THE EU DIRECTIVE ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS AND THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

Antonio Maria MARZOCCO
Michele NINO*

Abstract

The essay concerns the implications of EU Directive 2008/52/EC regarding mediation in civil and commercial matters on the right of effective judicial protection. After having underlined the importance assumed in the European Union by alternative dispute resolution, the essay examines the stages that led European institutions to the adoption of the Directive on mediation in civil and commercial matters. The article addresses the aims and the scope of the Directive and subsequently focuses its attention on Directive dispositions regulating the "key aspects" of civil procedure. The essay emphasizes that the Directive, in substance, allows both optional mediation and compulsory mediation. However, compulsory mediation can contrast with the principle of effective judicial protection. Furthermore, the essay deals with the relationship between compulsory mediation and the principle of effective judicial protection, and identifies, examining a recent pronouncement of the EU Court of Justice, the needed requisites to be respected in order that such contrast does not occur.

Keywords: *ADR; mediation; judicial proceedings; access to justice; compulsory mediation; principle of effective judicial protection*

1. Introduction

By means of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, the European Union (EU) has provided the criteria for the regulation of mediation in civil and commercial matters in EU Member States. This important intervention has the aim to improve access to justice and to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".[1] Therefore, the present essay deals with the issue of the relationship between mediation and judicial proceedings. In particular, it concerns the respect to be afforded to the principle of effective judicial protection. In the first part (Sections 2-5, *infra*), the essay reconstructs the road that led the European Union to adopt Directive 2008/52, classifies mediation as an alternative extrajudicial method of dispute settlement,[2] underlines the aims pursued

* Michele Nino, Ph.D., Researcher in International Law, Lecturer of International Law of Armed Conflicts, Faculty of Law, University of Salerno (Italy). Professional address: University of Salerno, Faculty of Law, Department of International Studies, of Law and Ethic of Markets, Via Ponte don Melillo 1, 84084 Fisciano (SA), Italy; email: mnino@unisa.it. Michele Nino wrote sections 1 to 5. Antonio Maria Marzocco, Ph.D., Researcher in Civil Procedural Law, Lecturer of Civil Procedural Law, Faculty of Law, Second University of Naples (Italy). Professional address: Second University of Naples, Department of Law, Via Mazzocchi, 5 (Palazzo Melzi), 81055, Santa Maria Capua Vetere (CE), Italy; email: antonio.marzocco@unina2.it. Antonio Maria Marzocco wrote sections 6 to 9.

[1] Art. 1(1), 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, OJ L 136, 24.5.2008, p. 3.

[2] See Sections 2, 3, 3.1, *infra*.

by and the scope of the Directive[3] and identifies its principal dispositions governing the relationship between mediation and judicial proceedings.[4] As to the regulation of such relationship, the Directive does not exclude the possibility for an individual State to provide cases in which the mediation attempt is compulsory (compulsory mediation).[5] In the second part of the essay (Sections 6-9, *infra*), the authors examine the relationship between mediation and the right to access to justice.[6] The regulation of such relationship falls within the scope of procedural matters. For this reason, reference is made to the principle of "procedural autonomy" of the individual States,[7] which is subject to certain limits, amongst which the principle of effective judicial protection assumes a priority role.[8] Thus, the question that arises is whether compulsory mediation always contrasts with the principle of effective judicial protection.[9] To answer to this question, it is necessary to take into account, on the one hand, the non-absolute nature of the above-mentioned principle[10] and, on the other hand, some requisites that the EU Court of Justice in the 2010 *Alassini* judgment has indicated are necessary in order that a compulsory attempt to reach an out-of-court dispute settlement does not violate the principle of effective judicial protection.[11]

2. The path of European institutions towards the promotion and development of alternative dispute resolution in the European Union

Following the entry into force of the Treaty of Amsterdam, the necessity to assure the proper functioning of civil proceedings in the area of judicial cooperation in civil matters having a cross-border nature has become a priority under European Union law.[12] According to *ex* Article 65 of the Treaty establishing the European Community, as introduced by the Treaty of Amsterdam, this aim was to be pursued through the improvement and the simplification of the recognition and enforcement of decisions in civil and commercial cases, as well as decisions in extrajudicial cases, and through the elimination of "obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States".[13] It is, however, following the entry into force of the Treaty of Lisbon[14] that the importance of alternative dispute resolution has been for the first time affirmed by a primary source of European Union law. In particular, Article 81 of the Treaty of the Functioning of the European Union -which has replaced Article 65 of Treaty establishing the European Community- provides that, in the context of judicial cooperation in civil matters, the European Parliament and the Council, according to the ordinary

[3] See Sections 4, 4.1, *infra*.
[4] See Section 5, *infra*.
[5] *Ibid*.
[6] See Section 6, *infra*.
[7] See Section 7, *infra*.
[8] See Section 7.1, *infra*.
[9] See Section 8, *infra*.
[10] *Ibid*.
[11] See Sections 8.1, 8.2, *infra*.
[12] 1997 Treaty of Amsterdam, **OJ C 340, 10.11.1997.**
[13] Art. 65, Treaty Establishing the European Community, **OJ C 325, 24.12.2002; see also *ibid.*,** art. 61(c).
[14] 2007 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, **OJ C 306, 17.12.2007, which entered into force on December 1, 2009. As noted by an eminent scholar, the** Treaty of Lisbon extends the European Union's capacity to act ("amplia la capacità di azione dell'Unione") in a number of areas such as public health, energy, **civil protection, environment and climate changes: G. Ziccardi Capaldo, *Diritto Globale. Il Nuovo Diritto Internazionale* (2010), p. 18.**

legislative procedure, can adopt measures necessary for the proper functioning of the internal market aimed at assuring "the development of alternative methods of dispute settlement".[15]

The gradual recognition by EU Treaties of the significance of judicial cooperation in civil matters, of the access to justice and of alternative dispute resolution, represents the important goal pursued over a lengthy period of time by European institutions, which began in 1993, when the European Commission adopted the Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market.[16] Following the Green Paper, EU institutions adopted some important directives concerning consumer protection, which made express reference to the need and importance of alternative dispute resolution.[17]

In the sector of consumer law, methods of alternative dispute resolution have been considered in depth and especially in the electronic commerce field. In this regard, it is of fundamental importance to recall the Directive 2000/31/EC on electronic commerce, whose Article 17 provides that in case an information society service provider and the recipient of the service are in disagreement, Member States have to adopt measures formulated so that "their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means",[18] and that encourages "bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned".[19]

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[15] Art. 81 of The Treaty on the Functioning of the European Union (TFEU), **OJ C 83, 30.3.2010, in particular provides that: "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.** 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: … (e) effective access to justice; …. (g) the development of alternative methods of dispute settlement".

[16] Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576 final, November 16, 1993; see also S. Sticchi Damiani, "Le Forme di Risoluzione delle Controversie Alternative alla Giurisdizione - Disciplina Vigente e Prospettive di Misurazione Statistica", (2003) 13, nos. 3-4, *Rivista Italiana di Diritto Pubblico Comunitario*, pp. 743-774.

[17] See Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 43, 14.2.1997, p. 25, art. 10; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19, art. 10(4); on consumer protection, see also: Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51. Furthermore, in the transport field, the Commission adopted a range of measures aimed at protecting consumers, making reference to the importance of alternative dispute resolution mechanisms: Communication from the Commission to the European Parliament and the Council - Protection of air passengers in the European Union, COM(2000) 365 final, June 21, 2000; White Paper on "European transport policy for 2010: Time to decide", COM(2001) 370 final, September 12, 2001; Communication from the Commission to the European Parliament and the Council "Towards an integrated European railway area", COM(2002) 18 final, January 23, 2002. Furthermore the Commission adopted two Recommendations that stated important principles applicable to out-of-court proceedings for the resolution of consumer disputes, which had significant importance in EU member States legal systems (Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, **OJ L 115, 17.4.1998, p. 31;** Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, **OJ L 109, 19.4.2001, p. 56).**

[18] Art. 17(1), Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178, 17.7.2000, p. 1.

[19] *Ibid.*, art. 17(2).

