Kluwer Mediation Blog

The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJUE Decision

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Introduction

In the variegated landscape of European legal systems, mediation has often been overshadowed by traditional litigation. Yet, the winds of change are blowing, particularly with the emergence of soft mandatory mediation models. Among these, Italy's opt-out model stands as a beacon of innovation, especially in light of a recent ruling from the Court of Justice of the European Union (CJUE). This blog will explore the nuances of this model and its implications for other European countries, particularly Bulgaria and Romania, which have been testing their mandatory mediation frameworks.

The Italian Journey: integrating mediation into the legal system

Italy's journey into mandatory mediation began with Legislative Decree No. 28/2010, a bold move that mandated certain civil and commercial disputes to undergo mediation before litigation. Initially met with fierce opposition from legal practitioners, this decree faced constitutional challenges related to process, not merits, in 2012. After nearly 13 years, the recourse to mediation is now well integrated into Italian civil and commercial justice, with the significant support of lawyers and the judiciary.

The Italian model requires parties to attend an initial mediation session held in a mediation center accredited by the Minister of Justice before pursuing court action in many civil and commercial dispute matters or when ordered by a judge in a pending case. This session conducted by a professional mediator is designed to reconnect the communication among the parties and initiate a mediation process without imposing any obligation to attend the full mediation process, let alone reach an agreement. In most cases, the presence of legal counsel is mandatory, ensuring that parties are well informed about their rights and options, thus also waiving unfounded concerns for privatization of justice. For the initial 11 years, the fees associated with this initial required session were almost nominal of € 40 or € 80, depending on the dispute's value, with regulated full mediation fees when parties decided voluntarily to opt in. This provision helped gradually increase the culture of mediation among stakeholders and integrate it within the legal system.

Since November 2023, following a comprehensive reform of civil justice procedures and

mediation law, the required initial mediation session was extended to cover more commercial dispute matters. This session has been transformed into an effective mediation session of up to two hours, with the fee subsequently increased from € 80 to € 224. This recent reform includes well-balanced financial incentives for parties attending the mediation sessions and financial sanctions for those who fail to attend without justifiable reasons. To this end, among a variety of financial incentives, mediation users can use a tax credit of up to € 600 for each party both for mediation and legal fees, with a yearly cap of € 1.200 for individuals and € 2.400 for legal entities.

Over the years, Italy has experienced a significant journey in its mediation landscape, with more than 500 public and private mediation centers and 20.000 professional mediators accredited. The number of mediations rose from just over 60,000 in 2011 to between 150,000 and 200,000 annually, with the exceptions of 2013 and 2020, due to a Constitutional Court decision and the Covid-19 pandemic, respectively. This surge demonstrates that mediation is not merely an "alternative" to court, but rather the first natural step in litigation. By 2023, participation rates in these initial sessions reached an impressive 60%, with more than half of the participants opting for full mediation. The success rate of settlements in these mediations has also grown, rising from 43.5% in 2014 to 50.1% in 2023, reflecting its increasing efficacy.

This success story has inspired other EU Member States to reconsider their approaches to mediation, leading to diverse models emerging across Europe aimed at effectively integrating mediation into the dispute-resolution process.

The Bulgarian and Romanian Experience: A Cautionary Tale

While Italy's experience showcases the potential benefits of the soft mandatory attempt to mediate (or the opt-out model), Bulgaria and Romania present contrasting narratives that highlight the complexities involved in adopting and implementing such models efficiently.

In Romania, the 2006 Mediation Act was amended in 2012 and 2013 to require plaintiffs to attend a cost-free information session with a mediator before litigation and sanctioning them with case inadmissibility for filing the claim with the courts without showing proof for attending such a session. The legislation didn't create incentives or sanctions for the defendants to attend such a session, paving the way to a mere formality in most cases. This is anecdotal, as there were no effective data-gathering mechanisms in place to collect statistics around such required efforts and their impacts on courts' caseloads and party satisfaction. Such statistics usually include how many mandatory sessions were initiated, how many were attended by all parties, how many led to a joint appetite for mediation, how many were settled, and what the satisfaction levels were with these processes. Further, statistics could indicate reasons behind the parties' decisions not to attend these sessions, not agree to go ahead with the full mediation process, or not to settle if they did engage in the full mediation process. None of these existed; hence, the implementation was challenging due to the lack of data.

It is important to understand the context of the limited infrastructure for data collection. Hence, the Romanian Parliament adopted this mediation policy at the initiative of a group of Members of the Parliament but without the Ministry of Justice's backing. There was no implementation plan or monitoring roles for stakeholders. Inevitably, one or two years after its adoption, this model faced scrutiny when the Romanian Constitutional Court ruled it unconstitutional in 2014 (Decision 266/2014). The court found that mandating attendance at an information session hindered effective access to justice because of the unbalanced, too strong sanction of case inadmissibility that the

plaintiffs would face. In other words, the legal instrument used to enforce the mandatory requirement – sanctioning the plaintiff with case inadmissibility – would not be balanced with the purpose being sought, i.e., decreasing the heavy caseload in the courts.

