

COMMENT

CCBE response to the public consultation on the application of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters

11/12/2015

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

As part of the European Commission consultation, the CCBE wishes to provide further contribution to the Commission questionnaire. Since Directive 2008/52/EC of 21 May 2008, which applies only to mediation in cross-border disputes, it seems that improvements could be made by member states in promoting the implementation and development of mediation in the member states.

The need for a precise definition of the concept of Mediation

Under Article 3 of Directive 2008/52/EC, 'mediation' is 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."

Article 3 includes mediation conducted by a judge who is not responsible for any judicial proceedings relating to the dispute concerned. It excludes attempts from a court or a judge hearing a case to solve a dispute during the judicial proceedings relating to the dispute.

The feedback received from Member States shows divided views about the usefulness of such definition. Even though the definition is consistent with the strict limitations of mediation within the process, by allowing the term to be used freely, a misunderstanding will clearly remain on the concept of mediation. There is often some confusion between mediation and conciliation processes.

More importantly, notwithstanding this European definition, many different 'mediation' processes are developing, offering various contents, away from the structured process of mediation: mediation in criminal law/banking mediation/corporate credit mediator/mediation in human resources and work relations.

It seems that the word 'mediation' has now become the universal cure-all able to shape a peace-promoting endeavor in society.

Therefore, the CCBE recommends that the definition of mediation be clarified at European level by clearly associating the term with a specific extra-judicial process, thereby avoiding any possible confusion with other alternative dispute resolution mechanisms. Such clarification will also strengthen the identification of the process and facilitate communication for its implementation within civil society. The CCBE also recommends to avoid a circular definition, i.e., to avoid defining "mediation" by using the word "mediator".

Furthermore, the CCBE considers that the function of mediator should not develop into a kind of separate profession. In any case, if the role of mediator is fulfilled by a lawyer, this should never be a conflict between the exercise of the legal profession and mediator.

A high number of Bars have set up their own register of mediators (who are members of the Bar, receive specific training, and have professional indemnity insurance, etc.) together with mediation

centres. The legal profession is, due its understanding of the legal order and the rights and interests of the parties, one of the best-positioned professions to fulfil the functions related to mediation.

The importance of the non-compulsory nature of mediation and the counterproductive effects of its compulsory use

In principle, mediation should remain non-compulsory for two main reasons. The first reason is the nature of the dispute. Not all disputes may be suited for mediation. For instance, it might be necessary to make decisions on questions of principle on legal issues prior to the mediation, or the parties do not wish to enter into a dialogue due to difficult circumstances.

The second reason is the need for ownership of the process by the parties. A distinctive feature of mediation is that it enables the development of a solution by the parties themselves. To support such aspirations towards a collaborative solution, all initiatives in courts or through conventional mediation situations confirm that the parties must agree to use mediation from the very beginning. Otherwise it merely becomes a formal step prior to going to court.

In order to stimulate the use of mediation, incentives could be developed, such as fast access to a judge for the approval of an agreement, social and tax incentives, or priority status given to cases which were, prior to the referral to court, subject to mediation.

In addition, mediation should not be seen as a form of privatisation of justice. As a consequence, the cost of the mediation process should, as often as possible, be supported by the State, in fulfilling its sovereign function of rendering justice and, therefore, of settling disputes between citizens.

The right to information and legal assistance

The CCBE also calls for the establishment of mandatory information on mediation for all parties to court proceedings. Moreover, it is important that information on mediation is made available to the general public (e.g. how to access mediators), as this is lacking in most Member States. Also, parties entering into a mediation procedure should always have the possibility to be assisted by a lawyer in order to safeguard their rights and ensure they are in a position to take informed decisions.

The need to ensure the quality of mediation through training and implementation of European standards

In recital 16 of Directive 2008/52/EC the following principle is laid down: 'To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services'.

In most countries, initial training and continuing education are left to all professional stakeholders who wish to develop mediation activities. There is no harmonised scientific content, or even a minimum training framework. The EU must urgently set this framework, in order to ensure the quality of mediation. This could also facilitate the cross-border use of mediation in the EU.

Confidentiality of Mediations

There is an urgent need for a uniform approach to confidentiality of the mediation process. This will require clarification of the meaning of Article 7 of the directive, in particular as to who is bound by the confidentiality requirement, and the extent thereof.