3. The various EU stages towards the regulation of mediation in civil and commercial matters

It is evident that the initial attention of the European Union towards alternative dispute resolution systems was primarily limited to the sector of consumer protection.[20] However, subsequently, the European Union focused its attention towards other forms of alternative methods of dispute settlement in different sectors, such as family mediation and, next, civil and commercial mediation. In reality, the beginning of the slow road of the European Union towards the establishment of rules adequately regulating the various forms of mediation (*i.e.*, family mediation, mediation in the field of labor law and consumer law, and mediation in civil and commercial matters), intended to ensure an area of freedom, security and justice where the free movement of persons is protected, and at the same time the respect of the right to access to justice, dates back to the 1999 Tampere European Council.[21] On this occasion, for the first time, the EU Council was asked to identify common substantial and procedural rules capable of guaranteeing an adequate level of legal assistance in cross-border litigation throughout the European Union and to accelerate the resolution of cross-border disputes "on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims".[22] In order to allow the achievement of these objectives in a uniform way in the national legal systems, the Member States were asked to adopt alternative out-of-court procedures.[23] Subsequently, others European Councils underlined the necessity to create alternative dispute resolution methods in the European Union.[24]

This orientation has consequently led European institutions to adopt specific measures in definite sectors. As to the family field, Regulation No. 2201/2003 has established an important system of cooperation between central authorities in the context of disputes concerning matters of parental responsibility by assigning an important role to the mediation.[25] Indeed, Article 55 of that Regulation provides that central authorities, directly or through public authorities or other bodies, must adopt measures in order to "facilitate agreement between holders of parental responsibility

[20] For a detailed overview of the evolution of consumer protection in the European Union in relation to the topic of mediation, see G. Rossolillo, "I Mezzi Alternativi di Risoluzione delle Controversie (ADR) tra Diritto Comunitario e Diritto Internazionale", in N. Boschiero and P. Bertoli (eds.), *Verso un "Ordine Comunitario" del Processo Civile: Pluralità di Modelli e Tecniche Processuali nello Spazio Europeo di Giustizia: Convegno Interinale SIDI, Como, 23 Novembre 2007* (2008), pp. 167-183, especially pp. 170-171.

[21] Tampere European Council, October 15 and 16, 1999, Presidency Conclusions, available online at *http://www.europarl.europa.eu/summits/tam_en.htm* [Accessed February 9, 2012].

[22] *Ibid*., para. 30.

[23] *Ibid*.

[24] Lisbon European Council, March 23 and 24, 2000, Presidency Conclusions, available online at *http://www.europarl.europa.eu/summits/lis1_en.htm* [Accessed February 9, 2012], para. 11; Santa Maria Da Feira European Council, June 19 and 20, 2000, Presidency Conclusions, available online at *http://www.europarl.europa.eu/summits/fei1_en.htm* [Accessed February 9, 2012]; Laeken European Council, December 14 and 15, 2001, Presidency Conclusions, available online at *http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf* [Accessed February 9, 2012], para. 25.

The attempt to establish alternative dispute resolution mechanisms in the EU Member States' legal systems proposed in the various European Councils exemplifies the Council of Europe's aims at identifying common principles and standards concerning family mediation and mediation in civil and commercial matters (see also Recommendation No. R (98) 1 on family mediation, adopted by the Council of Europe Committee of Ministers on January 21, 1998; Recommendation (2002)10 on mediation in civil matters adopted by the Council of Europe Committee of Ministers on September 18, 2002).

[25] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23.12.2003, p. 1.

through mediation or other means, and facilitate cross-border cooperation to this end".[26] As far as the civil and commercial context is concerned, the necessity to identify common criteria regulating mediation in Europe affirmed in the several European Councils has induced the Commission to adopt in 2002 the Green Paper on alternative dispute resolution in civil and commercial law[27] -which is inspired by the regulation of mediation in consumer and family sectors- and, in 2004, the European Code of Conduct for Mediators.[28] These two documents constitute the basis for the adoption in 2008 of the EU Directive concerning mediation in civil and commercial matters.[29]

3.1. The 2002 Green Paper of the Commission concerning alternative dispute resolution in civil and commercial law, and the 2004 European Code of Conduct for Mediators

The need to provide a general overview of the situation regarding alternative dispute resolution systems in the European Union originated from the existence of problems concerning the procedures before the EU Member States' judicial authorities, such as the excessive increase of the volume of disputes brought before national judicial organs, the consequent length and prolongation of these proceedings, as well as the rise of the costs incurred by the parties. This particular situation was also aggravated by the complexity and technicality of national norms of several internal legal systems which, by regulating the matters in different ways, were unable to assure adequate access to justice.[30]

In April 2002, the European Commission presented the Green Paper relating to alternative dispute resolution in civil and commercial matters. The Green Paper represented the first real attempt of European institutions to identify common criteria and principles concerning alternative dispute resolution mechanisms applicable in the EU Member States' legal systems.[31] The Green Paper constituted a significant impulse for European institutions to establish a definite EU legal context concerning alternative dispute resolution in civil and commercial matters: indeed, as it will be seen below, several principles expressed by the Green Paper have been reproduced by the 2008 Directive on mediation.

The Green Paper defined alternative dispute resolution systems as "out-of-court dispute resolution processes conducted by a neutral third party".[32] This concept covers alternative dispute resolutions in the context of judicial proceedings, *i.e.* procedures conducted by a judicial authority or assigned by a judge to a third party.[33] However, arbitration proper does not fall into this category, since it has been considered very similar to a quasi-judicial procedure more than to an alternative dispute resolution mechanism.[34] According to the Commission, alternative means of settling cross-border disputes are to be regarded as mechanisms able to fill the gap of national judicial proceedings and to assure better access to justice, as protected by Article 6 of the European Convention on

[26] *Ibid.*, art. 55(e).

[27] Green Paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final, April 19, 2002.

[28] European Code of Conduct for Mediators, available online at *http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf* [Accessed February 9, 2011].

[29] See Sections 4, 4.1, 5, *infra*.

[30] COM(2002) 196 final, *supra* note 27, p. 7, para. 5.

[31] For some considerations concerning the Green Paper, see A. Brady, "Alternative Dispute Resolution (ADR) Developments Within the European Union", (2005) 71, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 318-327, especially pp. 321-322.

[32] *Ibid.*, p. 6, para. 2.

[33] *Ibid.*, p. 7, para. 3. It should, however, be underlined that Directive 2008/52/EC expressly excludes from its scope "attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question" (see art. 3(a) and 12th Whereas, Directive 2008/52/EC, *supra* note 1).

[34] *Ibid.*, p. 6, para. 2.

Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union;[35] indeed, they are often to be considered as more adequate in order to resolve disputes because they allow parties to confront each other on the basis of a dialogue and to eventually decide whether or not to sue using judicial mechanisms.[36]

The Green Paper deals with a series of legal issues that have been regulated by the 2008 Directive with regard the mediation in civil and commercial matters,[37] such as questions regarding the alternative dispute resolution clauses in contracts, the effects of ADR on limitation and prescription periods, the necessity of confidentiality, the validity and the effectiveness of the agreements resulting from ADR processes, the training of third parties, and the rules regulating their responsibility.

The importance of the Green Paper is undeniable because it has identified alternative dispute resolution mechanisms not just as an alternative, but, in some cases, as a better means to guarantee to parties in a dispute the effective protection of their right to access to justice. The change of perception generated by this Green Paper has inevitably produced positive effects because it has allowed European institutions to attribute to alternative dispute resolution mechanisms a fundamental role in the legal context of the European Union and of the Member States.

Subsequently, in July 2004, the Commission adopted the European Code of Conduct for Mediators, which formulated several principles to which individual mediators and mediation organizations can voluntarily adhere and that are applicable to all types of mediation in civil and commercial matters.[38] It deals with all areas concerning civil and commercial matters, in particular: the competence, the appointment and fees of mediators and promotion of their services, the independence and impartiality of mediators, the structure and fairness of mediation procedures, and the confidentiality of mediators. The definition of the principles and of the structure of the mediation process contained in the Code has influenced the EU rules regulating civil and commercial mediation because it has represented a guide for the reconstruction of all aspects relating to mediation in civil and commercial area. Indeed, the 2008 Directive on civil and commercial mediation, which will be examined in the next paragraph, has acknowledged many principles affirmed in the Code just examined.

4. Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, and its aims

In 2008, the European Union adopted Directive 2008/52 regulating mediation in civil and commercial matters.[39] The directive contains norms intended not only to regulate the mediation

[35] *Ibid.*, pp. 7-8, paras 5-13; see, however, *ibid*., p. 25, para. 62. See art. 6, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950; art. 47, Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010. On this topic, see Sections 6 *et seq*., *infra.*

[36] COM(2002) 196 final, *supra* note 27, p. 8, para. 9.

[37] See Section 5, *infra*.

[38] European Code of Conduct for Mediators, *supra* note 28; on this point, see E. Birch, "The Historical Background to the EU Directive on Mediation", (2006) 72, no. 1, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 57-61, especially p. 59; B. Hess, *Europäisches Zivilprozessrecht* (2010), pp. 601-602.

