Mandatory Mediation and the Right to Court Proceedings

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In the area of electronic communications between end-users and operators concerning non-compliance with the rules on universal service and on the rights of end-users, according to Italian legislation (Article 3 (1) of Decision No 173/07/CONS of the Regulatory Authority and Article 1 (11) of Law No 249/1997), the submission of any contractual claim before a court is preconditioned to a mandatory attempt at conciliation, without which proceedings in that regard may not be brought before the courts. The case challenging this law, referred to the court by an Italian Justice of the Peace, provides an opportunity for the court to adopt a position not only in relation to Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the 'Universal Service Directive') but also, in particular, in relation to the principle of effective judicial protection.

This paper summarises the issues surrounding this case and the broader rules and considerations governing mandatory mediation methods which constitute an integral part of the framework governing dispute resolution throughout the European Union and indeed much of the world.

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Facts

On 15 January 2008, a consumer filed a complaint against an Italian telecommunications operator concerning compensation of €1,000 for damages due to the failure to provide telecommunications services, including an internet connection, to her property. The complaint was filed before the Justice of Peace in Ischia (Naples, Italy). The defendant company objected that the claim was inadmissible because it was not first submitted to a mediation process as prescribed for by prevailing legislation and regulation. The judge suspended the proceeding to ask the court if the Italian legislation violates the principle of the right to a legal proceeding expressed in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the communitarian law. In referring the matter to the court, the judge took the position that the mandatory nature of the dispute resolution procedure represents an illegal barrier to access to the courts.[1]

National law

The establishing law of the Italian communications regulatory authority (the 'Authority') provides for the duty to attempt the settlement of all disputes between consumers and a telecommunications company. For such disputes, it is not possible to bring the case before any court if a mediation procedure has not been concluded within 30 days from the date of the presentation of the claim to one of the institutions delegated by the Authority to conduct such a procedure. For this purpose, the time limit for proposing the legal proceedings is suspended until the conclusion of the mediation phase (Article 1 (11), Law No 249/1997). Decision 173/07/CONS provides the procedural rules for the resolution of disputes between telecommunications providers and end-users, whereby the Authority may authorise the following to conduct a settlement procedure: (i) regional

1 A national judge does not have the power to express his opinion but can only ask the court if the national law is compatible with the communitarian legislation. Nevertheless in the examined case the judge improperly declared also his preference for the voluntary mediation. The Court of Justice of the European Union can, in accordance with the Treaties, inter alia, give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions. The Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning even the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the court to give a ruling thereon (Articles 19 (3) and 267 Treaty on the European Union) .

communications commission responsible for the geographical area concerned; (ii) private institutions such as the Chamber of Commerce and other private organisations; or (iii) bodies established by agreement between the operators and the national associations of consumers' representatives. These authorised bodies must observe the principles of transparency, fairness and effectiveness referred to in Recommendation 2001/310/EC. The time-limit for completion of the settlement procedure is 30 days from the date of the request. On expiry of the deadline the parties may bring court proceedings, even if the procedure has not been completed (Articles 3 and 13, Decision No 173/07/CONS). Mediation procedures are free of charge before the regional communications commission and national associations of consumers' representatives, but before the other private providers of mediation services the parties pay fees as determined in the rules of such providers. The aim of the aforementioned mediation procedures is to promote the protection of consumer rights in the relationship with telecommunication operators through simple, speedy and cost-effective settlement procedures.[2]

These rules come against the context of a broad legislative and regulatory discipline that pursues the aim of protecting consumers against the delays in civil proceedings that have increased by 90 per cent from 1975 to 2009. The average duration is 887 days for a decision of a court of first instance, 808 days for a court of appeal and 912 for the Supreme Court: 2,607 days in total, or about seven years.[3] The Italian Government was sentenced for a violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and ordered to pay €41 million between 2002 and 2006 due to these delays. The World Bank ranks Italy in 156th position (out of 181 ranked countries) for enforcement of contracts, coming after Angola, Gabon and Botswana.[4] By contrast, in 2009 alone, a total of approximately 30,000 disputes in the area of telecommunications services were settled through mandatory mediation, with an average duration to settlement of 60 days.[5]

