Mediation in the European Union: The Directive 2008/52/EC and its Effects on National Legislations

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Abstract. *Recent reports on the use of mediation in the European Union question the strategies adopted by the member states, insisting that the provisions of the Directive 2008/52/EC have not been bold and imperative enough, therefore conducting to the relative lethargy of mediation as an alternative to courts in solving disputes. This paper analyzes the provisions of the Directive and how they have been transposed into the national legislation of Romania, as a case study relevant to the subject. It argues that there is not enough data to claim that these provisions or any other would have had a different impact upon the recourse to mediation in the EU.*

Keywords*: mediation, European Union, Directive 2008/52/EC, Romania, Law 192/2006, civil disputes, commercial disputes, cross-border disputes.*

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Overview

Using mediation as an alternative to courts was not a new European advent. Mediation had been tried for decades (if not more, in some cases like Denmark) in various member states, with varying degrees of success. England and Netherlands had been pioneers of implementing mediation within their national justice systems, under the form of functional pilot programs designed to test the method and its reception by the public. The results were deemed worth of pursuing these policies and proved contagious, as other countries started to experience different models of alternative dispute resolution mechanisms.

As with other practices, mediation in Europe was implemented piecemeal and rather chaotic, with member states using a wide range of strategies to make mediation attractive for their citizens, with big variations in the degree of implementation and inconsistent results. As courts became more and more overwhelmed, as public budgets shrunk and cross-border disputes grew in number exponentially, it became clear that a new, more coordinated approach would be needed if mediation (and other alternative dispute resolution methods) was to succeed. Directive 2008/52/EC was intended to be such an approach. Even if it focuses on the wide domains of civil and commercial matters, it is of no limited interest for family matters, especially those regarding matrimonial matters and matters of parental responsibilities.

It has to be noted that the Directive is not the first European document concerning alternative methods of dispute resolution. It is based upon the Conclusions on alternative methods of settling disputes under civil and commercial law, adopted by the Council in May 2000, a document stipulating that the establishment of basic principles in the area of alternative dispute resolution is essential for the development and operation of extrajudicial procedures for the settlement of civil and commercial disputes and to improve access to justice.

In April 2002, the European Commission presented a Green Paper on ADR in civil and commercial disputes, taking into account the present situation and enabling consultations between member states and interested parties concerning possible measures of implementing and promoting mediation. This process opened the road towards Directive 2008/52, a document seen as contributing to the proper functioning of the internal market as part of the policy of the European Union to establish an area of freedom, security and justice, which encompassed access to judicial as well as extrajudicial dispute resolution methods.

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

In its preamble, the Directive stipulates that "*mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements*". All these are elements pleading for the wide use of mediation as a mainstream method of dispute resolution, on equal foot with traditional judicial procedures.

Key to understanding the importance of the Directive as a turning point in mediation implementation and promotion in the EU is paragraph (8) of the preamble, saying "*the provisions of this Directive should apply only to mediation in cross-border disputes, but*

nothing should prevent the Member States from applying such provisions also to internal mediation processes" (Directive 2008/52/EC). This paragraph became the instrument of pressure used by EU bodies, notably the Commission, to nudge the member states to implementing and promoting mediation more boldly within their own judiciary systems.

The Directive strikes to set up a proper balance between mediation and judicial procedures by asking the member states to make agreements resulted from mediation enforceable in cross-border disputes, as it was the case with the Regulation 2201/2003 provision about recognition and enforceability. The Directive recommends that an agreement resulted from mediation in one member state should be recognized and enforced in another member state (if the case requires), except is its provisions contravene national legislation of the enforcing state. It also forbids the use of mediation agreements enforceability rules to circumvent the limitations imposed by Regulation 2201/2003 on the recognition and enforceability of judgments on parental responsibilities.

The Directive's preamble also takes note of the decision of England and Ireland to take part in the adoption and application of the Directive and of Denmark to use its opt-out right and not take part in the process.

The provisions of the Directive concern the definition of mediation and mediators, the definition of cross-border disputes, the quality and access to mediation, the enforceability of mediation agreements, the voluntary and confidential nature of the process, its effects on the limitations and prescription periods and rules regarding the information of public and on competent courts and authorities.