Similarly, Bulgaria attempted to introduce a mandatory mediation model that required parties to attend an information session within two months after initiating litigation. However, this legislation was struck down by the Bulgarian Constitutional Court as unconstitutional before it even came into effect on July 1st, 2024. The legal instrument used in this case would be to sanction the party that would not attend such a session when the court would rule on the court fees at the end of the trial. The court argued that such compulsion delayed access to justice and violated principles of voluntariness fundamental to effective dispute resolution. Further, by sanctioning the not-attending party with court fees, the Bulgarian Constitutional Court appreciated that it would be a barrier to access to justice, a fair trial, and legal assistance.

Both countries' experiences serve as cautionary tales about the delicate balance between promoting mediation and ensuring access to justice. They underscore the importance of designing models that encourage participation without infringing on individuals' rights.

The CJUE's Influence: A Guiding Light

On September 3, 2024, the Court of Justice of the European Union (CJEU) delivered an important ruling in case C-658/23, affirming that national laws can mandate mediation, whether before or after legal proceedings. This decision highlights the essential role of mediation in efficiently resolving disputes and alleviating court backlogs throughout Europe. It also clarifies that national courts have the authority to disregard previous rulings from their Constitutional Courts that invalidated mandatory mediation legislation.

The implications of this ruling are significant, particularly for countries like Romania and Bulgaria, which are making efforts to implement effective mediation models. The CJEU's interpretation of Articles 3(a) and 5(2) of the Mediation Directive empowers Member States to adopt mandatory mediation frameworks. The court indicated that requiring participation in an information session about mediation does not inherently conflict with EU law, thus encouraging a reconsideration of previously dismissed models.

In its ruling, the CJEU emphasized that while national courts must respect constitutional decisions, they are not bound by them if those decisions contradict EU law principles. This interpretation could enable judges to apply national laws promoting mediation, even if such laws had been deemed unconstitutional at the national level.

The case that led to this CJEU ruling stems from a preliminary ruling by the Bucharest Court of First Instance regarding a small claims dispute involving Investcapital LTD and Orange Romania S.A. The Romanian Mediation Act mandates plaintiffs to attend an information session on mediation before filing a claim. The CJEU ruled that such requirements do not violate the Mediation Directive as long as they do not impede access to justice.

This decision serves as guidance for Member States considering mandatory mediation models. It reassures them that compelling parties to engage with mediators can coexist with their rights to judicial protection, fostering an environment where mediation can thrive alongside traditional litigation in Europe.

Questions for Policymakers: Navigating Forward

As we reflect on these developments in mediation across Europe, several critical questions emerge for policymakers:
• How can we effectively promote awareness and understanding of mediation's benefits among potential users?
• What measures can be put in place so that mandatory mediation does not inadvertently create barriers to accessing justice?
• How can we find a balance between increasing mediation uptake and managing existing court caseloads?
• What role should legal professionals play in shaping attitudes toward mandatory mediation?
• How can we ensure adaptability in mandatory models across diverse socio-economic contexts within EU member states?

Striking a Balance: The Path Ahead

The overarching goal set forth by Article 1 of the EU Mediation Directive is clear: foster an environment where mediation complements traditional litigation rather than competing with it. Achieving this balance requires innovative strategies:
• Adopting the opt-out models: Nudging parties to make reasonable efforts to try mediation by attending an initial mediation session with an easy opt-out.
• Incentivizing mediation: Financial or procedural incentives could encourage litigants to participate in a mediation session as a first step.
• Training legal professionals: Equipping lawyers with knowledge about mediation can help shift perceptions and encourage clients toward amicable resolutions.
• Public awareness campaigns: Educating citizens about the benefits and processes of mediation can increase acceptance and usage.
• Monitoring effectiveness: Establishing metrics for evaluating mandatory models will allow for ongoing refinement and improvement.

Conclusion

The Italian opt-out model serves as a promising framework for integrating soft mandatory mediation into European legal systems. With the data available now from Italy and other countries, identifying effective mediation models is no longer a matter of opinion or ideology. It is about facts and core data.

The same opt-out model based on the "mediate first" approach can be applied in corporate mediation policies, where internal and external disputes are processed through dialogue-based interventions, like facilitation or mediation. Starting with an assessment stage, where parties are assisted in making an informed choice into mediation and then choosing their preferred approach – either through dialogue or compliance/investigation, the same principle is applicable. Mediation is not mandatory, but a reasonable effort to attempt to mediate, and it is for the parties to make informed choices about entering into the full process or settling. But about the corporate sector it will be for another post.

Of course, while no model is perfect, the EU Mediation Directive needs to be more directive. Sixteen years after its adoption, there is still no EU-wide data reflecting its impacts. With recent CJEU decisions providing supportive guidance, there is an opportunity for policymakers across

Europe—especially in countries like Bulgaria and Romania—to engage in meaningful dialogue about how best to implement these models while safeguarding access to justice.

As stakeholders deliberate on these issues, they must prioritize both individual rights and broader societal goals outlined by EU directives regarding justice accessibility and effectiveness. By promoting a culture where amicable dispute resolution is valued alongside traditional litigation, Europe can move toward a more harmonious legal landscape where conflicts are resolved collaboratively rather than adversarial.

We look toward the 95% or more settlement rates in the U.S. courts and wonder what needs to happen in the EU to achieve the same results. Most importantly, how can mediation and mediators assist in the process? The CJEU has had its say. Now it is time for action.

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