The National Board of the Consumers and Users, a public institutional organisation composed of the main consumer associations, strongly supports all kinds of alternative dispute resolution methods, even mandatory, because with these extrajudicial procedures the parties can really establish the rules and the duration of their negotiations with the

2 Articles 13 and 84 Legislative Decree No 259/2003 in execution of Universal Service Directive.

3 Authority presentation at the conference 'From the negotiation of contracts to the resolution of disputes' on 18 December 2008.

4 *Doing Business 2009*, Country profile for Italy.

5 *Authority annual report 2008*, Il Sole 24 Ore 21 October 2008.

purpose of reducing the recourse to civil proceedings and increasing the protection of all citizen rights.[6]

The Constitutional Court has affirmed many times the legitimacy of mandatory mediation in the respect of the principle of the reasonable duration of the proceedings (Article 111 Cost). On 30 November 2007, the Constitutional Court sustained that the compulsory attempt to settle the dispute respects the right to a legal proceeding (expressed in Article 24 Cost) because it is aimed at ensuring the general interest of satisfying immediately the substantial rights of the claimants. With this purpose in mind, any country legislator has the power to impose conditions on the bringing of the case before the court for the protection of the superior interest, specifically the length of the civil proceedings, without any prejudice to the parties' rights, a procedure which is for them not expensive.[7] The opinion was affirmed by the Supreme Court in a significant case it conducted concerning the legality of mandatory mediation rules, where the Supreme Court declared that in all telecommunications disputes, even if the subject of the claim is the validity of the contract, the plaintiff must always attempt to mediate the claim before the regional communications commission or another provider.[8]

The European legal framework

The judicial protection of consumers is one of the main principles of community legislation. Access to justice is at the top of the political agenda in all Member States of the European Union. More and more disputes are being brought to court.[9] As a result, this has not only led to longer waiting periods for disputes to be resolved but also has pushed up legal costs to such levels as to often be disproportionate to the value of the dispute. Further, the advent of the single European market has increased the movement of goods and of people across the European Union, resulting in a consequential rise in the number, as well as the complexity, of disputes involving nationals of different Member States. In this context, ADRs are regarded as an important element in the attempt to provide fair and efficient dispute-resolution mechanisms at EU level.

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6 **www.tuttoconsumatori.it/archivio/giustizia/soluzione_extragiudizale_delle_controversie/index.shtml**

7 Constitutional Court decision no 403/2007, orders no 125/2006 and no 268/2006

8 Supreme Court no 24334/2008.

9 An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings final Report 2007. A Study for the European Commission, Health and Consumer Protection Directorate-General Directorate B – Consumer Affairs.

The subject of every juridical regulation is to realise an efficient system of the protection of rights that must be recognised, affirmed and regulated. The Maastricht Treaty institutionalised the policy of consumer protection as a primary target of the European Union. The Amsterdam Treaty further developed this objective with the purpose of adopting decisions in favour of consumers. The specific consumer problems connected to the defence of their positions at the community level were already recognised in the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for consumer information and protection. This resolution mentioned, inter alia, the consumer right to claim compensation for damages through quick, easy and non expensive procedures.[10] The access to justice for individual consumers encounters material obstacles such as the high cost of legal consultation and representation and the long delays before a case is judged. Consumers are also faced with barriers of a psychological order due to the formality and complexity of court procedures, particularly in the case of cross-border disputes. As a result, in most consumer disputes the inordinate length and excessive cost of the legal procedure are out of proportion to the limited value of the case. Many consumers therefore do not even try to assert their rights.[11]

Commission Recommendation 98/257/EC

Commission Recommendation 98/257/EC (cited by the Justice of Peace of Ischia in referring the instant case to the court), in affirming the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, expresses a clear preference for a non mandatory procedure. In accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right that knows no exceptions. Out-of-court procedures cannot be designed to replace court procedures. Therefore, the use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to renounce that right. Parties must be free to consent to conciliation or to abandon the attempt at any time. This recommendation focuses on circumstances in which there is an active intervention of a third party, who proposes or imposes a solution, thus implying the complete avoidance of the court system.