[39] Directive 2008/52/EC, *supra* note 1. On the Directive at issue, see Association for International Arbitration (ed.), *The New EU Directive on Mediation. First Insights* (2008); G. Blanke, "The Mediation Directive: What Will It Mean for Us?", (2008) 74, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators* pp. 441-443; R. Bleemer, "The Directive Is in: European Union Strongly Backs Cross-Border Mediation", (2008) 26, no. 6, *Alternatives to the High Cost of Litigation*, pp 119-126; E. Minervini, "La Direttiva Europea sulla Conciliazione in Materia Civile e Commerciale", (2009) 14, no. 1, *Contratto e Impresa/Europa*, pp. 41-58, V. Vigoriti, "La Direttiva Europea sulla Mediation: Quale Attuazione", (2009) 19, no. 1, *Rivista dell'Arbitrato*, pp. 1-18; D. H. Sharma, "Europarechtliche

process and its effects, as well as to guarantee the proper balance between mediation and judicial proceedings, but also to intensify the recourse to mediation in EU Member States. To this end, it contains provisions aimed at encouraging the promotion and the diffusion of mediation processes,[40] as well as at stirring the improvement of the professionalism and technicality of mediators.

The Directive enhances the advantages of mediation compared to ordinary judicial proceedings. In particular, mediation, based on the will of the parties, enables the expeditious resolution of the disputes arisen in civil and commercial matters, especially of cross-border disputes.[41] On top of that, agreements resulting from mediation, as the result of the will of the parties, can be more easily executed and respected, contributing to maintaining an amicable and sustainable relationship between the parties.[42] Mediation is, thus, considered by the Directive not as just an alternative procedure to be initiated in case the judicial proceedings fail, but as a potentially superior means to resolve civil and commercial disputes. Mediation is aimed not only at entrusting a third party with the role of mediator in order to reach an amicable solution of the dispute but also at "restoring or re-defining the parties' relationship".[43]

In this context, as a consequence, it is to be understood that the aim of the Directive is to favor the access to alternative disputes resolution systems and to promote the amicable agreement on the settlement of disputes "by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".[44] To this end, the Directive provides a broad definition of mediation, which means "a structured process" where two or more parties to a dispute try, on a voluntary basis, to achieve an agreement on the resolution of their dispute with the help of a mediator;[45] mediator means any third person having the task "to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation".[46] This definition, although it is quite elaborate such as to include a broad category of persons, presents a gap: indeed, it would have been appropriate that it would have referred to some fundamental characteristics of the activity of mediator, as already identified by the European Code of Conduct for Mediators,[47] such as neutrality and independence.[48] The necessity that the mediator exercises his activity in full autonomy and independence, without being influenced by persons external to the dispute and being involved in a conflict of interest, is a fundamental element in order to guarantee the success of the mediation. It is, however, to be mentioned that Article 4 of

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Impulse", in F. Haft and K. Gräfin von Schlieffen (eds.), *Handbuch Mediation*, 2nd edn. (2009), pp. 1233-1245, especially pp. 1239 *et seq*.; Hess, *supra* note 38, pp. 597 *et seq*.; I. Blackshaw, "Mediating Business and Sports Disputes in Europe", available online at *http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume6/number2/blackshaw_int/* [Accessed February 9, 2012]; S. Friel and C. Toms, "The European Mediation Directive - Legal and Political Support for Alternative Dispute Resolution in Europe", available online at *http://www.brownrudnick.com/nr/pdf/articles/Brown_Rudnick_Litigation_European_Mediation_Directive_Friel_Toms_1-2011.pdf* [Accessed February 9, 2012]; F. P. Phillips, "The European Directive on Commercial Mediation: What It Provides and What It Doesn't", available online at *www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf* [Accessed February 9, 2012].

[40] Art. 9, Directive 2008/52/EC, *supra* note 1.

[41] *Ibid*., 6th Whereas.

[42] *Ibid*., 19th Whereas.

[43] See in this sense H. André-Dumont, "European Union: The New European Directive on Mediation: Its Impact on Construction Disputes", (2009) 26, no. 1, *International Construction Law Review* , pp. 117-124, especially p. 118.

[44] Art. 1, Directive 2008/52/EC, *supra* note 1.

[45] *Ibid.*, art. 3(a).

[46] *Ibid.*, art. 3(b).

[47] See Section 3.1, *infra*.

[48] André-Dumont, *supra* note 43, p. 118.

the Directive, which is expressly dedicated to the quality of mediation, confers on Member States the responsibility of encouraging "the development of … voluntary codes of conduct by mediators and organizations providing mediation services".[49]

The Directive also deals with the training and preparation of the mediator, in the light of the fact that the high quality and professionalism of the mediator, as well as the proper knowledge of the methods of behavior to be taken into account in the context of the mediation process, contribute to the success of the mediation and, as a result, to an easy and quick resolution of the disputes in civil and commercial matters. Indeed, Article 4(1) of the Directive also requests States to encourage the arrangement of effective quality control mechanisms regarding the provision of mediation services; furthermore, Paragraph 2 entrusts States with the task of promoting the initial and further training of mediators in order to guarantee that mediation is conducted in an effective, impartial and competent manner.[50] These provisions, which are intended to improve the quality of mediation, are to be connected to the cited disposition (Article 9), which is aimed at developing and promoting mediation in Europe, through the distribution to the general public, in particular on the Internet, of information in order to contact mediators and organisations providing mediation services.[51]

By the provisions yet indicated, the Directive aims at providing a legal context that, in addition to harmonizing the mediation processes and judicial proceedings, attempts to propose mediation as a quick, sure and effective legal tool for the resolution of the disputes in civil and commercial matters. The norms, which have the objective of improving the professionalism of mediators and of intensifying the exchange of information concerning mediators, fit into the view of an effective and genuine attempt to affirm mediation in the EU and Member States national legal systems.

4.1. The scope of the Directive

The scope *rationae materiae* of the Directive is restricted to disputes in civil and commercial matters.[52] As a consequence, disputes pertaining to revenue, customs or administrative matters or implying the responsibility of the State for activities and omissions in the exercise of its authority are excluded from the scope of the Directive.[53] However, there exists a general limit to the application of the Directive even in disputes in civil and commercial matters: it can never be applied to legal situations in which rights and obligations are not at the parties' disposal.[54] The circumstance where the parties cannot easily dispose of their rights and duties occurs very often in disputes concerning family and employment matters, which, as a result, are generally excluded from the ambit of the application of the directive at issue.[55] The *ratio* of these exclusions is to be found in the fact that it would not be possible to establish mediation processes for the resolution of disputes in relation to which the parties do not have the power to decide on their own and to totally dispose of the legal situations arising in the context of those disputes.

The scope of the directive seems to be apparently restricted to cross-border disputes, *i.e.* disputes "in which at least one of the parties is domiciled or habitually resident in a Member State

[49] Art. 4(1), Directive 2008/52/EC, *supra* note 1.
[50] *Ibid.*, art. 4(1)(2).
[51] *Ibid.*, art. 9(1).
[52] *Ibid.*, art. 1(2).
[53] *Ibid.*.
[54] *Ibid.*. According to 10th Whereas of Directive 2008/52/EC, *supra* note 1, "it should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law".
[55] 10th Whereas, Directive 2008/52/EC, *supra* note 1.

other than that of any other party".[56] The formulation of Article 1(2) could reasonably be construed to exclude from the scope of the norms provided by the Directive disputes arising at the national level.[57] However, the 8th Whereas clause of the Directive is without prejudice to the application of the directive to internal disputes because, as a rule, the fact that the Directive is to be applied to cross-border disputes does not preclude Member States from applying the provisions of the Directive to internal mediation processes.[58]

5. Directive dispositions regulating the "key aspects" of civil procedure

In compliance with the 7th Whereas clause, according to which "it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure",[59] the Directive provides a series of dispositions regarding, in particular: the relationship between judicial proceedings and mediation, the possibility to provide -within certain limits- compulsory mediation,[60] the enforceability of agreements resulting from mediation, the confidentiality of mediators, and finally the effects of mediation on limitation and prescription periods. These dispositions are intended to guarantee the balanced relationship between mediation and ordinary judicial proceedings, and to encourage parties to have recourse to the mediation in the EU Member States.

Article 5 of the Directive gives to the judicial authority before which an action is brought the power to invite parties of the dispute to resort to mediation, whereas, evaluating all the circumstances of the case, it considers that recourse as appropriate (the so-called mediation delegated by the judge).[61] Furthermore, although under the provisions of the directive mediation is as a rule optional, the same Directive does not exclude that EU Member State national legislation could provide for recourse to compulsory mediation, provided that such legislation does not preclude the parties "from exercising their right of access to the judicial system".[62]

Then, in order to ensure the enforceability of the agreements resulting from mediation,[63] and thus to guarantee that they would be effectively respected by the parties, the Directive provides that the content of the agreements can be made enforceable "by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."[64] Thus, under the Directive, parties must have the possibility to request that the content of an agreement reached following the success of the mediation process could be made enforceable.[65] Otherwise, the principal aim of the mediation process would risk being thwarted, because if one party does not respect the agreement resulting from mediation and this agreement cannot be enforced, the other party shall certainly initiate a judicial proceeding.[66]

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[56] *Ibid.*, art. 1(2), 2(1).

