

# **Mediation Quality and Information**

## **Implementing the Neglected Articles of the EU Mediation Directive**

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The EU Mediation Directive of May 21, 2008<sup>1</sup> addressed several basic procedural, legal and other issues that impact the growth of mediation<sup>2</sup>. Most, but not all, were matters that only regulation can address: court referrals, enforceability of settlements, the effect on prescription periods and the guarantee of confidentiality. Although the Directive was aimed at mediation in cross-border disputes, the hope was that improvements in these legal and procedural areas would filter down to local disputes and liberate mediation from some of the anchors on its growth.

The Directive featured two less-celebrated provisions, equally important anchors on growth - one on quality and one on information. They have escaped much attention as both Articles are framed to require Member States merely to "encourage" changes rather than to change national law. However, without these Articles being energetically acted upon, mediation will fail to develop for lack of universal user acceptance and understanding. Neither has been acted upon by most Member States.

We cannot turn Admiral Lord Nelson's blind eye to these two vital areas. We need to be creative and find credible and sustainable ways to enable users to have faith in mediation quality, and be objectively informed about mediation and what it involves.

This paper examines the options in both areas, and proposes a practical way forward.

### **Article 4 - Ensuring the quality of mediation**

High quality delivery of services is a central imperative in the growth of any profession. Few users can have confidence in any professional service if they are unable to have trust in quality. Article 4 is the first substantive provision of the Directive, immediately following the Definitions, and precedes the provisions that

#### *Article 4*

##### **Ensuring the quality of mediation**

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. 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.

Member States are required to implement. So it was given prominence. It calls on Member States to encourage adherence to codes of conduct by mediators and providers as well as other unspecified quality control mechanisms and the training of mediators. No attempt was made to suggest how the proposed "encouragement" should be put into effect by Member States. The

regulator is either reluctant to require Member States to impose quality standards, perhaps because none have been drafted, or believes that quality, while essential, should ideally be a matter for the market to implement on a self-regulated basis, which Member States should then support.

<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>

<sup>2</sup> For a detailed review, see: *The European Mediation Directive: More Questions Than Answers* by John Bosnak, which is Chapter 29 of *ADR In Business: Practice & Issues Across Countries & Cultures*, published by Wolters Kluwer, 2011.

## Article 9 - Information for the general public

Article 9, requires Member States to encourage steps to make information available to the public at large about how to contact mediators and mediation providers *"in particular on the Internet"*. Recital 25 of the Directive mentions that Member States

### Article 9

#### Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

should encourage lawyers to inform their clients about the mediation option. It is left to Member States to decide how best to provide that encouragement, though presumably what is intended is a central database and information source that the public

can trust to be objective in leading them to quality mediators and service providers. This would ideally be some kind of Government-sponsored entity that is independent of the mediation market place, in order to be free of bias toward any particular group of mediators or service providers. The Directive avoided getting into such matters.

## European Parliament Follow-Up

Had the EU obligated Member States to set and enforce mediation quality standards, they would inevitably have been all over the place - some set high, others low. Likewise mandatory information about mediators and mediation service providers would most likely be perfunctory. These are not areas that lend themselves to cross-border government regulation. The European Institutions trod a cautious path<sup>3</sup>.

It did not escape the European Parliament that most Member States had failed to offer the "encouragement" required in both Articles 4 and 9 of the Directive by the due date of May 2011. Not only had national quality standards for mediators not been "encouraged", but public knowledge about mediation and where to find quality mediators remained at a very low level. On September 13, 2011 the European Parliament passed a Resolution *"on the implementation of the Directive...its impact...and take-up by the Courts"*<sup>4</sup>. The Resolution noted that the Member States' implementation of the Directive was *"largely on track"* and that most were *"not only compliant but... ahead of the Directive's requirements"* (in terms of providing financial incentives for participating in a mediation and in providing for mandatory mediation). However, with regard to Articles 4 and 9 the Parliament added three paragraphs, 18-20, above, indicating that more should be done on both quality standards and on the availability of information.

18. Believes that there is a need for increased awareness and understanding of mediation, and calls for further action relating to education, growing awareness of mediation, enhancing mediation uptake by businesses and requirements for access to the profession of mediator.

19. Considers that national authorities should be encouraged to develop programmes in order to promote adequate knowledge of alternative dispute resolution; considers 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.

20. Acknowledges the importance of establishing common standards for accessing the profession of mediator in order to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the Union.

<sup>3</sup> Quality and information also feature in the Commission's November 29, 2011 Proposal for a Directive on ADR in consumer disputes - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0793:FIN:EN:PDF>

<sup>4</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN>

## Problems in implementing Articles 4 and 9

The quality aspects of professional services do not lend themselves to Government regulation, though it can be done on a national level<sup>5</sup>. Mediation is reliant on good training and hands-on experience. There are intense debates on regulated standards about whether they should be set at a high level, which requires experience and proven competency, but creates some natural barriers to entry, or at a low level, which opens the market to almost all but severely impacts credibility and public acceptance.