10 The same principle is expressed: in the Council Resolution 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy; in the Council Resolution 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests; and finally in the Council Resolution 9 November 1989.

11 Communication from the Commission of 30 March 1998 on the out of court settlement of consumer disputes.

Commission Recommendation 2001/310/EC

The Commission recognised that the scope of the Recommendation 98/257/EC was limited to the procedures through the intervention of a third party who proposes or imposes a solution of the dispute. It did not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent.

The setting out of principles for consumer dispute resolution procedures not covered by the principles in Recommendation 98/257/EC seemed necessary at the community level to support and supplement, in an essential area, the initiatives taken by the Member States in order to realise, in accordance with Article 153 of the Treaty, a high level of consumer protection.[12] These procedures, even if mandatory, do not impede the recourse to the court in considering that they operate not in substitution of, but in addition to, the ordinary judicial system and, therefore, in application of the subsidiary principle.

Directive 2002/22/EC

Directive 2002/22/EC, commonly referred to as the Universal Service Directive, is also cited by the Justice of Peace of Ischia in referring the instant case to the court. This Directive establishes that contracts are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security with specific reference, inter alia, to the dispute resolution methods adopted in the relationship with the telecommunications service provider. Effective procedures should be available to deal with disputes between consumers, on the one hand, and organisations providing publicly available communications services, on the other.[13] The Universal Service Directive handles the relationship between out-of-court and court proceedings. It requires Member States to make available out-of-court procedures for dealing with unresolved disputes. Procedures should be transparent, simple and inexpensive.[14] Member States should ensure that such procedures enable disputes to be settled fairly and promptly. Even if the rule does not expressly state that out-of-court dispute resolution can also be made mandatory and imposed as a condition for the admissibility of a legal action, it states clearly that it is without prejudice to national court procedures. In other words, the Universal Service Directive

12 (19) Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

13 (30) and (47) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

14 Article 34 Universal Service Directive.

does not preclude the making of such a dispute resolution mandatory and each Member State has the power to define its own procedural rules and conditions for bringing a civil case to the court.

Directive 2008/52/EC

The Green Paper of 16 November 1993 on the access of consumers to justice and the settlement of consumer disputes in the single market recognised the need to provide alternative, including mandatory, resolution methods. On this basis, the European Council, at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extrajudicial procedures to be created by Member States. In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation. 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 was necessary to encompass access to judicial as well as extrajudicial dispute resolution methods. Based on these Green Papers, the Commission passed Directive 2008/52/EC, wherein it is stated that mediation:

> 'can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements. In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.'

Mediation should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time.[15] It also applies to cases where a court refers parties to mediation or in which national law prescribes mediation.

Nothing in this Directive prejudices any national legislation making the use of mediation compulsory or subject to incentives, or sanctions, provided that such legislation does not prevent parties from exercising their right of access to the judicial system.

15 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.

The position of Member States on interventions in proceedings and the jurisprudence

Italy

The Italian Government supported mandatory mediation because it drastically reduces the time and the cost for the affirmation of consumers' rights and confirmed that the national legislative and regulatory rules apply to disputes between consumers and telecommunications companies and respects European law.

Germany

According to the position of the German Government, Article 6 (2) EU, in connection with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, must not be interpreted to preclude mandatory mediation in the relationship between end users and telecommunications service provider. Even Directive 2002/22/EC and the Commission Recommendations 2001/310/EC and 1998/257/EC do not represent an obstacle to any national legislature introducing a binding mediation phase before the bringing of a case to the court.

