



EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



LEGAL AFFAIRS

**Mediation as
Alternative Dispute Resolution**

The functioning of Directive 2008/52/EC
on certain aspects of mediation
in civil and commercial matters



MEDIATION

SOME ADVANTAGES

- 🍷 Self determination
- 🍷 Control over outcomes
- 🍷 Preservation of relationships

SOME KEY FEATURES of Directive 2008/52/EC

- 🍷 Guaranteeing quality
- 🍷 Protecting confidentiality
- 🍷 Empowering judges to invite litigants to mediate
- 🍷 Ensuring enforceability

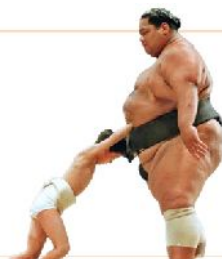
3

THE EU “MEDIATION PARADOX”

ONLY 0.05%
of civil cases
mediated

20 MILLION
civil cases filed
in courts

NO “BALANCED RELATIONSHIP”
between mediation and judicial proceedings
(required by art. 1 of Mediation Directive)



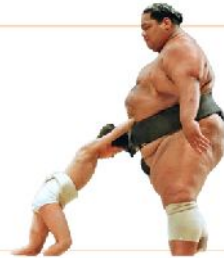
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**Massive
economic loss**

BILLIONS WOULD BE SAVED
even if only 50% of mediations end
with an agreement.

5

THE ‘ECJ’ ON MEDIATION: OPTIONAL = LESS EFFICIENT

**The 2010
«Alassini» case
(Sec. 65)**

*“no less restrictive
alternative to the
implementation of a
mandatory procedure
exists, since the
introduction of **an out-of-
court settlement
procedure which is
merely optional is not as
efficient ...**”*

**An acceptable mandatory
mediation model
(Sec. 67)**

- *“Is not binding on the parties...”*
- *“Does not cause a substantial delay...”*
- *“Suspends the period of the time-barring
of claims ...”*
- *“Is free or very low cost ...”*

6

THE 'ECJ' ON MEDIATION: OPTIONAL = LESS EFFICIENT

The 2010 «Alassini» case (Sec. 65)

"no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives"

Article 5.2 of the EU Mediation Directive

*"This Directive is without prejudice to national legislation **making the use of mediation compulsory** or subject to incentives or sanctions"*

An acceptable mandatory mediation model (Sec. 67)

- *"Is not binding on the parties..."*
- *"Does not cause a substantial delay..."*
- *"Suspends the period of the time-barring of claims ..."*
- *"Is free or very low cost ..."*

7

POET 'OVIDIUS' ON A MOTORCYCLE ...

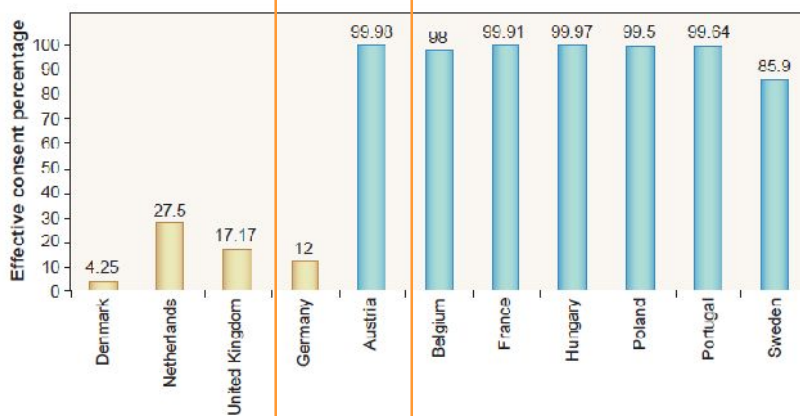


*"I SEE AND APPROVE OF THE BETTER,
BUT I FOLLOW THE WORSE."*

("Video Meliora Proboque, Deteriora Sequor")

8

ORGAN DONATIONS GRAPH BY COUNTRY



Effective consent rates, by country. Explicit consent (opt-in, gold) and presumed consent (opt-out, blue).