[57] See also, in this sense, F. P. Phillips, "European Directive on Commercial Mediation: What It Provides and What It Doesn't", in A. W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2008), pp. 311-318, especially p. 313.

[58] 10th Whereas, Directive 2008/52/EC, *supra* note 1.

[59] *Ibid.*, 7th Whereas.

[60] See Sections 6 *et seq.*, especially 8, *infra*.

[61] Art. 5(1), Directive 2008/52/EC, *supra* note 1.

[62] *Ibid.*, art. 5(2).

[63] On this topic, see Hess, *supra* note 38, p. 599.

[64] *Ibid.*, art. 6(2).

[65] The attribution of the enforceability to the agreement resulting from mediation is essential in order that mediation "should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties" (19th Whereas, Directive 2008/52/EC, *supra* note 1).

[66] This particular risk is underlined, in particular with reference to cross-border disputes, by M. Roth, "The Proposal for an EU Directive on Certain Aspects of Mediation in Comparison with Austrian Mediation Law", (2005) 1, no. 1, *London Law Review* pp. 5-25, especially p. 16.

With Directive 2008/52, the principle of confidentiality has become one of the cornerstone principles of mediation, since it imposes upon mediators or persons administrating the mediation a bar upon testifying in the possible judicial proceedings or arbitration as regards to "information arising out of or in connection with a mediation process".[67] The guarantee that the information resulting from a mediation process be, as a rule, reserved and not released during a subsequent ordinary judicial proceeding constitutes an essential principle of the mediation mechanism because mutual trust contributes to the correct execution and realization of a mediation process.[68] Indeed, the success of a mediation process depends upon the guarantee of confidentiality because the parties must be assured that the declarations made during a mediation process cannot be used in subsequent judicial proceedings should the mediation process fail. The rule of confidentiality can not only be derogated from by the parties, but it is also subject to some exceptions, *viz.* where the testimony of the mediator or the disclosure of information relating to a mediation process is necessary "for overriding considerations of public policy of the Member State concerned", such as the protection of the "best interests of children" or the prevention of the damage to the "physical or psychological integrity of a person", or for implementing or executing the content of the agreement resulting from the mediation process.[69] However, the Directive should have specified what evidence is covered by the principle of confidentiality and clarified what "overriding considerations of public policy" means.[70] The vagueness of the Directive on these topics does not contribute to the certainty of law and to legislative harmonization in the European Union.[71]

Article 8 of the directive contains a very important principle concerning the effects produced by the mediation on limitation and prescription periods for submitting an application in front of ordinary judicial authorities or for initiating an arbitration procedure. In order to preserve the opportunity for parties who decide to use mediation for settling their dispute, which mediation later proves to be unsuccessful, to subsequently initiate a judicial proceeding or an arbitration procedure regarding such dispute, the Directive provides, in substance, that a mediation request determines the interruption and the suspension of the prescription periods and the impediment of limitation.[72] The aim of this disposition is not as such to harmonize the EU Member States' legal systems in relation to the limitation and prescription periods, but it is principally to avoid that the Member States' national legislation regulating limitation and prescription periods from precluding the parties involved in a dispute from having recourse to a national court or to the arbitration process, if the mediation process fails.[73] The effects produced on prescription and limitation periods represent a relevant legal tool, since they are intended to encourage the use of mediation in the European Union: indeed, if the recourse to mediation would not produce such an effect, the use of mediation would not be very frequent because the parties, out of fear of the possibility of a future failure of the mediation process and in order to avoid the expiry of the limitation and prescription periods, could decide to initiate judicial proceedings rather than to have recourse to mediation.

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[67] Art. 7(1), Directive 2008/52/EC, *supra* note 1.

[68] Birch, *supra* note 38, p. 60.

[69] Art. 7(1)(a), Directive 2008/52/EC, *supra* note 1.

[70] See also in this sense, D. Cornes, "Mediation Privilege and the EU Mediation Directive: An Opportunity?", (2008) 74, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 395-405, especially pp. 403-404.

[71] For a criticism concerning the confidentiality principle in mediation, as elaborated by the Directive, see A. Colvin, "The New Mediation in Italy", (2010) 76, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 739-756, especially p. 744.

[72] Art. 8(1), Directive 2008/52/EC, *supra* note 1.

[73] See A. Brady, "Mediation Developments in Civil and Commercial Matters Within the European Union", (2009) 75, no. 3, *Arbitration: The Journal of the Chartered Institute of Arbitrators* pp. 390-399, especially p. 396.

6. The relationship between mediation and the access to justice

The problem of the relationship between mediation and the access to justice arises just from the examination of some of the aforementioned norms that are aimed at coordinating mediation with judicial proceedings.

Mediation represents an alternative to judicial proceedings,[74] but at the same time it constitutes a legal tool for promoting better access to justice because the correct functioning of the mediation process should result in the decrease of new disputes being brought before judicial authorities[75] and, as a consequence, even in a reduction of the duration of judicial proceedings.[76] Therefore, it can be affirmed that the Directive on mediation falls into those interventions intended to realize far better access to justice. Besides, this is the orientation welcomed by the European Council from its Tampere meeting on 15 and 16 October 1999, where the Council, in order to facilitate a better access to justice, invited Member States to create alternative and extra-judicial procedures.[77] Although mediation is to be considered as a tool aimed at improving the access to justice,[78] it also presents an important limitation because, at the same time, it cannot constitute an obstacle to the right of access to the judicial system.[79] That is the real and unique general prohibition that the Directive provides for in the mediation process (in addition to the general limitation concerning the rights not at disposal of the parties[80]).

The law regulating the relationship between mediation, as an extra-judicial instrument for resolving disputes, and judicial proceedings, *i.e.* the recourse to a judge, is a topic that forms part of procedural law. Indeed, a State could establish that the implementation of a mediation attempt constitutes a condition for proposing judicial action (a condition for the admissibility of an action before the courts), or even a necessary condition in order that the proceeding can proceed (a condition to proceeding in court). In this way, the individual State attributes to the mediation attempt

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[74] The 19th Whereas of the Directive 2008/52/EC, *supra* note 1, underlines that, even with reference to the enforceability of the agreement resulting from mediation, "Mediation should not be regarded as a poorer alternative to judicial proceedings".

[75] Furthermore art. 5(1) of the Directive 2008/52/EC, *supra* note 1, also provides for the possibility of a mediation delegated by the judge (see Section 5, *supra*).

[76] It is, however, to be considered that the Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters of October 22, 2004 (COM(2004) 718 final, available on line at <http://eurlex.europa.eu/LexUriServ/site/en/com/2004/com2004_0718en01.pdf> [Accessed February 9, 2012]), from which Directive 2008/52/EC, *supra* note 1, has originated, stated that "the concept of access to justice should include promoting access to adequate dispute resolution processes". Thus, mediation could also directly realize a better access to justice. Indeed, according to the Proposal: "Better access to justice is one of the key objectives of the EU's policy to establish an area of freedom, security and justice, where individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. The concept of access to justice should, in this context, include promoting access to adequate dispute resolution processes for individuals and business, and *not just access* to the judicial system." (Paragraph 1.1.1, p. 2). On the proposal of the Directive at issue, see M. F. Ghirga, "Conciliazione e Mediazione alla Luce della Proposta di Direttiva Europea", (2006) 61, no. 2, *Rivista di Diritto Processuale*, pp. 463-498; E. Minervini, "La Proposta di Direttiva Comunitaria sulla Conciliazione in Materia Civile e Commerciale", (2005) 10, no. 1, *Contratto e Impresa/Europa*, pp. 427-438.

[77] See 2nd Whereas, Directive 2008/52/EC, *supra* note 1, and in detail, Sections 3, 3.1, *supra.* Furthermore, it is to be remembered that art. 81(2)(g), TFEU, *supra* note 15, indicates that included amongst the measures to be taken by the European Union in order to develop judicial cooperation in civil matters is "the development of alternative methods of dispute settlement": see P. Biavati, "Il Futuro del Diritto Processuale di Origine Europea", (2010) 64, no. 3, *Rivista Trimestrale di Diritto e Procedura Civile,* pp. 859-873, especially p. 865.

[78] See also Section 4, *supra*.

[79] See, especially, art. 5(2), Directive 2008/52/EC, *supra* note 1, and, in detail, this Section, *infra*.

[80] See Section 4.1, *supra*.

a compulsory nature under its scheme as a condition for the admissibility of the action or as a condition precedent to proceeding in court. The Directive does not seem to place any obstacles in the way of this discretional choice of the individual State.