Poland

According to the opinion of the Polish Government, disputes between consumers and telecommunications companies must not be subject to a mandatory mediation. Mediation must be a voluntary process without any kind of procedural consequence such as the inadmissibility of the proceedings. The Commission Recommendations and the Directive 2008/52/EU can justify a limitation of the legal autonomy of each state in the designing of dispute resolution procedures if the aim is to protect fundamental citizen rights such as the access to the court. The precedents cited in supporting this relate to the inopposite affirmation of a right to a

fair proceeding, rather than the issue of mandatory mediation.[16]

European Commission

A national rule that, in the ambit of an out of court procedure recognises that the imperative of the attempt to mediate a dispute, in principle, is not a violation of Directive 2002/22/EU. Article 34 of the Universal Service Directive – interpreted considering the Convention for the Protection of Human Rights (Article 6) and the Charter of Fundamental Rights of The European Union (Article 47) – is not an impediment to a mandatory mediation if this attempt respects the effective judicial protection principle. The Commission retains that it is the specific duty of a national judge to determine if this principle could be prejudiced by the mandatory alternative dispute resolution methods and if it violates the fundamental right to a court proceedings provided by the community law.[17]

The jurisprudence of the court

According to a consolidated jurisprudence orientation, the Member State has to decide the conditions for the protection of citizen rights respecting community principles. Effective judicial protection is a general principle of community law stemming from the constitutional traditions common to the Member States. The court has consistently held that, in the absence of community rules governing the subject, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and

16 A 018 *Golder v The United Kingdom*, 4451/70. In the Case C-87/90, *A Verholen and others v Sociale Verzekeringsbank Amsterdam*, according to the court, the community law requires that the national legislation does not undermine the right to effective judicial protection (see the judgments in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, 1986 ECR 1651 and in Case 222/86 *UNECTEF v Heylens*, 1987, ECR 4097) and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by community law (judgment in Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio*, 1983, ECR 3595). The mediation when it is mandatory does not impede the recourse to the ordinary proceedings but could postpone its starting for a limited period of time. Even in the Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* the court affirmed the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that essential right of the free access to employment. That requirement reflects a general principle of community law which stems from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European convention for the protection of human rights but does not mean that each state cannot provide a prior and out of court step to render more efficient the justice service.

17 The European Commission in favour of the voluntary procedure cites the United Kingdom Court of Appeal case *Hickman v Blake Lapthorn*. Nevertheless this was a case of court annexed mediation (ie, mandatory by a judge's order and not provided by law) without any determination of the time limit and cost of the procedure.

to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from community law and the Member States. However, each Member State is responsible for ensuring that those rights are effectively protected in each case.[18] This implies that the national law can impose a prior step before bringing a case to court, provided that the right to an impartial tribunal is guaranteed.[19] In other words, the right to a court provided by Article 6 of the Convention is not absolute, but rather may be subject to implied limitations. Such limitations, however must be applied so as to not impair the very essence of the right of access to court, must pursue a legitimate aim and must respect the principle of proportionality having regard to the nature of the barred claims the applicant wished to assert.[20] The right to institute proceedings before courts in civil matters constitutes one aspect of the right to a court proceeding and that restrictions on the right of access are compatible with Article 6 ECHR where they do not impair the essence of the right and pursue a legitimate aim.[21]

Mandatory mediation in Europe[22]

Austria

In certain disputes relating to the Not-For-Profit Housing Associations Act (Wohnungsgemeinnützigkeitsgesetz) or the 2002 Property Act, which have to be decided in a court in non-contentious proceedings, where the local authorities in question have conciliation boards that deal with tenancy law disputes, local conciliation procedures have to be initiated before the matter can be referred to a court. In such proceedings, it is mandatory to bring matters before an arbitration tribunal relating to a tenancy in one of the local authority areas where there is an arbitration tribunal. Such cases can therefore be brought before a court only if they had previously been brought before the local authority's conciliation board and the conciliation board had already made a decision or if proceedings had not been brought to a close within three months. Conciliation proceedings in matters of tenancy are free of charge. Either of the parties may also bring the matter before a court if the proceedings before the conciliation board have not been concluded within three months.