The easy option is to have no quality standards at all, or let them be established by the supply side of the market. But that will severely limit the development of mediation.

**The argument in favour of having no quality standards** is that users will quickly sort the good mediators from the bad, just like any other service. Today, in all EU countries, there is no law against anyone setting up in practice as a mediator, but it is claimed that a poor mediator will gain a poor reputation and attract few referrals. Supporters of quality standards argue that mediation happens behind closed doors, the mediators are usually sole practitioners, and word of mouth, gossip and innuendo are unreliable quality indicators. Moreover, they say that although larger law firms may know who's who and what's what in the mediation world, such knowledge often does not reside with advisers who rarely get engaged in mediation. And the general public, who may not be legally represented, are even more in the dark.

**Letting the mediation service providers set standards** is the alternative. The larger and longer-established providers no doubt do so, though usually their websites do not reveal what criteria they use to measure the performance of their mediators. They trade on their reputations, generated by careful self-marketing. However, most mediators, as sole practitioners, have their own websites and marketing strategies. Many spread their memberships around a number of provider panels. Most providers are in competition with each other, and do not get together to set common standards.

With regard to information about mediation, the websites of most provider organisations do explain what mediation is, and offer basic information about the process. However, they also tend to explain only the type of mediation they practice, and most of their websites are understandably dedicated to promoting themselves.

The mediation market in every EU country is not homogeneous. Although there are some independent national bodies, such as the UK's Civil Mediation Council (CMC)<sup>6</sup> and the Netherlands Mediation Institute<sup>7</sup>, most are inadequately funded, membership-based and focused on servicing the needs and interests of the supply side of the market. The CMC sets standards for mediation service providers<sup>8</sup> but not for individual mediators, while the NMI sets standards for mediators but not for service providers, though it does accredit mediation trainers. Both are voluntary bodies and provide some very basic information about mediation for users. The NMI has a Code of Conduct and a strong and detailed disciplinary process which the CMC does not.

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<sup>5</sup> For example, in 2008 Australia introduced a National Mediator Accreditation System and Practice and Approval Standards. [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatIsADR\\_NationalMediatorAccreditationSystem\\_NationalMediatorAccreditationSystem](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatIsADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem).

<sup>6</sup> <http://www.civilmediation.org/>

<sup>7</sup> <http://www.nmi-mediation.nl>

<sup>8</sup> <http://www.civilmediation.org/downloads.php?f=50>

## **Self-regulation via a private-public partnership**

Mediation is such a fragmented local market, differing radically from one jurisdiction to another, that a different approach is needed to both the establishment of mediation quality standards and to the dissemination of information about mediation to users.

What is required is robust encouragement, not only by regulators but also by other stakeholders, of a system that is voluntary, establishes high and clear standards, addresses users' quality needs, covers all styles and types of mediation and all practice fields, and involves credible, transparent, user-based competency assessments. Although the standards should be set high, and competency should be certified and be verifiable by the public, the barrier to entry should be accessible. Aspiring but inexperienced mediators should be helped by established practitioners, and motivated to progress. Not only should a strong, world-class Code of Professional Conduct be mandated, but there must also be a disciplinary process carrying loss of certification as the ultimate sanction - otherwise the code has no teeth and lacks credibility.

So instead of letting the market "decide" on quality, or allowing providers to set their own "standards", users and other stakeholders should be actively involved. This can partly be done through a user feedback scheme, properly implemented. Service providers and mediators will gradually adhere to a good user-orientated initiative.

The ideal body to establish mediation standards is one that has credibility with all stakeholders, and actively involves them all. Mediation's stakeholders are users (including professional firms that advise users), mediators, service providers, adjudicators, educators, trainers and regulators. That body must not provide any services in the mediation marketplace (it should not, for example, conduct mediator training) or represent the service side as a trade lobby. It should not, therefore, be reliant on mediator and provider subscriptions, but be adequately funded by donations from users and governments. It should be registered as a charity and be governed by a Board whose members are trustees. Ideally, this body should be a foundation funded as a private-public partnership of users and regulators, and should be registered in an EU country.

That body should also be responsible for using a significant proportion of its funding for disseminating objective clear information about mediation to the public. This should include tools that users can employ to get more out of mediation. The information it develops should be openly shared with any organisation interested in adopting it. This would enable mediators, trainers, service providers, professional bodies and other stakeholders to use the information without any copyright, cost or other restrictions.

Such a private-public partnership is by far the most productive and cost-effective way to give effect to Articles 4 and 9 of the Directive. No such organisation exists right now either at national or at EU level that is co-funded by users and government and is focused on the mediation field. The closest initiative to this ideal scenario is the International Mediation Institute, an organisation that, with EU financial support, could be a private-public partnership to implement Articles 4 and 9 of the Directive.

## **The International Mediation Institute (IMI)**

IMI was established and registered in The Hague in 2007. The Vision of IMI is *Professional Mediation Worldwide: Promoting Consensus & Access to Justice*. The Mission is also short - *IMI will set and achieve high mediation standards, convene stakeholders and parties, promote the understanding and adoption of mediation, and disseminate skills for parties, counsel and mediators*.