Indeed, the Directive emphasizes the necessity that the "key aspects of civil procedure" be regulated. To this end it addresses: the effects of mediation on limitation and prescription periods, in order to avoid that judicial action be precluded in case mediation fails, as well as the enforceability of the agreement resulting from mediation that, once recognized as a binding instrument, can be enforced.[81] Yet, the Directive does not contain any precise choice concerning the relationship between mediation and access to judicial proceedings, although such relationship certainly represents a "key aspect" of civil procedure. The Directive has chosen to not intervene on this topic and to leave the State free to configure the mediation attempt as a duty or as a free option. Both choices are allowed. In fact, Article 5(2) of the Directive states: "This Directive *is without prejudice to national legislation making the use of mediation compulsory*[82] or subject to incentives or 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"; furthermore, Article 3, by defining the concept of mediation, provides for the possibility that the mediation process can be "prescribed" by the law of a Member State.[83]

Besides, it is not to be excluded that cases of compulsory mediation and optional mediation can coexist: the single State could prescribe the compulsoriness of the mediation attempt only for certain disputes in the context of civil and commercial matters; as to the other remaining disputes, the mediation process would be considered optional (it being understood that the above-mentioned general limitation relating to the rights not at the disposal of the parties applies).[84]

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[81] See, for even further "key aspects" of civil procedure provided for by Directive 2008/52/EC, Section 5, *supra.*

[82] This provision has been recently recalled by the European Parliament resolution of September 13, 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)), which expressely recognizes that art. 5(2) of Directive 2008/52/EC allows to make as compulsory the recourse to mediation (lett. K.5). Art. 5(2) of the directive has been criticized by André-Dumont, *supra* note 43, p. 122, who considers it "inconsistent with the *voluntary* nature of mediation".

[83] The broad formulation of art. 5(2), Directive 2008/52/EC, *supra* note 1, allows EU Member States to make various and different choices in the regulation of mediation. On this point, Brady, *supra* note 73, p. 394, after having affirmed that "[t]he Directive is designed to facilitate the *voluntary* use of mediation", correctly underlines that, however, "variations in domestic practice are inevitable but the Directive will doubtless serve as a minimum standard for mediation processes involving both cross-border and domestic disputes".

[84] That is the choice made by the Italian legislator in the regulation of mediation (Legislative Decree No. 28 of March 4, 2010). Art. 5(1) of this Legislative Decree identifies, in the ambit of civil and commercial matters, the disputes in relation to which the mediation attempt is compulsory and, as such, is regulated according to the scheme of the condition to proceeding in court (see Section 7, *infra*); while, as to the remaining disputes in civil and commercial matters, optional mediation is operational (art. 2(1) of the Legislative Decree).

On mediation in the Italian legal system, see, in particular, G. P. Califano, *Procedura della Mediazione per la Conciliazione delle Controversie Civili e Commerciali* (2011); M. Bove (ed.), *La Mediazione per la Composizione delle Controversie Civili e Commerciali* (2011). See also G. Canale, "Il Decreto Legislativo in Materia di Mediazione", (2010) 65, no. 3, *Rivista di Diritto Processuale* pp. 616-630. R. Caponi, "La Giustizia Civile alla Prova della Mediazione (a Proposito del D.leg. 4 Marzo 2010 n. 28) - Quadro Generale", (2010) 135, no. 4, Part V, *Foro Italiano,* pp. 89-95; D. Dalfino, "Mediazione, Conciliazione e Rapporti con il Processo", (2010) 135, no. 4, Part V, *Foro Italiano*, pp. 101 *et seq*.; L. Dittrich, "Il Procedimento di Mediazione nel D.lgs. n. 28 del 4 Marzo 2010", (2010) 65, no. 3, *Rivista di Diritto Processuale* pp. 575-594; I. Pagni, "Mediazione e Processo nelle Controversie Civili e Commerciali: Risoluzione Negoziale delle Liti e Tutela Giudiziale dei Diritti - Introduzione", (2010) 29, no. 5, *Le Società* pp. 619-625; R. Tiscini, "Il Procedimento di Mediazione per la Conciliazione delle Controversie Civili e Commerciali", (2010) 20, no. 4, *Rivista dell'Arbitrato*, pp. 585-610; E. Zucconi Galli Fonseca, "La Nuova Mediazione nella Prospettiva Europea: Note a Prima Lettura", (2010) 64, no. 2, *Rivista Trimestrale di Diritto e Procedura Civile*, pp. 653-673.

If, on the one hand, it cannot be denied that Article 5(2) of the Directive, whereas it is without prejudice to legislation providing for the compulsoriness of the mediation attempt, has a clear *ratio*, because the imposition of a compulsory attempt at mediation can facilitate the concrete success of mediation and the achievement of its objectives;[85] on the other hand, it cannot be denied that, although optional mediation does not create an obstacle to access to judicial proceedings, the imposition of a compulsory attempt at mediation clearly restricts free access to justice. Now, it is necessary to draw attention to this particular issue.

7. The "procedural autonomy" of individual States in regulating the relationship between compulsory mediation and judicial proceedings

It has already been observed that, where a single State provides as compulsory the mediation attempt, it can choose to regulate the relationship between mediation and access to judicial proceedings according to the scheme of a condition for the admissibility of the action or of a condition precedent to proceeding in court. In the first case, the judicial action, which is proposed by a party without attempting to resolve the dispute using the mediation process,[86] shall be declared as inadmissible by the judge. In the second case, the judge shall declare that the process cannot proceed, shall suspend it[87] and fix a deadline by which the party must initiate the mediation process. If the mediation attempt fails, then the process can be resumed.

In both cases, there exists a restriction of the right to access to justice. It is, however, to be pointed out that the scheme of the condition to proceeding in court causes a lesser obstacle to the right to access to justice: the judicial action can produce its effects, but the process cannot proceed; it can proceed only after the mediation attempt has terminated (and failed).

The choice left to the individual State to prescribe the compulsoriness of the mediation attempt, and to reconstruct this attempt as a condition for the admissibility of action or a condition to proceeding in court, is a choice that implicates procedural matters. In particular, it concerns procedural rules that have to be respected to propose a judicial action. As is well known, a single State is competent to regulate and to define its own procedural rules. Indeed, there exists settled EU case-law according to which, as a rule, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction, as well as the administrative authorities, and to establish - as far as the topic of this essay is concerned - *the procedural rules regulating actions* for protecting rights that individuals derive from EU law. This is the "procedural autonomy" of the EU Member States.[88]

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[85] The EU Court of Justice itself in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, [2010] ECR I-2213, recognized compulsory out-of-court dispute settlement as more efficient than optional out-of-court dispute settlement. Indeed, according to para. 65 of *Alassini* judgment: "In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation *of a mandatory procedure exists*, since the introduction of an out-of-court settlement procedure *which is merely optional is not as efficient* a means of achieving those objectives".

[86] Or proposed before that the time limit for the mediation attempt fixed by an individual State has expired.

[87] Or, if law permits it, the judge can also simply fix a new hearing to a date subsequent to the expiry of the time limit provided by law for the completion of the mediation process.

[88] Amongst several decisions, see: Case 45/76, *Comet*, [1976] ECR 2043, para. 13; Case 33/76, *Rewe*, [1976] ECR 1989, para. 5; Case C-312/93, *Peterbroeck*, [1995] ECR I-4599, para. 12; Case C-228/96, *Aprile*, [1998] ECR I-7141, para. 18; Case C-453/99, *Courage e Crehan*, [2001] ECR I-6297, para. 29; Case C-62/00, *Marks & Spencer*, [2002] ECR I-6325, para. 34; Case C-13/01, *Safalero*, [2003] ECR I-8679, para. 49; Joined Cases C-222/05 to C-225/05, *van der Weerd and Others,* [2007] ECR I-4233, para. 28; Case C-432/05, *Unibet*, [2007] ECR I-2271, para. 39; Case C-268/06, *Impact*, [2008] ECR I-2483, para. 44; Case C-12/08, *Mono Car Styling* [2009] ECR I-6653, para. 48; Case C-472/08, *Alstom Power Hydro*, [2010] ECR I-623, para. 17; Case C-240/09, *Lesoochranárske zoskupenie*, not yet reprinted in [2011] ECR, para. 47. The topic of procedural autonomy has been examined, under several profiles and as to different sectors, by D. U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States* (2010).