18 Case C-12/08 *Mono Car Styling SA, in liquidation, v Dervis Odemis and Others.*

19 CaseT-351/03, *Schneider Electric SA v Commission of the European Communities.* See also *European Court of Human Rights, Le Compte, Van Leuven and De Meyere v Belgium*, 23 June 1981, Series A No 43, § 51.

20 A 093 *Ashingdane v The United Kingdom*, 28 May 1985; *Bentham v The Netherlands*, 23 October 1985.

21 *Mendel v Sweden*, 7 April 2009.

22 European Commission alternative dispute resolution: **http://ec.europa.eu/civiljustice/adr/adr_gen_en.htm**.

Germany

The various federal states can provide mandatory conciliation procedures based on section 15a of the Act Introducing the Code of Civil Procedure (EGZPO) for the following: disputes relating to proprietary rights coming under the jurisdiction of a local court (Amtsgericht) and where the amount of the claim in dispute does not exceed €750; in certain disputes relating to the law concerning neighbours and the interests of adjoining owners: and in disputes relating to defamation claims, where the derogatory remarks were not made via the press or broadcasting media. If an action were brought in this case without an attempt to reach a consensus it would be dismissed as being inadmissible. Anyway, it is thus possible to bring the matter before a court if no solution to the dispute has been reached. During an attempt to settle a dispute extrajudicially, the statute of limitations is suspended with reference to the claims of the parties to the dispute.

Greece

Efforts to find another method of ADR began in 1995. Article 214A of the Civil Procedure Code provides: 'Suits concerning disputes in private law which by reason of their subject matter fall within the jurisdiction of the multi-member court of first instance in ordinary proceedings, and in respect of which conciliation is permissible under substantive law, may not be heard unless there has been a prior attempt to find an out-of-court settlement. When drawing up the record of the filing of the suit and setting the date of the hearing, the registrar shall affix a clear stamp on the original and the copies stating that the case cannot be heard if there has not been a prior attempt to achieve an out-of-court settlement of the dispute.' The summons to the hearing must also include an invitation to the defendant to attend at the office of the plaintiff's lawyer or at the offices of the law society of that lawyer, on a specific day at a specific time, to attempt to find an out-of-court settlement. The party thus invited must appear with a lawyer or be represented by a lawyer with special power of attorney. The meetings to achieve an out-of court settlement of the dispute take place within a period from the fifth day after the service of notice of the suit to the thirty-fifth day before the date fixed for the hearing.

Slovenia

Among its provisions on the procedure to be followed in labour and social disputes, the Labour and Social Courts Act, which came into force on 1 January 2005, states that where a mandatory procedure for the peaceful resolution of a dispute is prescribed by law or by collective agreement, a court action is admissible only on condition that such a procedure was

initiated beforehand, but was unsuccessful. In addition, courts practice court-related mediation in civil, family and commercial matters, whereas non-governmental bodies mediate in disputes between neighbours, disputes between landlords and tenants, disputes at school, at work or between organisations and consumer disputes.

Spain

In Spain there is conciliation which must be carried out before Labour Administration Mediation Services prior to labour litigation (linked to the labour court). Moreover, in civil courts, for proceedings involving amounts exceeding €3,000, there is a compulsory conciliation procedure subsequent to the submitting of the application and the response by the defence. This conciliation procedure is led by the judge, who is obliged to promote efforts to obtain an agreement. The court proceedings go ahead only if this does not succeed.