Regarding the definition of mediation as a process, the Directive had to take into account the wide range of definitions present in the body of literature available on the matter (Chereji & Gavrila, 2014). As there is no universally recognized definition of mediation (against all efforts done by institutions like the International Mediation Institute to deliver one), the Directive had to come up with one that can broadly cover all visions, even if this approach is not necessarily contributing to clarifying the issue. Art. 3 (a) says:

"*'Mediation' means 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.*

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question" (Directive 2008/52/EC).

This definition contains a number of elements of importance to the understanding of mediation as a process. First of all, mediation refers only to those processes where

two or more parties (in person or represented) attempt to settle their dispute with the assistance of a mediator. The Decision to settle rests with the parties and cannot be forced upon them by the mediator. Therefore, mediation excludes negotiation made by the lawyers of the parties themselves in order to settle the matter out of court, or by judges or courts seised to make a decision through judicial proceedings. A judge can play the role of mediator only in disputes where she/he is not the person making the judgment (as in the notable example of France, where judges regularly play the role of mediators). Mediation is, by an large, a negotiation between the parties where they benefit from the support of a third party (preferably neutral and impartial), no matter how this third party is called. The decision is retained by the parties, and they can proceed or stop the proceedings of mediation on their own will.

The term "voluntary" included in the definition presides over the whole understanding of mediation as an alternative to courts in settling disputes. It signifies that, by no means, mediation is not a replacement of the courts – the principle of free access to justice is fundamental to any proper democracy and cannot be infringed by ordering the parties to use mediation and deny their "day in court" if they not oblige. The voluntary principle of mediation means that courts or other authorities can suggest or even order the parties to attend mediation, but they cannot deny their right to use the courts venue to settle their dispute based on their non-compliance with the court suggestion or order. This principle is also based on common-sense: as long as mediation is defined as a special negotiation process (assisted or facilitated by a third party), it is only logical that parties cannot be forced to negotiate and settle if they do not want to.

Other fundamental elements necessary to make mediation an attractive way of solving disputes out of court are embedded in the definition of the mediator (Art. 3 (b)) and the recommendations for ensuring the quality of mediation process (Art. 4). The entire body of literature on mediation stipulates that neutrality and impartiality of the mediator are essential for the success of mediation. Neutrality is defined as the absence of any conflict of interests (the mediator should not have any proverbial horse in the dispute she/he is called to mediate). Impartiality refers to the need to treat the parties equally and without unilateral favor and also, more controversially, to uphold the balance of power between the parties. This last provision is contested by some schools of thought as contrary to the principle of self-determination of the parties – the decisions regarding the flow of the mediation process and the settlement rest entirely with the parties, so it's up to them to decide how to devise the terms of the agreement, no matter the opinion of the mediator about the fairness of them.

The competence of the mediator is also of concern for the Directive. There is no chance of making mediation an attractive and effective way of solving disputes out of court if the quality of the process of mediation is not guaranteed in a way or another by law-

makers. The experience of countries where mediation is considered a simple activity (not a profession) and is not regulated (or very lightly regulated) shows that quality of mediation process vary on a wide scale and this contributes to the marginalization of mediation. As such, the Directive recommends:

1. *The Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.*
2. *The Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.*

Further on, the articles 5 to 8 contain provisions concerning the characteristics of the mediation process. First, it is important to note the recommendation for courts to send the parties to mediation, whenever the courts deem appropriate (Art. 5/1). More, the Directive does not oppose member states decisions to adopt legislation making recourse to mediation compulsory or "*subject to incentives and sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system*" (Art. 5/2). It means that, as long as the free access to justice is not affected, member states can introduce rules making the recourse to mediation mandatory. This provision contradicts the principle of voluntary access to mediation and also the principle of self-determination and it generated heated disputes following the implementation of this kind of measures in countries like Italy or Romania. The contradiction has not been solved to-date, highest courts in these countries striking down the mandatory measures as unconstitutional.

The use of mediation in cross-border disputes would be of no consequence if agreements reached in one member state would not be recognizable and enforceable in any other one. Accordingly, art. 6 of the Directive stipulates that "*the Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability*". The courts of the member states or any other competent authority designated by them are responsible for making the agreements enforceable.

Confidentiality of mediation is universally considered a key aspect of this method of dispute resolution. It is seen as one of the most attractive characteristics of the process and is consequently guaranteed by law in any country implementing it. For this reason, the article 6 of the Directive provides that "*Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of*

the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process".