By Eric J. Johnson and Daniel Goldstein https://www.academia.edu/5104501/Save_default_save_life

9

«OPT-IN» vs. «OPT-OUT» MEDIATION

OPT-IN MODELS

Parties must sign an agreement **TO mediate**



27 Countries

- None has **more than 10.000 cases**
- 19 have **less than 2.000 cases**

OPT-OUT MODELS

Parties are by default in mediation, but either can decide **NOT to mediate**



1 Country (Italy)



'Rebooting the Mediation Directive', available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET%282014%29493042_EN.pdf

10

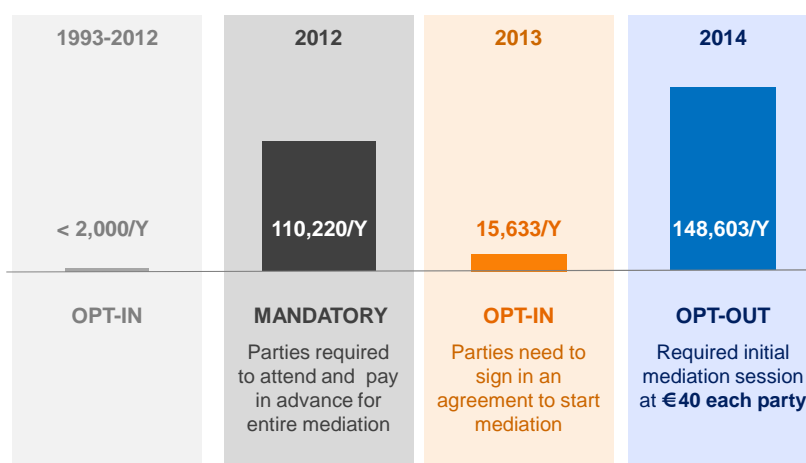
HOW TO GET TO 150,000 MEDIATIONS (IN ONE YEAR!)

THE ITALIAN “OPT-OUT” MEDIATION MODEL

- | | |
|---|--|
| 1
REQUIRED INITIAL MEDIATION MEETING, IN CERTAIN CASES | 4
NO OBLIGATION TO PAY UNLESS PARTIES AGREE TO CONTINUE MEDIATION |
| 2
NOMINAL FEE FOR MEDIATION | 5
NO SANCTIONS FOR OPTING OUT |
| 3
SANCTIONS FOR NOT SHOWING UP AT INITIAL MEETING | 6
SOME ECONOMIC BENEFITS TO PARTIES |

11

ITALY: A SOCIAL LABORATORY IN MEDIATION POLICY



Source: Department of Statistics – Italian Ministry of Justice, 2015

12

ITALY: A SOCIAL LABORATORY IN MEDIATION POLICY



Source: Department of Statistics – Italian Ministry of Justice, 2015

13

WHO PAYS, AND HOW MUCH, FOR CIVIL JUSTICE?

With court fees, average EU litigant pays only **30%** of total civil justice service costs

Non-litigants
Pay **70%** of costs
(via general taxation)



Have the right to
ask litigants to try
mediation first

Data from the 2014 CEPEJ Report on «European Judicial Systems – edition 2014: efficiency and quality of justice» (http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf)

14

PROBLEMATIC MEDIATION TRENDS



In family cases, no direct access to courts; mandatory first meeting with mediation counselor (not a mediator!). MoJ considering to extend mechanism to all civil cases.



**Opt-in system:
less effective than
opt-out.**



Bill requiring mediation before trial recently announced. No indication of easy opt-out.



**Plain mandatory
mediation: also less
effective.**



Proposal to review Insurance Directive would make it mandatory for insurance companies to participate in ADR.



**Plain and unilateral
mandatory mediation:
less effective and
likely to face
industry resistance.**

15

A NEW ARTICLE 5 FOR THE MEDIATION DIRECTIVE

"Member States shall ensure that a mediation step is integrated into the judicial process for civil and commercial cases, except for such cases as Member States shall determine are not suitable for mediation. The minimum requirements for such mediation step are that the parties must meet together with a mediator, subject to the condition that the procedure shall:

- *Not result in a decision binding on the parties*
- *Not cause a substantial delay*
- *Suspend the period for time barring of claims*
- *Be free of charge, or of limited cost in the case any party decides to opt out at the initial session."*

16

GOD'S OWN MEDIATION CENTER ON EARTH?
STILL NO CLIENTS WAITING IN LINE,
ABSENT A PROPER MEDIATION POLICY!



17

MEDIATION DIRECTIVE STUDY TEAM

Giuseppe DE PALO (team leader/presenter)

ADR Center (Rome); Hamline University School of Law (St. Paul, U.S.A.)

Chris THOMPSON, Richon Consulting International

Leonardo D'URSO, ADR Center

Mary TREVOR, Hamline University School of Law

Bryan BRANON, ADR Center

Romina CANESSA, ADR Center

Pietro FORTUZZI, ADR Center

Chiara ZILIO, ADR Center

Thank You !

giuseppe.depalo@adrcenter.com



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