England

The country provides for indirect mandatory ADR methods. In England and Wales, consumers faced with an unresolved dispute over goods or services have a range of routes they can choose to pursue. Contacting the trader or business directly is the way many complaints are resolved before they become disputes. There are a number of sources of help and advice, most notably from trading standards departments and Citizens Advice Bureaux. While ADR is not usually compulsory, clauses providing for ADR in contracts are binding as long as they are specific. Moreover, the Civil Procedure Rules provide for the judiciary to encourage the use of ADR in appropriate cases. The parties should consider whether some form of ADR procedure would be more suitable than litigation, and if so, endeavor to agree which form to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. The courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the court must have regard to such conduct when determining costs.[23]

Mandatory mediation in the world

The international scenario offers many examples of mandatory mediation, even under the form of the court annexed mediation. According to Argentine law, and subsequent related laws, all matters are covered by mandatory

23 4.7 Practice Direction Protocols Civil Procedure Rules.

mediation except criminal issues, writs of *habeas corpus*, bankruptcies, and cases that involve the federal government. Once a case is filed in the Argentine civil courts, it is assigned to a mediator, and mediation is scheduled to begin within 60 days of the notification of the parties to the dispute.

Mediation was formally institutionalised in Israel in 1992, with the amendment of the Courts Law of 1984. The amendment granted courts the authority to refer civil disputes to mediation or arbitration with party consent. The new pilot of mandatory mediation, started in March 2008, has a very good chance of taking mediation to new heights in Israel.[24]

US states including Oregon, California, Texas and Florida have started making mediation mandatory, at least for some claims. Only if it fails may the parties go to trial. In the state of New York, mandatory referral to mediation is permitted in cases involving civil issues besides liability for damages.[25]

In Ontario, Mandatory Mediation is a programme designed to help parties involved in civil litigation and estates matters settle their cases early in the litigation process to save time and money. It applies in Toronto, Ottawa and Windsor to certain civil actions under Rule 24.1 of the Rules of Civil Procedure and to contested estates, trusts and substitute decision matters under Rule 75.1 of the Rules of Civil Procedure.[26] Since June 2008, mandatory mediation has been used in Chinese courts on a trial basis in the provinces and municipalities of Guangdong, Fujian, Yunnan, Hebei, Gansu, Chongqing and Shanghai.

Conclusion

Mandatory mediation does not involve the problems connected with mandatory arbitration because the access to the courts is only temporarily suspended and the parties cannot be forced into an agreement. It is only the attempt to resolve the dispute that is mandatory, not the agreement. Obligatory mediation does not violate the fundamental right to access a court. It is, however, necessary to ensure that, rather than guaranteeing the freedom to decide to start mediation, the freedom to conclude a settlement is always guaranteed.[27] According to the opinion of the Advocate General delivered on the examined case, the right to effective judicial protection is

24 Mandatory Mediation – the Israeli Pilot by The Honorable Judge Edna Bekenstein and Advocate Ari Syrquin

25 Mandatory Mediation – the Israeli Pilot, it

26 Fact Sheet: Mandatory Mediation under rules 24.1 and 75.1 of the Rules of Civil Procedure **www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_mandatory_mediation.pdf**.

27 An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report, *A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs.*

not granted unconditionally. Every judicial procedure requires procedural rules and conditions governing admissibility. In this respect, Member States have a particularly broad discretion. As the court has held in connection with compliance with procedural rules, restrictions must actually correspond to objectives in the general interest.[28]

The principle of effective judicial protection does not preclude such procedures for out-of-court dispute resolution from being mandatory, provided they pursue legitimate objectives in the general interest and are not disproportionate with regard to the objective pursued.

We can finally conclude that a mandatory mediation procedure that will not result in a significant delay to the start of a legal action; concedes to the parties the commencement of the legal proceedings after that deadline has expired; is transparent, simple and inexpensive; and suspends the period of limitation for any claim does not violate the principle of effective judicial protection, pursues legitimate objectives in the general interest and is not disproportionate with regard to the objective pursued.

Finally, according to the recent European Court of Justice decision, nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure. This is provided that: the procedure does not result in a decision which is binding on the parties; that it does not cause a substantial delay for the purposes of bringing legal proceedings; that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties; and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.[29]

28 Opinion of advocate general Kokott delivered on 19 November 2009 1(1) joined cases c 317/08 to c 320/08

29 Case C-318/08, Califano.