Confidentiality is limited by to exceptions. First, confidentiality cannot be claimed in cases where the testimony of mediators is "*necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person*". Second, confidentiality is forfeited in cases where "*disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement*", a rather logical provision made by the creators of the Directive.

Of no small matter is the effect of mediation (or the recourse to mediation, to be more precise) on the limitation and prescription periods. As mediation is not to be considered a substitute of the judicial procedures and as recourse to mediation should not forfeit the right of the parties to "have their day in court", the Directive recommend that member states should make sure that recourse to mediation shall not in any form prevent the parties to initiate judicial procedures by the expiration of limitation or prescription periods. The intention of the lawmakers when adopting the Directive was not to replace judicial procedure with mediation in an "or/or" type of option, but as an "and/and" process, whereas mediation complements the courts in helping settle the disputes cost- and time-effectively.

The Directive 2008/52 aimed to create a common denominator for the implementation of mediation by EU member states, without infringing on national legislations already doing it. That's the reason for the relative vagueness of the Directive recommendations and for leaving a lot of space for particular approaches to be taken by national legislators. As the practice of mediation vary a lot from country to country and it is strongly affected by national culture in general and national juridical culture, with consistent differences between, for example, Northern and Southern European states, the task of the Council was not to standardize the practice of mediation in the EU, but rather to make agreements resulted from mediation recognizable and enforceable across borders. With this objective in mind, a minimal correlation of implementation, promotion and practice of mediation by member states, resting on a common set of principles, was considered essential for the success of this ambitious enterprise.

These minimum standards were to be implemented by member states in their legislation by no later than May 21st, 2011. Also, the member states were required to communicate to the Commission the measures taken to implement the recommendations of the Directive. By that date, all EU member states have proceeded to the task, with various degrees of success and compliance.

Implementation of Directive 2008/52/EC by EU member states

By July 15th 2011, the Committee on Legal Affairs has published the **Report on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts**, a document that sums up the efforts of the EU member states to transplant into their national legislation of the recommendation of the Directive 2008/52.

As expected, the results were far from being uniform. Some of the member states were praised by the Report for their diligence whether others were nominated for their apparent lack of enthusiasm for the implementation of the recommendations.

The Report noted that all member states had dutifully implemented the recommendations regarding confidentiality and the effects of mediation on the limitations and prescription periods. Also, progress had been made by the majority of the states regarding the procedures needed to give mediation agreements the same weight as a judicial decision but noted that, whereas some national legislators opted for the variant of submitting the agreement to courts, many other chose for the notarization of the agreement, as an option already existent in their national law. Slovenia and Greece are nominated as examples of the former variant (submitting to the courts) whether in Germany or the Netherlands agreements can be rendered enforceable as notarial acts (according to law provision). In Austria, agreements become enforceable as notarial acts even if this provision does not exist in Austrian law explicitly.

In terms of incentives and sanctions to render recourse of mediation by public wider, the Report notes that some member states had chosen to go far beyond the recommendations of the Directive. A number of states opted to include incentives in their laws for attracting the public to the use of mediation. In Bulgaria, parties received a refund of 50% of the state fee already paid for filing the dispute in court if they had successfully resolved a dispute in mediation. Hungary has similar provisions and in Italy "*all mediation acts and agreements are exempt from stamp duties and charges*".

Other states opted for sanctions, such as the impossibility of filling disputes into courts before the parties have first attempted to resolve the issues by mediation. Italy was given as a singular example for its Legislative Decree 28 "*which aims in this way to overhaul the legal system and make up for the notoriously congested Italian courts by reducing caseloads and the nine-year average time to complete litigation in a civil case; observes that, not surprisingly, this has not been well received by practitioners, who have challenged the decree in court and even gone on strike*". (To be noted: the Decree has already been struck down by Italy's Supreme Court of Cassation as un-constitutional).