IMI is registered as a charity<sup>9</sup> and is therefore exempt from Netherlands Gift Tax. IMI provides no services, and is therefore wholly reliant on donations from Patrons such as Shell International, the General Electric Foundation and non-profit bodies such as the American Arbitration Association and the International Chamber of Commerce. IMI Patrons are listed on its web portal<sup>10</sup>.

IMI represents a diverse collaboration of the demand and supply sides, with equal representation of each on the Board. A leader with a user perspective has chaired IMI from the start. The current Chair of IMI is Ms Ute Joas Quinn of Hess Corporation.

IMI is a global public service initiative to drive transparency and high competency standards into mediation practice across all fields, worldwide. It is not restricted to business mediation. The Vision and Mission is being achieved through a transparent international mediator competency certification scheme, based on visible high standards and creating a diverse cadre of *IMI Certified Mediators*. All IMI Certified Mediators are required to assemble a Profile that includes a Feedback Digest prepared by an independent person or institution. Mediation users are assisted by an open, easily-accessible search engine to surface concise and comparable information relating to suitable competent mediators. There are currently almost 400 IMI Certified Mediators in 30 countries, about half of them located in Europe.

The IMI competency standards for mediators are established by the IMI Independent Standards Commission (ISC), which convenes 70 of the field's thought leaders from over 25 countries. The ISC establishes the IMI practice and ethical standards, and reviews and approves applications by providers for Qualifying Assessment Programs (QAPs) by which they may qualify mediators for IMI Certification. There are currently 22 approved QAPs, of which 11 are based in the EU.

The IMI Advisory Council is chaired by Lord Woolf of Barnes, former Lord Chief Justice of England & Wales. The Advisory Council has a critical strategic, advisory and enabling role to assist the IMI Board to implement the IMI Vision and Mission.

The IMI Advisory Council and Independent Standards Commission are independent of the IMI Board of Directors. All members of all three bodies serve IMI pro bono.

The IMI portal also provides impartial guidance, information and materials for users and service providers, and includes a Young Mediator Initiative to encourage the acquisition of practical mediation skills and experience by new mediators.

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<sup>9</sup> ANBI: Institution Aimed at the Common Good <http://imimediation.org/imi-anbi-charitable-status>

<sup>10</sup> <http://imimediation.org/imi-patrons>

## A way forward

Without major structural changes, IMI could be a private-public partnership. A dedicated EU unit of IMI may be appropriate for this purpose. Regulators could support users and providers, with the added broad support and active involvement of all other stakeholder groups, to implement quality standards and disseminate objective information about mediation and mediation services throughout the EU.

The IMI model has been proved to work over the past 5 years. To accelerate its development and application at grass-roots levels, some governance and funding changes would be required:

- \* Although IMI would remain a global institution, its focus in the EU would increase. Several people with a regulatory expertise and oversight could be invited to join the IMI Board<sup>11</sup> and Advisory Council<sup>12</sup>.
- \* Similarly, experts with a regulatory background may be appointed to the Independent Standards Commission<sup>13</sup>.
- \* Supplemental funding would be required from the EU Institutions and Member States to contribute to the cost of presenting the web portal in the EU languages, and some additional staffing would be needed.
- \* IMI could be a significant contributor to the European e-Justice portal.
- \* Formal alliances, some of which are already being discussed, would be beneficial with non-profit organisations active in the European mediation field to give maximum effect to the information strategy.

IMI has pursued several projects funded by the GE Foundation as part of its Public Policy/Rule of Law programme. These initiatives are: (1) the creation of copyright-free tools for use by mediation trainers in countries where mediation is non-existent or at an early stage of development; (2) the development of a certification of the competency of advocates and others who represent or advise clients in mediations; and (3) the web-enablement of the IMI case analysis tool called Olé<sup>14</sup>. All three initiatives will help advance the intentions behind Articles 4 and 9.

IMI already has an advanced and detailed Code of Professional Conduct<sup>15</sup> and a formal Disciplinary Process<sup>16</sup> in case of need. IMI has a user-focused set of high and transparent quality standards, a process through which mediators can be qualified as IMI Certified through organisations with QAPs, and a search engine to find the right mediators. IMI is well-supported in Europe and elsewhere. It can develop further.

The practical momentum behind IMI can be applied effectively in the EU. Developing IMI into a private-public partnership directed at professionalising the practice of mediation, and disseminating objective information about mediation and mediation practitioners, would add credibility and support. It will enable Articles 4 and 9 of the Directive to be implemented effectively.

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<sup>11</sup> <http://imimediation.org/imi-board-of-directors>

<sup>12</sup> <http://imimediation.org/imi-advisory-council>

<sup>13</sup> <http://imimediation.org/imi-independent-standards-commission>

<sup>14</sup> <http://imimediation.org/ole>

<sup>15</sup> <http://imimediation.org/imi-code-of-professional-conduct>

<sup>16</sup> <http://imimediation.org/professional-conduct-assessment-process>