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The opinion of the European Commission on mandatory mediation in Italy

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The European Commission has submitted to the Court of Justice, in regards to a case routed to the Court by an Italian judge located in Mercato San Severino [**Case no. C-492/11 - Di Donà v. SIMSA**], an opinion with interesting notes on mediation ex Directive CE/52/2008, as implemented in Italy by Decree no. 28/2010 and its implementing regulations (among others, Ministerial Decree no. 180/10).

Several comments in Italy, indeed very simplistically, have asserted that the Commission would have rejected the so-called “mandatory mediation”, that is to mean the mechanism provided by the Italian Decree 28/10 under which the initiation and continuation of litigation over certain matters must be necessarily preceded by the experiment of a mediation attempt.

However, this is not the case. **The Commission takes the view that:**

a) the fear of the judge who routed its case to the Court of Justice, that is that art. 116 (2) of the Italian code of civil procedure (which sets that the judge can draw evidence arguments against the party who chooses not to participate to a ‘mandatory’ mediation under Decree 28/10), has no ground. This sanction in fact does **NOT** affect the hypothetical decision to initiate a proceeding in court later on, thanks to the coverage provided by the principle of confidentiality and unavailability of evidence resulting from a mediation in court (paragraph 61);

b) likewise for the economic sanctions (paragraph 62);

c) the **implementation of a mandatory step in mediation before access to court is compatible with EU regulations**, if intended as a measure (not disproportionate) in order to achieve objectives of public interest - ** as it was already mentioned in the field of network and telecommunication (paragraph 76);

d) as to whether mandatory mediation would entail an **excessive cost upon parties**, it is a matter to be left to Italian national courts, which will have to verify it in practice (paragraph 82), given that a mandatory mediation system should not imply disproportionate costs in respect to the goal of an economic resolution of disputes (paragraph 89): the Commission, among other things, does not seem to have considered that, in Italy, the already politically reduced mediation fees (originally provided by Ministerial Decree no. 180/10), have been again reduced, in August 2011, in regards to those fields where mediation is mandatory (Ministerial Decree no. 145/11);

e) as to the alleged delay (the ‘famous’ four months during which it is not possible to start court proceedings unless a mediation has been attempted), it **cannot be demonstrated how they could affect negatively proceedings that, in Italian courts, last an average of nine years** (paragraph 85).

[Note for non-Italian readers: In Italy the mediator is allowed to make a proposal to parties, if he is persuaded that they cannot reach a settlement on their own. This proposal, if refused, may have effects on subsequent court proceedings, in terms of costs allocation].

f) Concerning the mechanism of the **mediator's proposal**, however, the Commission is rightly very skeptical (paragraph 65), especially in cases of mandatory mediation (paragraph 78), given the obvious forcing to the principle of parties' self-determination, that shall instead encourage the search for shared solutions (also note that, pursuant art. 5.2 of Directive 52/2008, mediation proceedings may have a mandatory nature only if the Member State believes it consistent with its own general law policy).

Overall, it seems to me that the Commission simply set out the guidelines in relation to the use that a Member State shall decide to do (for the purpose of a more efficient judicial system) of mediation, a phenomenon in itself independent and of voluntary nature. In principle, such use is tolerated, **but it should not excessively compress the freedom to go before a judge.**

In conclusion, **I have little doubt that both the Court of Justice and the Italian Constitutional Court (which is ruling on the issue this October) will not confirm this view.**

I hope that our legislator (and the Italian Ministry of Justice, that has contributed a lot as far as the Italian legislation on mediation is concerned), will listen to this message loud and clear. Moreover, hopefully the mechanism of the 'mediator's proposal' will cease to exist (mechanism which is being extended also to workplace court proceedings, and which is even adoptable - ex art. 420 of the Italian code of Civil Procedure - by the same person who will be judging later on the matter ...!)