The Report took note of the positive effects the mandatory measures apparently had upon the de-congestion of overwhelmed courts in various countries, but, nonetheless, recommended that "*mediation should be promoted as a viable, low-cost and quicker*

alternative form of justice rather than a compulsory aspect of the judicial procedure". There is still an ongoing dispute, involving scholars, practitioners and lawmakers, over the positive/negative effects of the mandatory measures in mediation, all parties citing all sorts of statistics to support their respective point of view. The contradiction between the voluntary character of mediation and the principle of self-determination, on one hand, and the mandatory measures taken to enforce the use of mediation on a wider scale, on the other hand, will not be easily solved in the near future, especially as solid, reliable data about the use of mediation and its impact on the judicial systems is conspicuously absent.

Research done by the author of this paper during the years 2013-2014 have revealed that there is almost impossible to find out, with a decent degree of precision, how many mediation cases occur in most of the member states. Establishing the number of mediators in EU is also a futile attempt (there are very few countries keeping accurate, if at all, national rosters), which makes unthinkable the measuring with any degree of accuracy and reliability the impact of mediation and mediators upon national judicial systems or of the success of mediation itself (Chereji and Gavrila, 2014). As such, coming up with solid arguments in favor or against mandatory measures is a daunting task, possible may be in a faraway future, when professional national bodies of mediators or institutions mandated to supervise and regulate the activity of mediators will begin collecting data in regularly and systematically manner. Just citing the increase of numbers of people coming to mediation following the introduction of mandatory measures (a rather tautological, circular argumentation) does not constitute credible evidence for the success of these measures.

The Report considered that there is a clear need to increase the awareness of the public regarding mediation, lack of knowledge about this procedure having a significant negative effect upon the recourse to mediation. The Report, in its final provisions, recommended that member states should step up their efforts of promoting mediation, considering that "*those actions should address the main advantages of mediation – cost, success rate and time efficiency – and should concern lawyers, notaries and businesses, in particular SMEs, as well as academics*". The focus of these actions should be the benefits of mediation for users, the fact that, in the words of the Report, "*mediation is more likely to produce a result that is mutually agreeable, or 'win-win', for the parties; notes that, as a result, acceptance of such an agreement is more likely and compliance with mediated agreements is usually high*" and "*parties who are willing to work toward resolving their case are more likely to work with one another than against one another; […] therefore these parties are often more open to consideration of the other party's position and work on the underlying issues of the dispute*".

A detailed analysis of the strategies adopted by each EU member state for the implementation of Directive 2008/52 in their national legislation was done by a team coor-

dinated by professor Giuseppe De Palo, president of the ADR Center, member of JAMS International, international professor of ADR Law and Practice, Hamline University School of Law, Minnesota and professor Mary B. Trevor, Director of Legal Research and Writing Department, Hamline University School of Law, Minnesota, in a book published in 2012 by Oxford University Press and called **EU Mediation Law and Practice**. This collective work present how the member states of the EU have decided to address the requirements of the Directive 2008/52, grouped in 9 major directions (De Palo & Trevor, 2012):

1. Court Referral to Mediation;
2. Protections Provided to Ensure Confidentiality of Mediation Proceedings;
3. Enforceability of Mediation Agreements;
4. The Impact of Mediation on Statutes of Limitation;
5. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option;
6. Requirements for Parties to Participate in Mediation;
7. Accreditation Requirements for Mediators;
8. Mediator Duties;
9. Duties of Legal Representatives and Other Professional Mediation Participants.

As a presentation, even brief and overly-general, of all member states would be far beyond the dimensions and the scope of this paper, there is still a need to understand how the recommendations of the Directive 2008/52 were translated at the level of national legislation. Consequently, and because the 2011 Report had praised Romania as an example of how it transposed the Directive into its own national legislation and how it built a functional mediation system from scratch, it is only natural to give this country closer look. This analysis will use a slightly different set of categories than the work of de Palo and Trevor (, for reasons related to the structure itself of the Romanian Law of Mediation and the relevancy of certain aspects of the Romanian strategy of implementation.

Implementation of Directive 2008/52/EC in Romania

Mediation has been brought within the Romanian judicial system through the Law 192 on mediation and the profession of mediation, law adopted by the Parliament in May 2006 (Chereji and Tanul, 2006; Chereji and Pop, 2014). The Law provided the general framework for the organization and the practice of mediation in Romania. It has been amended several times (in 2009, 2010 and 2012) to incorporate the recommendations of the Directive 2008/52 but also the experience gained during the period by the practitioners and the lawmakers in the field of mediation.