7.1. The limits of "procedural autonomy" of the individual State: the principle of effective judicial protection

The procedural autonomy of the States is subject to two limitations: the first is represented by the principle of equivalence, according to which procedural rules governing actions cannot be less favourable than those regulating similar domestic actions; the second is constituted by the principle of effectiveness,[89] which provides that such rules must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.[90]

In reality, there also exists a third limitation, which is represented by a general principle of EU law, *i.e.* the principle of effective judicial protection[91] (which is also related to the just above-

[89] As far as the principle of effectiveness is concerned, it is to be recalled that according to the EU Court of Justice "cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically impossible or excessively difficult must similarly be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings": see Joined Cases C-222/05 to C-225/05, *van der Weerd and Others, supra* note 88, para. 33; Case C-312/93, *Peterbroeck, supra* note 88, para. 14; Case C-426/05, *Tele2 Telecommunication,* [2008] ECR I-685, para. 55; Case C-63/08, *Pontin*, [2009] ECR I-10467, para. 47.

[90] On these two limits, see, amongst more-recent decisions: Case C-312/93, *Peterbroeck, supra* note 88, para. 12; Case C-298/96, *Oelmühle Hamburg and Schmidt Söhne*, [1998] ECR I-4767, para. 24; Case C-228/96, *Aprile*, *supra* note 88, para. 18; Case C-453/99, *Courage e Crehan*, *supra* note 88, para. 29; Case C-62/00, *Marks & Spencer*, *supra* note 88, para. 34; Case C-255/00, *Grundig Italiana*, [2002] ECR I-8003, para. 33; Case C-13/01, *Safalero*, *supra* note 88, para. 49; Case C-467/01, *Eribrand*, [2003] ECR I-6471, para. 62; Case C-147/01*, Weber's Wine World and Others,* [2003] ECR I-11365, para. 103; Case C-201/02, *Wells*, [2004] ECR I-723, para. 67; Case C-268/06, *Impact*, *supra* note 88, paras 45-46; Case C-63/08, *Pontin*, *supra* note 89, paras 43-47; *Alstom Power Hydro, supra* note 88, para. 17; Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, para. 48; Case C-240/09, *Lesoochranárske zoskupenie, supra* note 88, para. 48; see, amongst more dated decisions: Case 45/76, *Comet*, *supra* note 88, paras 13-16; Case 33/76, *Rewe, supra* note 88, para. 5; Joined Cases 205 to 215/82, *Deutsche Milchkontor GmbH and Others*, [1983] ECR 2633, para. 19; Case 199/82, *San Giorgio*, [1983] ECR 3593, para. 12. For a systematic analysis of the EU Court of Justice case-law on this topic, see Galetta, *supra* note 88, pp. 33 *et seq*.

Some recent EU Court of Justice pronouncements, which seem to affect the authority of *res judicata*, could be considered as manifestations of a further restriction of the procedural autonomy of the individual State, but, in reality, they have to be otherwise interpreted. The reference is, in particular, to Case C-119/05, *Lucchini*, [2007] ECR I-6199 (on which, see E. Cannizzaro, "Sui Rapporti fra Sistemi Processuali Nazionali e Diritto dell'Unione Europea", (2008) 13, no. 3, *Il Diritto dell'Unione Europea*, pp. 447-468; C. Consolo, "La Sentenza "Lucchini" della Corte di Giustizia: Quale Possibile Adattamento degli Ordinamenti Processuali Interni ed in Specie del Nostro?", (2008) 63, no. 1, *Rivista di Diritto Processuale*, pp. 225-238; P. Biavati, "La Sentenza Lucchini: Il Giudicato Nazionale Cede al Diritto Comunitario", (2007) 50, no. 5, *Rassegna Tributaria*, pp. 1591-1603); and furthermore, but in a minor way, to Case C-2/08*, Fallimento Olimpiclub*, [2009] ECR I-7501 (on which see G. Raiti, "Le Pronunce Olimpiclub ed Asturcom Telecomunicaciones: Verso un Ridimensionamento della Paventata 'Crisi del Giudicato Civile Nazionale'"', (2010) 65, no. 3, *Rivista di Diritto Processuale*, pp. 677-689) and Case C-40/08, *Asturcom Telecomunicaciones*, [2009] ECR I-9579 (on which see E. D'Alessandro, "La Corte di Giustizia Sancisce il Dovere, per il Giudice Nazionale, di Rilevare D'ufficio l'Invalidità della Clausola Compromissoria Stipulata tra il Professionista ed il Consumatore Rimasto Contumace nel Processo Arbitrale", (2009) 19, no. 4, *Rivista dell'Arbitrato* pp. 667-684; and Raiti, *supra*). For a proper interpretation of all these EU Court interventions, even in the broad context of the relationships between European courts and national judges, see the important contributions of: R. Caponi, "Corti Europee e Giudicati Nazionali", in *Corti Europee e Giudici Nazionali – Atti del XXVII Convegno Nazionale (Quaderni della Associazione Italiana fra gli Studiosi del Processo Civile)* (2011), pp. 239-390, especially pp. 273 *et seq*., 360 *et seq*.; and C. Consolo, "Il Flessibile Rapporto dei Diritti Processuali Civili Nazionali Rispetto al Primato Integratore del Diritto Comunitario (Integrato dalla CEDU a sua Volta)", *ibidem*, pp. 49-237, especially pp. 177 *et seq*.

[91] See, in particular, Joined Cases C-87/90, C-88/90 and C-89/90, *Verholen and Others*, [1991] ECR I-3757, para. 24; Case C-13/01, *Safalero*, *supra* note 88, para. 50; Case C-432/05, *Unibet*, *supra* note 88, para. 42; and, more recently, Case C-12/08, *Mono Car Styling, supra* note 88, para. 49.

mentioned principle of effectiveness[92]). The principle of effective judicial protection constitutes a general principle of EU law deriving from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.[93] Furthermore, this principle has been reasserted in Article 47 of the Charter of Fundamental Rights of the European Union,[94] proclaimed on 7 December 2000 in Nice, which, according to Article 6(1) of the Treaty on the European Union, has the same legal value as the EU Treaties.[95] According to this basic principle, which during the years has been applied in diverse matters -from interim legal protection[96] to terrorism[97] to mediation matters-[98] individuals must enjoy an effective judicial protection of the rights conferred upon them by the EU legal system.[99]

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[92] See, in this sense, Opinion of Advocate General Kokott delivered on November 19, 2009, Joined Cases C-317/08 to C-320/08, Alassini and Others, para. 42.

[93] The principle at issue has been affirmed by the EU Court of Justice, since the well-known Judgment of May 15, 1986 in Case C-222/84, *Johnston*, [1986] ECR 1651, paras 18-19. In this judgment, the EU Court of Justice, at para. 18, made reference to a "general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 november 1950". According with the *Johnston* decision, see subsequently: Case 222/86, *Heylens and Others*, [1987] ECR 4097, para. 14; Case C-97/91, *Oleificio Borelli SpA v Commission of the European Communities*, [1992] ECR I-6313, para. 14; Case C-1/99, *Kofisa Italia*, [2001] ECR I-207, para. 46; Case C-226/99, *Siples,* [2001] ECR I-277, para. 17; Case C-424/99, *Commission of the European Communities v Republic of Austria,* [2001] ECR I-9285, para. 45; C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, [2002] ECR I-6677, para. 39; Case C-467/01, *Eribrand*, *supra* note 90, para. 61; Case C-268/06, *Impact*, *supra* note 88, para. 43; Case C-432/05, *Unibet, supra* note 88, para. 37; Case C-12/08, *Mono Car Styling, supra* note 88, para. 47. On the stages of the affirmation of the principle of effective judicial protection in the European Union, see N. Trocker, "'Civil Law' e 'Common Law' nella Formazione del Diritto Processuale Europeo", (2007) 17, no. 2, *Rivista Italiana di Diritto Pubblico*, pp. 421-465, especially pp. 437 *et seq*.; *Id*., "Il Diritto Processuale Civile Europeo e le "Tecniche" della sua Formazione: L'Opera della Corte di Giustizia", (2010) 2 *Europa e Diritto Privato*, pp. 366-412, especially pp. 384 *et seq*.

As to the affirmation of the principle at issue by the European Court of Human Rights, see: Application No. 30210/96, *Kudła v Poland,* [2000-XI] ECHR, para. 157; Application No. 61444/00, *Krasuski v Poland,* [2005-V] ECHR, para. 66; Application No. 36813/97, *Scordino v Italy (No. 1),* [2006-V] ECHR, para. 142; Application No. 16528/05, *Hajibeyli v Azerbaijan*, para. 39; Application No. 18274/04*, Borzhonov v Russia*, paras 32-34; Application No. 33509/04*, Burdov v Russia (No. 2)*, para. 97; Application No. 40450/04, *Yuriy Nikolayevich Ivanov v Ukraine*, para. 64; Application No. 16530/06*, Eltari v Albania*, para. 81. On the interpretation of arts 6(1) and 13 of European Convention on Human Rights by the Strasbourg Court, see Trocker, "Civil Law" e "Common Law", *supra*, especially pp. 453 *et seq*.

