

Mandatory Mediation Procedures v Effective Access to Courts: CJEU Sets Down Criteria

Authored by Alexandre Biard

To what extent can mandatory mediation procedures be compatible with consumers' right to access to the judicial system? The preliminary ruling of the First Chamber of the CJEU delivered on 14 June 2017 (case C-75/16, *Menini & Rampanelli v Banco Popolare - Società Cooperativa*, and the associated Opinion of the Advocate General) brings interesting clarifications on this issue at a time where several Member States have - or are about to - introduce mandatory alternative dispute resolution procedures into their national legislations.

In 2015, two Italian individuals brought an appeal before the District Court of Verona (*Tribunale Ordinario di Verona*, hereafter "the referring court") against an order for payment obtained against them by the credit institution Banco Popolare. The order required them to pay the amount of 991,848 EUR corresponding to the balance that remained outstanding under a contract signed between the parties in 2009. However, as the referring court noted, under Italian law (Legislative Decree 28/2010), an application to have an order set aside is admissible only if the parties have first initiated a mediation procedure. The referring court therefore requested clarifications on the interpretation of Directive 2013/11 ("ADR Directive") and Directive 2008/52 ("Mediation Directive"), and on the compatibility of Italian legislation with EU law.

The Court used this opportunity to set down the criteria that mandatory mediation procedures should fulfil in order to be compatible with consumers' right to judicial access in the EU (I). Furthermore, although the case does not bring a definitive answer on the articulation between the ADR Directive and the Mediation Directive, it nonetheless provides some clarifications on the hierarchy and relationship between those two directives (II).

(I) Admissibility Criteria for Mandatory Mediation Procedures in the EU

The referring court sought to clarify whether the mandatory mediation procedure

imposed by Italian law is compatible with the provisions of the ADR Directive, whose Article 1 ambiguously provides that consumers can, on a “voluntary basis”, submit complaints against traders by using ADR procedures, but also indicates that this is “without prejudice to national legislation making participation in such procedures mandatory (...)”.

As the Court points out, “the voluntary” nature of ADR schemes does not lie in consumers’ freedom of access, but in the freedom of process. In other words, what is important is not that the parties can choose whether or not to use ADR, but the fact that they should be “themselves in charge of the process, and may organise it as they wish and terminate it at any time”. Put simply, “what is important is not whether the mediation system is mandatory or optional, but the fact that the parties’ right of access to the judicial system is maintained”. Therefore, the mere fact that a national legislation imposes a mandatory mediation procedure should not, as such, be regarded as being contrary to the provisions of the ADR Directive.

That said, the Court also acknowledges that mandatory mediation procedures introduce an additional layer of complexity for consumers. They may therefore ultimately prevent them from exercising their right to access to judicial bodies. While referring to and transposing the conditions set down by the Fourth Chamber of the CJEU in *Alassini and Others* (Case 317/08 to C-320/08 of 18 March 2010), which concerned a settlement procedure, the Court identifies six conditions for a mandatory mediation procedure to be compatible with the principle of effective judicial protection:

1. The mediation procedure should not result in a binding decision for the parties;
2. It should not cause substantial delays;
3. It should suspend the period for the time-barring of claims;
4. It should entail no (or very limited) costs;
5. Electronic means should not be the only means by which the procedure can be accessed; and
6. Interim measures should remain possible in exceptional circumstances.

It is up to the referring court to assess whether the mandatory procedure under consideration indeed complies with the criteria set above.

In parallel, national legislations should not include obligations deemed too burdensome for consumers. In particular:

- National legislation may not include an obligation for consumers to be assisted by a lawyer when they take part in a mediation procedure. This is in accordance with Article 8(b) and 9 of the ADR Directive; and
- Legislation should not authorize consumers to withdraw from a mediation procedure only under the condition that they can demonstrate valid reasons to do so. In accordance with Article 9(2) of the ADR Directive, such a withdrawal should remain possible at any time.

(II) Preliminary Clarifications on the Relationship Between the ADR Directive and the Mediation Directive

The referring court also sought to clarify the respective scopes of the Mediation Directive and the ADR Directive, as well as their articulation. In particular, the Italian court requested clarifications on whether the provisions of those two directives overlap, or if, on the contrary, the Mediation Directive only governs cases to which the ADR Directive does not apply.

The Court ultimately took the view that reference to the Mediation Directive was here not relevant as the Directive only applies to cross-border situations, which is not the case in the present situation (the litigants being all located in Italy). Although the Court did not address this issue, the conclusions of the Advocate General nonetheless provided some interesting food for thought. The latter indeed considered that, if a conflict between those two directives should arise, the Mediation Directive should, in his view, ultimately prevail. This is because Article 3(2) and Recital 19 of the ADR Directive clearly provide that the Directive “shall be without prejudice to Directive 2008/52/EC”.

This decision is an important step towards combining consumers’ effective access to judicial bodies on the one hand, and the use of mandatory alternative dispute resolution schemes on the other hand. The key issue is now to see how those criteria will be applied by national courts, and if they are likely to constitute sufficient safeguards to preserve consumers’ rights in the EU.