invite parties to information sessions on mediation;
- less than half of the Member States have introduced an obligation in their national laws to spread information about mediation;³
- eighteen Member States introduced binding quality control mechanisms;⁴
- nineteen Member States require the development of and adherence to codes of conduct;⁵
- seventeen Member States encourage training or regulate it in their national legislation;⁶

IV. A balanced relationship between mediation and judicial proceedings

The principle of access to justice is fundamental and one of the main objectives of the EU-policy in the field of civil justice cooperation. The European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States with a view to facilitating better access to justice. Effective and efficient justice systems are of fundamental importance to the proper functioning of the internal market, to economic stability, to investment and to competitiveness. They foster confidence in commercial transactions, facilitate the resolution of disputes and help ensure that the necessary trust exists to encourage economic activity.

In line with the Justice for Growth agenda the Europe 2020 Strategy, mediation could be seen as a means to improve the efficiency of the justice system and to reduce the hurdles that lengthy and costly judicial procedures create for citizens and businesses; it can therefore contribute to economic growth. Mediation may also contribute to maintaining good relationship between the parties as, contrary to judicial proceedings there is no ‘winning’ or ‘losing’ party, which is particularly important, e.g. in family law cases.

Your rapporteur is of the opinion that although compulsory mediation would promote the use of mediation as an alternative to in-court-dispute resolution, such a development would be contrary to the voluntary nature of mediation and would affect the exercise of the right to an effective remedy before a court or tribunal as established in Article 47 of the Charter. As exemplified in the Court’s *Alassini* judgment⁷, although prior implementation of an out-of-court settlement procedure for specific disputes would not be problematic *per se*, a series of safeguards would need to be put in place to ensure that effective judicial protection is not hampered, including, the non-binding character of the decision reached in such out-of-court procedures, the swift and at very low cost completion of such procedures as well as the availability of interim measures in exceptional cases where the urgency of the situation so

¹ AT, CZ, EE, EL, ES IE, PT, SI, SK, UK.

² CY, CZ, ES, DE, FR, HU, IT, LT, PL, PT, RO, SK.

³ AT, BG, CY, EL, ES, HU, IT, LT, LV, PL, PT, RO, SI, SK.

⁴ AT, BE, BG, CY, CZ, DE, EE, EL, ES, HU, IT, LT, LV, PL, PT, RO, SI, SK.

⁵ AT, BE, BG, CY, EL, ES, FI, FR, IE, IT, LT, LV, MT, PL, PT, RO, SE, SI, SK.

⁶ AT, BE, BG, CY, EL, ES FI, HR, HU, IT, LT, LV, RO, SE, SI, SK, UK.

⁷ ECJ, C-317/08, C-318/08, C-319/08 and C-320/08 (par.2), ECLI:EU:C:2010:146.

requires. Accordingly, Article 5(2) of the mediation directive allows Member States to make the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that this does not prevent the parties from exercising their right of access to the courts.

Your rapporteur contends that adequate safeguards need to be put in place in mediation processes to limit the risk that weaker parties, such as consumers and unrepresented litigants, are being deprived of their right to an independent judicial determination or have the perception that they are so being deprived. To this direction, it is of utmost importance that those recommending, requiring or conducting mediations ensure that weaker parties do not settle a dispute without understanding their proper legal rights and that more powerful parties do not use speedy dispute resolution procedures, including mediation, as a means of avoiding their legal obligations or improving improperly their legal position against other parties.

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the implementation of 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 (the ‘Mediation Directive’) (2016/2066(INI))

The European Parliament,

- having regard to Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the ‘Mediation Directive’)¹,
- having regard to the Commission report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2016)0542),
- having regard to the compilation of in-depth analyses by the Directorate-General for Internal Policies entitled ‘The implementation of the Mediation Directive – 29 November 2016’²,
- having regard to the Commission study entitled ‘Study for an evaluation and implementation of Directive 2008/52/EC – the “Mediation Directive”’ of 2014³,
- having regard to the study by the Directorate-General for Internal Policies entitled ‘Rebooting the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU’⁴,
- having regard to the European Implementation Assessment on the Mediation Directive by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS)⁵,
- having regard to the study by the Directorate-General for Internal Policies entitled ‘Quantifying the cost of not using mediation – a data analysis’⁶,
- having regard to Articles 67 and 81(2)(g) of the Treaty on the Functioning of the European Union (TFEU),
- having regard to Rule 52 of its Rules of Procedure as well as Article 1(1)(e) of, and Annex 3 to, the decision of the Conference of Presidents of 12 December 2002 on the procedure for granting authorisation to draw up own-initiative reports,

¹ OJ L 136, 24.5.2008, p.3.