[94] See Case C-432/05, *Unibet*, *supra* note 88, para. 37; Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft,* not yet reprinted in [2010] ECR, paras 30-33; Case C-457/09, *Chartry*, not yet reprinted in [2011] ECR, para. 25; Case C-69/10, *Samba Diouf*, not yet reprinted in [2011] ECR, para. 49.

[95] According to art. 6(1), Treaty on European Union, OJ C 83, 30.3.2010: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

[96] As to the legal interim protection, see the well-known judgments: Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, [1991] ECR I-415, especially paras 16-20; and Case C-465/93, *Atlanta Fruchthandelsgesellschaft and Others,* [1995] ECR I-3761, para. 20.

[97] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6351, para. 335. On this point, and in particular on the necessity to assure the principle of effective judicial protection of persons included in the EU antiterrorism lists without adequate judicial guarantees, see the proper considerations of G. Ziccardi Capaldo, *The Pillars of Global Law* (2008), pp. 294-296.

[98] See Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, paras. 46 *et seq*.

[99] Trocker (Il Diritto Processuale Civile Europeo, *supra* note 93, especially pp. 385 *et seq*.) observes that, by affirming the principle of effective judicial protection and by classifying it amongst the general principles of European

This principle, like every general principle of EU law, must be respected by each national legislator regulating matters falling within the scope of application of EU law.[100] Obviously, the disputes to which the Directive refers, *i.e.* the disputes in civil and commercial matters, are often regulated by EU law.

8. Compulsory mediation and observance of the principle of effective judicial protection

The question that will now be addressed is whether the choice made by an individual State, as allowed by the Directive, to impose a compulsory mediation attempt -regulated or as a condition for the admissibility of an action or as a condition to proceeding in court-[101] always contrasts with the principle of effective judicial protection. In fact, it is possible to identify a trace of this concern in Article 5(2) of the Directive. This article, on the one hand, is without prejudice to national legislation "making the use of mediation compulsory"; on the other hand, it underlines the necessity that "such legislation does not prevent the parties from exercising their right of access to the judicial system".[102]

In order to properly face this topic, first of all, it is necessary to underline that the principle of effective judicial protection is not absolute. It can be subject to restrictions in order to achieve objectives of general interest, provided that such restrictions "do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed".[103] Such restrictions can be made even through the provision for a

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Union law, the EU Court of Justice devised a way in which to intervene in the procedural rules of the national legal systems and to identify the kind of protection that judges of each Member State must confer to rights provided for by EU law.

Furthermore Trocker ("Civil Law" e "Common Law", *supra* note 93, especially p. 437) notes that, before the recognition of this principle, the EU Court of Justice was used only to define in negative terms the conditions that the individual State must ensure for the protection of the rights recognized by EU law. Indeed, the Court identified only the two limits represented by the principle of equivalence and the principle of effectiveness that, according to the definitions just indicated in this section, only identify what the individual State cannot do (i.e., negative limit). Instead, the principle of effective judicial protection indicates in positive terms what the single State must guarantee (i.e., positive limit).

[100] Indeed, art. 19(1), first period, Treaty on European Union, *supra* note 95, expressly states: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". See also Case 12/86, *Demirel,* [1987] ECR 3719, para. 28; Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 15; Case C-309/96, *Annibaldi,* [1997] ECR I-7493, para. 13; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 75.

[101] See Section 6, *supra*.

[102] In the same way, the 14th Whereas clause, first period, of the Directive 2008/52/EC, *supra* note 1, provides that: "Nothing in this Directive should prejudice national legislation making the use of mediation compulsory … provided that such legislation does not prevent parties from exercising their right of access to the judicial system".

[103] For this statement, even if made with reference to various general principles, see: Case C-28/05, *Dokter and Others*, [2006] ECR I-5431, para. 75; Case C-394/07, *Gambazzi*, [2009] ECR I-2563, paras 29-32, especially para. 29. In the same way, as to more dated decisions, see: Case C-62/90, Commission of the European Communities v Federal Republic of Germany, [1992] ECR I-2575, para. 23; Case C-44/94, *Fishermen's Organisations and Others,* [1995] ECR I-3115, para. 5.

This limit has also been clearly stated by the European Court of Human Rights in *Fogarty* case (Application No. 37112/97, *Fogarty v The United Kingdom*, [2001-XI] ECHR). In this judgment, the ECHR held at para. 33 that: "The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59)".

compulsory mediation attempt, regulated or as a condition for the admissibility of an action or as a condition to proceeding in court.

The non-absolute nature of the principle of effective judicial protection allows it to affirm *in abstracto* that the imposition of a compulsory mediation attempt does not necessarily contrast with the principle itself. Thus, it is now necessary to identify the necessary conditions in order that that contrast does not occur in practice.

To this end, it is possible to draw useful indications from the 2010 *Alassini* judgment of the EU Court of Justice,[104] which dealt with the compulsory attempt to pursue out-of-court dispute settlement provided by Italian legislation in disputes between end-users and electronic communication providers. These disputes must be preliminarily subject to a compulsory attempt to settle the dispute out-of-court, which is considered as a condition precedent to proceeding in court.[105]

As to this form of compulsory out-of-court settlement, the EU Court of Justice has excluded a violation of the principle of effective judicial protection because it has ascertained its compliance with some requirements that every form of mandatory out-of-court settlement must satisfy. These requirements can be divided into: 1. a general requirement, which concerns the identification of the objectives pursued by a mandatory out-of-court settlement; and 2. some special requirements, which concern, instead, the specific characteristics that an out-of-court settlement procedure must respect in order to not violate the principle at issue.

Now, it is necessary to examine whether the rules concerning mediation contained in the Directive, and the margins that the Directive itself leaves to the appreciation of a single State, are able to satisfy the general requirement and the special requirements established by the EU Court of Justice in the *Alassini* judgment. In this way, it is possible to define the needed conditions in order that compulsory mediation does not violate the principle of effective judicial protection.

8.1. The general requirement: the achievement of objectives of general interest

The general requirement that arises from the *Alassini* judgment consists in the necessity that the compulsory attempt to settle the dispute out-of-court pursues objectives of general interest. In this way, the EU Court of Justice reaffirmed that the observance of the principle of effective judicial protection is not always absolute.[106]

This general requirement is certainly satisfied by the Directive on mediation. The objectives of this Directive have already been examined where the relationship between mediation and access to justice has been evaluated.[107]

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[104] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85. On this issue, see H. R. Dundas, "Court-Compelled Mediation and the European Convention on Human Rights Article 6", (2010) 76, no. 2, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 343-348; G. Fiengo, "Principio della Tutela Giurisdizionale Effettiva e Previo Esperimento di Procedura di Conciliazione Extragiudiziale in Materia di Servizi di Comunicazione Elettronica", (2010) 3 *Diritto Pubblico Comparato ed Europeo*, pp. 1238-1241.

[105] On this legislation and on the *Alassini* judgment, *supra* note 85, see G. Armone and P. Porreca, "La Mediazione Civile nel Sistema Costituzional-comunitario", (2010) 135, no. 8, Part IV, *Foro Italiano,* pp. 372 *et seq*.; C. Besso, "Obbligatorietà del Tentativo di Conciliazione e Diritto all'Effettività della Tutela Giurisdizionale", (2010) 12 *Giurisprudenza Italiana*, pp. 2585-2589; G. Rizzo, "L'Obbligatorietà del Tentativo di Conciliazione Extragiudiziale in Ambito di Servizi di Comunicazioni Elettroniche tra Operatori di Telecomunicazione e Utenti Finali", (2010) 27, no. 10, *Corriere Giuridico*, pp. 1292-1304.

[106] See Section 8, *supra*.

[107] See Sections 6 and especially 4, *supra*.

Therefore, it is sufficient to recall: Article 1(1), which provides that the Directive pursues the objective to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings"; the 5th Whereas clause, according to which: "The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services"; and the 6th Whereas clause, which states: "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".[108]

Once it is recognized that the Directive pursues objectives of general interest that can justify a restriction of the principle of effective judicial protection, the question is raised as to whether such restriction, when it consists of a compulsory mediation attempt -regulated or as a condition for the admissibility of an action or as a condition to proceeding in court- constitutes a disproportionate and intolerable interference with regard to the objectives pursued.[109] To this end, it is necessary to examine whether the Directive already contains dispositions complying with the special requirements that, according to the EU Court of Justice, an out-of-court settlement procedure must be respected.