The core principles of mediation are embedded in the very first article of the Law which defines mediation "*a way of amicable settlement of conflicts, with the support of a third party specialized as a mediator, in terms of neutrality, impartiality, confidentiality and*

with the free consent of the parties", reflecting the definition adopted by the Directive, but going beyond it to nominated all the pillars of mediation process: neutrality and impartiality, confidentiality, voluntary nature and self-determination.

Court referral to mediation has been stipulated by article 6 of the Law, which originally provided that "*judicial and arbitration bodies, as well as other authorities with jurisdictional powers may inform the parties of the possibility and on the advantages of using the mediation procedure and may advise them to resort to this recourse in order to settle conflicts between them*". Later on, the expressions "may inform" and "may advise" were transformed into "shall inform" and "shall advise", adding an element of compulsion and making information by courts about mediation imperative.

A hugely controversial element of compulsion in the recourse to mediation was added in 2012, when mandatory attendance to information session prior to filling a dispute in court was introduced in the body of the Law. It required the parties (especially the aggrieved party) to attend an information session about mediation and to obtain a certificate of attendance from the third party making the information. This certificate became a required condition for the registration of a suit in court – the court would refuse to register the case in the absence of this certificate. Article 2 of the Law was modified to make reference to this mandatory information sessions and the types of disputes that required a certificate prior to registration in courts:

1) *Unless the law provides otherwise, the parties, natural or legal persons, shall be bound by the obligation to attend the information session on advantages of mediation, including, if necessary, after the onset of a trial before the competent courts, in order to settle this way the conflicts on civil, family, criminal matters, as well as on other matters, under the terms provided by law.*

(1^1) *The proof of attendance in the information session on advantages of mediation shall be given by an informative certificate issued by the mediator that has made the information. If one of the parties expresses in writing the refusal to attend the information session, does not respond to the invitation provided in Article 43 (1) or does not appear at the date set for the information session, a minutes shall be prepared, which shall be enclosed to the court file.*

(1^2) *The court shall dismiss the request for summons as inadmissible in case the applicant does not meet his obligation to attend the information session on advantages of mediation, prior to filing the request for summons, or after the onset of the trial by the time limit set by the court for this purpose, for disputes arisen on matters provided in Article 60^1 (1) a) - f).*

(1^3) *The carrying out of the information procedure on advantages of mediation may be performed by the judge, prosecutor, legal adviser, lawyer, notary, in which case it shall be attested in writing.*

(1^4) *The services provided according to the provisions of paragraphs (1) and (1^1) shall be free of charge, being forbidden to charge fees, duties or any other amounts, regardless of the title under which they might be requested.*

(2) *The provisions of this Law shall also be applicable to conflicts in the field of consumers' protection, in case the consumer invokes the existence of injury as a result of having purchased defective products or services, of failure to comply with the contract clauses or with the securities provided, of existence of certain abusive clauses included in the contracts concluded between the consumers and the economic operators or of infringement of other rights provided by the national law or the European Union law in the field of consumers' protection.*

The "mandatory information clause" became an element of discontent and harsh disputes occurred between mediators, lawyers, notaries, judges and lawmakers regarding various aspects of this clause and the practice of these sessions. Even more questionable was the effect of this clause upon the recourse to mediation by parties, with no significant data to prove an increase in the use of mediation compared to the period prior to the introduction of the clause. Eventually, in 2014, the Constitutional Court stroke down the clause as unconstitutional. Work is ongoing now in the Parliament to find a replacement of this clause with a more amenable and less divisive set of provisions regarding the recourse to mediation.

To ensure the quality of the mediation process (keystone of making mediation attractive to public), the Law provided that mediation cannot be practiced but by authorized mediators required to fulfill a number of conditions in order to be accredited. The accreditation body was designated the Council of Mediation, an independent organism, made of mediators and elected by mediators, in charge with all aspects regarding mediation in Romania. The conditions to become an authorized mediator were stipulated by article 7 of the Law:

The persons who meet all the following conditions may become mediators:

a. *they have full capacity of exercise;*
b. *they have university education;*
c. *they have at least 3-year length of service;*
d. *they are fit, medically speaking, to pursue this activity;*
e. *they enjoy a good reputation and have not been finally convicted for an offense committed by ill intention, likely to prejudice the prestige of the profession;*
f. *they have graduated from mediator training courses, under the terms of the law, or a post-university master-based program in the field, accredited according to the law and endorsed by the Mediation Council;*
g. *they have been authorized as mediators, under the terms of the law.*

Also, provision were made by the Law in order to ensure the professional development of mediators after authorization and the observance of them of a Code of Conduct able to guarantee the parties a fair and effective mediation process.