² PE 571.395.

³ <http://bookshop.europa.eu/en/study-for-an-evaluation-and-implementation-of-directive-2008-52-ec-the-mediation-directive--pbDS0114825/>

⁴ PE 493.042.

⁵ PE 593.789.

⁶ PE 453.180.

- having regard to the report of the Committee on Legal Affairs (A8-0000/2017)
- A. whereas the implementation of Directive 2008/52/EC has differed greatly among Member States, with some opting for a relatively literal implementation of its provisions, others for an in-depth revision of alternative ways to dispense justice, and others deeming their existing laws to be already in line with the Mediation Directive;
- B. whereas most Member States have extended the scope of application of their national transposing measures to domestic cases too;
- C. whereas the Mediation Directive has provided EU added value by raising awareness among national legislators of the advantages of mediation;
- D. whereas the objectives stated in Article 1 of the Mediation Directive aimed at encouraging the use of mediation and in particular at achieving a ‘balanced relationship between mediation and judicial proceedings’ have clearly not been achieved, as mediation is used in less than 1 % of the cases in court on average in the majority of Member States¹;
- E. whereas the Mediation Directive has not created a Union system for out-of-court dispute resolution in the strictest sense, with the exception of the introduction of specific provisions in the field of expiration of limitation and prescription periods in legal proceedings when mediation is attempted and in the field of confidentiality obligations for the mediators and their administrative staff;

Main conclusions

1. Welcomes the fact that in many Member States mediation systems have recently been subject to changes and revisions, and in others amendments to the applicable legislation are envisaged²; observes that most Member States are not only compliant, but are in fact exceeding the Mediation Directive’s requirements;
2. Deplores however the lack of a mediation culture in the Member States and the low level of awareness of mediation in the majority of Member States;
3. Notes that many Member States provide financial incentives for parties to use mediation, either in the form of cost reductions, legal aid, or sanctions for unjustified refusal to consider mediation; observes that the results achieved in these countries prove that mediation can provide a cost-effective and quick extra-judicial resolution of disputes through processes tailored to the needs of the parties;
4. Is concerned by the difficulty of obtaining comprehensive statistical data on mediation, including the number of mediated cases, the average length and success rates of mediation processes; regrets the fact that without a reliable database it is very difficult to further promote mediation and increase public trust in its effectiveness; notes on the other hand the increasing role of the European Judicial Network in civil and commercial matters in improving national data collection on the application of the Mediation

¹ PE 571.395, p.25.

² Croatia, Estonia, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia and Spain.

Directive;

5. Stresses the significance of the development and maintenance of a separate section on the European e-Justice Portal dedicated to cross-border mediation in family matters, providing information on national mediation systems;
6. Welcomes the Commission's dedication therefore to co-financing various projects aimed at the promotion of mediation and training for judges and practitioners in the Member States;
7. Stresses that, despite the voluntary nature of mediation, further steps must be taken to ensure the enforceability of mediated agreements in a quick and affordable manner, with full respect for fundamental rights, as well as Union and national law;

Recommendations

8. Calls on the Member States to step up their efforts to provide citizens and legal persons with appropriate, comprehensive information regarding mediation and its advantages and to ensure improved cooperation between legal professionals for that purpose;
9. Calls on the Commission to assess the need to develop EU-wide quality standards for the provision of mediation services, especially in the form of minimum standards ensuring consistency, while taking into account the fundamental right of access to justice as well as local differences in mediation cultures, as a means to further promote the use of mediation;
10. Calls on the Commission also to assess the need for an obligation to be introduced for Member States to create and maintain national registers of mediated proceedings;
11. Requests that the Commission undertake a detailed study on the obstacles to the free circulation of foreign mediation agreements in the Union and on various options to promote the use of mediation as a sound, affordable and effective way to solve conflicts in internal and cross-border disputes in the Union, taking into account the rule of law and ongoing international developments in this field;
12. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.