8.2. The special requirements concerning the regulation of the mediation process

The conditions that the EU Court of Justice in the *Alassini* judgment indicated are necessary in order that a compulsory out-of-court settlement procedure does not violate the principle of effective judicial protection are the following: *a)* the "procedure does not result in a decision which is binding on the parties"; *b)* "it does not cause a substantial delay for the purposes of bringing legal proceedings"; *c)* "it suspends the period for the time-barring of claims"; *d)* "it does not give rise to costs – or gives rise to very low costs – for the parties"; *e)* "electronic means is not the only means by which the settlement procedure may be accessed"; *f)* "interim measures are possible in exceptional cases where the urgency of the situation so requires".[110]

Now, it is necessary to verify whether Directive 2008/52/EC already contains provisions complying with these prescriptions; otherwise, it is necessary to identify the characteristics that a national legislation governing mediation must have in order to avoid the violation of the principle of effective judicial protection.

a) The prescription that the procedure does not result in a decision that is binding on the parties can certainly be respected through the facilitative mediation scheme, where the mediator is not expected to make suggestions or to propose a solution (as in the case of an evaluative

[108] The importance of such benefits of mediation indicated by the 6th Whereas clause of Directive 2008/52/EC, *supra* note 1, in particular, the capacity of mediation to preserve the future contractual relationships of the parties, have been underlined since the proposal of the Directive was presented (see Roth, *supra* note 66, p. 5). Such advantages have also been emphasized after the Directive was adopted (see André-Dumont, *supra* note 43, p. 124; Brady, *supra* note 73, p. 390).

[109] See Section 8, *supra*, and the case-law cited in note 103.

[110] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, para. 67.

mediation[111]), but he operates only in order to facilitate a voluntary agreement between the parties.[112] Such scheme seems to be the more appropriate to comply with the EU Court prescription.[113]

b) The prescription requiring that the procedure does not cause a substantial delay for the purposes of bringing legal proceedings mandates that an individual State fix strict time limits for the completion of a mediation attempt. In order to identify such time limits there are no certain criteria: for example, the compulsory attempt to settle the disputes out-of-court in the telecommunications sector, examined in the *Alassini* judgment, must be completed –or in any case is considered as completed- once 30 days from the date of the beginning of the out-of-court settlement procedure have expired; instead, the Italian legislation on mediation fixes a four-month time limit for completing the mediation attempt.[114] Generally speaking, in order to establish whether the time limit fixed for the completion of the compulsory mediation attempt causes a substantial delay, one can consider the average duration of the process in the individual State, taking into account the criteria elaborated by the European Court on Human Rights relating to the reasonable length of the proceedings.[115]

c) As to the effects of mediation on limitation and prescription periods, the Directive devotes to this topic a proper disposition (Article 8), although it does not deal with the harmonization of EU Member States in this matter.[116] That norm provides, in substance, that the request of mediation determines the interruption and suspension of the prescription period, as well as the impediment of limitation. As a consequence, the new prescription and limitation periods should run from the date when the mediator announces the negative result of the mediation, through the deposit of the negative report.[117]

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[111] According to André-Dumont, *supra* note 43, p. 124, "because of the active role played by the mediator, [the] so-called evaluative mediation is closer to conciliation than to mediation".

[112] As to Directive 2008/52/EC, Hess, *supra* note 38, p. 599, arguing from art. 3(b) of the Directive (where it affirms "regardless … of the way in which the third person has been appointed or requested to conduct the mediation"), correctly observes: "Des Weiteren hat der Gemeinschaftsgesetzgeber sich auch nicht auf ein bestimmtes Modell der Mediation (moderierende oder evaluierende Mediation) festgelegt".

[113] In favor of the facilitative mediation scheme, it could be eventually recalled the wording of the 10th Whereas clause, first period, of the Directive 2008/52/EC, *supra* note 1, according to which: "This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute *with the assistance of* a mediator". See also art. 3(a), Directive 2008/52/EC, *supra* note 1.

[114] Art. 6(1), Legislative Decree No. 28/2010, *supra* note 84.

[115] As to the reasonableness of the length of the proceedings, ECHR settled case-law provides that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant": see Application No. 31333/06, *McFarlane v Ireland*, para. 140; see also Application No. 1602/62, *Stögmüller v Austria*, [1969] ECHR (Ser. A.), p. 9, para. 5; Application No. 49017/99*, Pedersen and Baadsgaard v Denmark*, [2004-XI] ECHR, para. 45; Application No. 54071/00, *Rokhlina v Russia*, para. 86; Application No. 75529/01, *Sürmeli v Germany* [2006-VII] ECHR, para. 128; Application No. 49163/99, *Kalpachka v Bulgaria*, paras 65, 68; Application No. 18274/04*, Borzhonov v Russia, supra* note 93, para. 39.

[116] See 24th, Directive 2008/52/EC, *supra* note 1, according to which: "In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved *even though this Directive does not harmonise national rules on limitation and prescription periods*. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive". See Section 5, *supra*.

[117] As to the negative result of the mediation attempt, art. 7(2) of the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters {SEC(2004) 1314} (presented by the Commission) provides that: "Where the mediation has ended without a settlement agreement, the period resumes running from the time the mediation ended without a settlement agreement, counting from the date

d) As far as the costs of mediation are concerned, it is clear that the gratuitousness of the procedure – as it is provided for by the out-of-court settlement procedure examined in the *Alassini* judgment – would be the *optimum*. However, the same EU Court of Justice, being aware of the costs required by the out-of-court settlement procedure, requests that such procedure "does not give rise to costs – or gives rise to very low costs – for the parties".[118] Thus, the question consists in evaluating how it can be possible to identify the "very low" nature of the costs eventually established for the mediation process. In this regard, first of all, a so-called "objective" criterion could be used, which takes into account the amount involved in the dispute and the costs to be incurred by the parties during the mediation process; then, this objective criterion could be applied together with a "subjective" criterion, which takes into account the economic difficulties of the parties. Indeed, a cost that objectively is not very low can be, however, subjectively high for a party. Therefore, in the case that the mediation process is onerous, the protection of the individuals having scarce or non-existent resources can be realized by providing the gratuitousness of the mediation process for the parties, who, during a judicial proceeding, would have the requisites to grant the legal aid.

e) With respect to the restriction that electronic means not constitute the only manner in which a settlement procedure may be accessed, the Directive provides that: "This Directive should not in any way prevent the use of modern communication technologies in the mediation process".[119] Thus, the Directive urges the adoption of those means but does not consider them as exclusive. However, it is not to be forgotten that electronic means can guarantee facilitations in disputes involving companies and undertakings providing services widely along the national territory and in the European Union (it is indeed to be recalled that the Directive makes reference to cross-border disputes).[120]

f) Lastly, interim measures cannot be subject to a compulsory mediation attempt, even in the case that such attempt is regulated as a condition for the admissibility of an action.[121] The free access to interim protection is imposed by the same principle of effective judicial protection. The urgency that justifies the request of an interim measure contrasts, due the inherent function of the interim measure itself, with the necessity to wait through the duration of the mediation process.[122] Furthermore, in some cases, the interim measures, in order to be effective, have to be adopted *inaudita altera parte*, while the mediation process, due to its nature, always requires that the parties be notified about the process.

Conclusions

As a result of this research, it can be affirmed that the mediation process, even if it is regulated by a single State as a compulsory attempt - according to the schemes of the condition for the admissibility of an action or, preferably, of the condition to proceed to court - does not necessarily violate the principle of effective judicial protection. In order to avoid this violation, individual States must respect the requirements clearly prescribed by the EU Court of Justice in the

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when one or both of the parties or the mediator declares that the mediation is terminated or effectively withdraws from it. The period shall in any event extend for at least one month from the date when it resumes running, except when it concerns a period within which an action must be brought to prevent that a provisional or similar measure ceases to have effect or is revoked". This disposition has not been reproduced in the final text of the Directive 2008/52/EC (see Article 8).

[118] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, para. 67.

[119] 9th Whereas, Directive 2008/52/EC, *supra* note 1.

[120] See Section 4.1, *supra.*

[121] See Section 6, *supra*.

[122] See also the case-law cited in note 96.

Alassini judgment. As we have seen, some of these requirements are already satisfied by the provisions of the Directive; instead, as to the special requirements not expressly regulated by the Directive, it is for the Member States to adopt appropriate measures. In particular, it is necessary that they ensure that the mediation process, as such, will not substantially delay the eventuality of a judicial action and that the mediation is without costs or gives rise to very low costs for the parties.

Thus, if the regulation of the mediation process respects the requirements delineated by the EU Court of Justice, there is no violation of the principle of judicial protection, which can certainly be subject to limited restrictions aimed at pursuing objectives of general interest. Such objectives, which consist of the improvement of access to justice and the achievement of a reasonable length to the proceedings, are without doubt favored by the diffusion of the culture of mediation, which reduces the number of actions before the judicial authorities.

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