

Arbitration - Italy

ECJ finds Italian rules on mandatory mediation consistent with EU law

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In a judgment for a preliminary ruling issued on March 18 2010⁽¹⁾ the European Court of Justice held that EU directives and general principles do not prevent national law from providing for mandatory out-of-court mediation procedures as a condition of admissibility to court proceedings, provided that such procedure:

- does not result in a decision that is binding on the parties;
- does not cause a substantial delay in bringing legal proceedings;
- suspends the period for the time-barring of claims; and
- does not give rise to more than minimal costs for the parties.

Italian proceedings

Italian recipients of telecommunications services brought actions before an Italian magistrates court against two Italian telephone companies, seeking damages for breach of contract for telephone services.

The two companies claimed that the actions were inadmissible because the plaintiffs had not first attempted to settle the dispute out of court through mediation according to the rules of the Communications Regulatory Authority. The rules provide that:

- a mandatory attempt to resolve a dispute must be undertaken using the services of a specialist mediation body;
- the time limit for completion of the settlement procedure is 30 days from the date of the request;
- when the deadline expires, the parties may bring court proceedings, even if the procedure has not been completed; and
- if no attempt has been made at out-of-court resolution, court proceedings are inadmissible.

The magistrate noted that it had not previously been determined whether such mediation bodies complied with the criteria set out in the relevant EU provisions, and that the mandatory nature of the dispute resolution procedure might constitute an illegal barrier to access to the courts.

In light of the doubts regarding the compatibility of the Italian provisions with EU law, the magistrate stayed the proceedings and referred the question to the European Court of Justice for a preliminary ruling on April 4 2008.

EU law

The relevant points of EU law were the EU Universal Service Directive (2002/22/EC) and the principle of effective judicial protection. According to Article 34 of the directive, EU member states must make out-of-court procedures available to parties to unresolved disputes. Such procedures must be transparent, simple and inexpensive, and must enable disputes to be settled fairly and promptly.

Effective judicial protection is a general principle of EU law, stemming from the constitutional traditions common to the member states, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights and reaffirmed by Article 47 of the Charter of Fundamental Rights.

EU proceedings

On November 19 2009 Advocate General Juliane Kokott concluded that the directive requires that procedures for out-of-court dispute resolution be transparent, simple and inexpensive, and that the principle of effective judicial protection does not preclude such procedures from being mandatory, provided that they pursue legitimate objectives in the general interest and are not disproportionate to the objective in question.

Judgment

The court noted that Italy had implemented the directive by enacting the Electronic Communications Code (Legislative Decree 259/2003), which required the authority to adopt transparent, simple and inexpensive out-of-court procedures for the fair and timely resolution of disputes involving consumers and end users. In 2007 the authority adopted dispute resolution rules whereby court proceedings are inadmissible unless the parties have first sought to settle the dispute before certain mediation bodies.

The court considered that the directive does not limit member states' powers to provide for mandatory out-of-court dispute resolution procedures; rather, the only condition is that such procedures may not obstruct access to justice before the courts.

However, Article 34 of the directive requires member states to make out-of-court procedures available. The fact that national legislation has not only put in place an out-of-court settlement procedure, but also made its use mandatory before bringing a court action, does not jeopardize the attainment of that objective; rather, such a provision is designed to strengthen the effectiveness of the directive insofar as it ensures that out-of-court procedures are systematically used for settling disputes.

The court considered whether such legislation would be compatible with the principles of equivalence and effectiveness and the principle of effective judicial protection.

The detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (according to the principle of equivalence), and must not make it impossible or excessively difficult to exercise rights conferred by EU law (according to the principle of effectiveness). These requirements embody the member states' general obligation to ensure judicial protection of an individual's rights under EU law.

The court found no evidence of infringement of the principle of equivalence. Moreover, various factors showed that a mandatory settlement procedure did not contravene the principle of effectiveness in respect of the directive. The court held as follows:

- The outcome of the settlement procedure was not binding on the parties and thus did not prejudice their right to bring legal proceedings.
- The settlement procedure did not result in a substantial delay for the purposes of bringing legal proceedings, as the deadline for completion of the settlement procedure was 30 days from the date of the request and, when the deadline expired, the parties were entitled to bring legal proceedings, regardless of whether the procedure had been completed.
- For the duration of the settlement procedure, the period for the time-barring of claims was suspended.
- The settlement procedure was inexpensive.

The court considered whether the principle of effective judicial protection had been respected.

It was common ground that by making the admissibility of legal proceedings conditional on the implementation of a mandatory attempt at settlement, Italian legislation introduced an additional step for access to the courts, which might in itself prejudice the implementation of the principle of effective judicial protection.

Nevertheless, the European Court of Justice found that it is settled case law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions (i) correspond to objectives in the public interest, and (ii) do not involve a disproportionate and intolerable interference with regard to the objectives pursued to the extent of infringing on the substance of the rights to be guaranteed.

The court noted that the aims of the Italian provisions at issue were the quicker and less expensive settlement of disputes and a lightening of the burden on the court system; thus, they pursued legitimate public interest objectives.

In addition, the imposition of an out-of-court settlement procedure appeared to be proportionate to the objectives. As the advocate general had stated, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure that is merely optional is a less efficient means of achieving such objectives. Moreover, it was not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure

were disproportionate to those objectives.

Therefore, the court considered that the procedure at issue complied with the principle of effective judicial protection. It held that Article 34 of the directive must be interpreted as not precluding member state legislation whereby the admissibility before the courts of actions relating to electronic communications services between end users and providers of those services, concerning the rights conferred by the directive, is conditional on an attempt to settle the dispute out of court. Moreover, it held that neither the principles of equivalence and effectiveness nor the principle of effective judicial protection preclude national legislation that imposes prior implementation of an out-of-court settlement procedure in respect of such disputes, provided that:

- the procedure does not result in a decision which is binding on the parties;
- the procedure does not cause a substantial delay for the purposes of bringing legal proceedings;
- the procedure suspends the period for the time-barring of claims;
- the procedure does not give rise to more than minimal costs for the parties;
- interim measures are available in exceptional cases where the situation so requires; and
- on a particular aspect of the case at issue, electronic means are not the only means of accessing the settlement procedure.

Comment

This preliminary ruling shows the European Court of Justice's attitude to the introduction of alternative dispute resolution procedures in member state legislation. This is particularly relevant to the implementation of the Mediation Directive (2008/52/EC), of which Article 5 states that:

"This directive is without prejudice to national legislation making the use of mediation compulsory 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."

The ruling clearly indicates the criteria that the ECJ will follow in examining instances of mandatory mediation enacted by national legislation in implementing the directive. Such implementation must be effected on or before May 21 2011. Italy has already implemented the directive by statutory provisions⁽²⁾ which came into force on March 20 2010 and which provide that, as from March 20 2011, attempting mediation will be a precondition for admissibility to court proceedings for certain classes of dispute.

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Endnotes

(1) Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08.

(2) Legislative Decree 20/2010.

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