There are several provision with special reference to the safeguard of confidentiality. First, article 37 stipulates that:

(1) *the mediator can not be heard as a witness in relation to the facts or acts that he became aware of during the mediation procedure. In criminal cases, the mediator may be heard as a witness only if it has obtained the prior, express and written consent of the parties and, where appropriate, of the other parties concerned.*

(2) *The status of witness takes precedence over that of mediator, as regards the facts and circumstances of which he was aware before becoming a mediator in that case.*

(3) *In all cases, after being heard as a witness, the mediator may no longer conduct mediation in that case.*

Second, the agreement to mediate, signed by the parties and the mediator prior to the mediation sessions, must specifically point to the fact that the mediator has the obligation to keep the confidentiality about all matters concerning the mediation process (Art. 45 (d)).

Nonetheless, there are limits to the application of confidentiality rule. In criminal cases, as rape or other grave offenses (Sandu, 2014), confidentiality can be broken in the interest of the case. The same, there are special provisions by the Law concerning the protection of the superior interest of the child in mediation and the duty of mediator to safeguard them even at the cost of breaking the confidentiality rule (The 192/2006 Mediation Law, Art. 65 and Art. 66/2).

In terms of enforceability of the agreement, as required by Directive 52, the Law provides at article 59:

(1) *The parties may request authentication from the notary public of their understanding, under the terms of the law and in compliance with the legal procedures*

(2) *The parties to the mediation agreement may go to court to request, in compliance with the legal proceedings, to give a decision to legalize their understanding. Competence shall lay with the court in whose jurisdiction any of the parties have their domicile or residence or, where appropriate, the head office or the court of first instance in whose jurisdiction is located the place where it has been signed mediation agreement. The decision whereby the court consents on the understanding between parties shall be delivered in the Council Hall and shall be an enforcement order under the law. The provisions of Article 438 - 441 of the Law No 134/2010 of the Civil Procedure Code, republished, as amended, shall apply accordingly.*

As incentives for the parties to give preference to settlement through mediation rather than by judicial decision, the Law provides that, if the parties of a lawsuit solve their dispute using mediation, they will be fully refunded, upon request, for all fees they have to pay to fill the lawsuit.

Conclusions

Summarizing our analysis, it is clear that Law 192/2006 and its subsequent modifications brought by the Laws 370/2009, 202/2010, 76 and 115/2012 can be considered a model of transposing the recommendations of the Directive 2008/52 in the legislation of Romania.

What is not so clear is how this transposition influenced in a way or another the recourse to mediation in this country, where the use of mediation remains (as in all Europe) extremely limited, especially if compared with the recourse by public to judicial procedures. Statistics available in Romania regarding the use of mediation are partial, as there is only an official record of lawsuits solved through mediation, located at the level of the Supreme Council of Magistrates. Unfortunately, the Council of Mediation does not keep an independent and comprehensive record of mediation cases.

The limited statistics at our disposal confirm a growing recourse to mediation over the years following the adoption by the Council of Mediation of the first set of reglementations that built the present mediation system in Romania (the first list of accredited providers of mediation basic training programs, the first national roster of mediators, the Code of Conduct etc.). The growth can be assigned to natural, endogenous causes.

As for the impact of the mandatory information sessions, this remains hugely controversial. Statistics available contradict the supporters of the mandatory measures by showing no relevant increase in the number of mediation cases after the adoption of Law 115/2012 introducing these information sessions compared to the period before. Of course, more light would be cast upon this issue if the Council of Mediation were to conduct its own, independent recording of the mediation cases, instead on relying only on the very restricted collection done by the Supreme Council of Magistrates.

There is still an overwhelming bias of the public towards to courts of justice. Bringing mediation at equal stature and status is a matter of time and commitment of all stakeholders, not by forcing the public to use mediation no matter the type of dispute, the disposition of the parties towards an amicable settlement of their dispute and the type of relationship the parties have had prior and during the dispute.

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