

## Recent Developments in EU Anti-Discrimination Law

ORGANISER:

ERA (KASSIANI CHRISTODOULOU AND DANIEL GÄRTNER)

IN COOPERATION WITH THE EUROPEAN COMMISSION (CONTRACTING AUTHORITY)

### OPTING FOR MEDIATION IN DISCRIMINATION DISPUTES



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Trier, 14 -15 May 2012

ERA Conference Centre, Metzger  
Allee 4, Trier

**ERA – Seminar for Legal Practitioners**

## Opting for mediation in discrimination disputes

I would like to thank the **ACADEMY OF EUROPEAN LAW** who, by inviting me onto the podium and before a gathering of legal practitioners from the 27 Member States of the EU, are expressing recognition for a professional training in mediation in the framework of European anti-discrimination law.

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## **Presentation outline**

- Part 1: Knowledge of the foundation of Community law reflected in the structural and functional modalities of mediation in discrimination scenarios
- Part 2: Understanding why mediation is pertinent interfacing with the issues involved in the conflict
- Part 3: The limites of mediation
- Part 4: Practical exemple of mediation in a discrimination context
- Conclusions

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## **Part 1: Knowledge of the foundations of Community law reflected in the structural and functional modalities of mediation in discrimination scenarios**

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- Chap. 1: The common provisions in the Treaty on European Union that entered into force on 1 December 2009
- Chap. 2: The general principles of mediation in harmony with the principles underlying the Charter of Fundamental Rights
- Chap. 3: Council Directives 2000/43/EC of 29 June 2000 & 2000/78/EC of 27 November 2000

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**Part 1: Knowledge of the foundations of  
Community law reflected in the structural  
and functional modalities of mediation in  
discrimination scenarios**

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Chap.4 : Recommendation no. R (99) 19 from the Committee of Ministers of the Council of Europe to the member States concerning mediation in penal matters

Chap.5 : 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 Member States bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by the date of 21 May 2011.

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**Chap.1: The common provisions in the Treaty on  
European Union that entered into force on 1  
December 2009**

1. Mediation fully reflects the common provisions of the Treaty on European Union that entered into force on 1 December 2009
2. Mediation reflects the principles expressed in the Charter of Fundamental Rights
3. The values and objectives of the EU Treaty

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**Chap.1:** Mediation fully reflects the common provisions of the Treaty on European Union that entered into force on 1 December 2009

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THE COMMON PROVISIONS OF THE EU TREATY:

- Cf. Title I Article 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
- Cf. Title I Article 3(1): The Union's aim is to promote peace, its values and the well-being of its peoples.
- Cf. Title I Article 3(2): The Union shall offer its citizens an area of freedom, security and justice...
- Cf. Title I Article 3(3): It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men...

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**Chap.1:** Mediation reflects the principles expressed in the Charter of Fundamental Rights

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PROVISIONS OF ARTICLE 6 OF THE EU TREATY ON THE CHARTER OF FUNDAMENTAL RIGHTS:

- Cf. Title I Article 6: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, which shall have the same legal value as the Treaties.
- Cf. Title VII (Charter) for general provisions governing its interpretation and application
- Cf. Article 52 Scope and interpretation of principles
- The interpretation of fundamental rights in harmony with Constitutional traditions
- Respect for Charter principles when implementing the law of the Union. Invoking the Charter before a court for interpretation and review of the legality of executive and legislative acts by institutions, agencies and other bodies.

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**Chap.1:** The values and objectives of the EU Treaty

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*HUMAN DIGNITY, FREEDOM, DEMOCRACY, EQUALITY,  
THE RULE OF LAW AND HUMAN RIGHTS ARE  
FUNDAMENTAL VALUES OF THE EU, AND THIS IS  
REFLECTED IN THE FIRST PAGES OF THE LISBON  
TREATY.*

*PROMOTING THE VALUES OF PEACE AND WELLBEING  
FOR THE PEOPLES OF THE EU ARE THE PRINCIPAL  
OBJECTIVES UNDERLYING THE PURSUIT OF SOCIAL  
JUSTICE, SOCIAL PROTECTION AND THE FIGHT AGAINST  
DISCRIMINATION AND SOCIAL EXCLUSION.*

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**Chap.2:** The general principles of mediation agree in substance with the principles enshrined in the Charter of Fundamental Rights

INCLUSION OF THE GENERAL PRINCIPLES OF THE  
CHARTER OF FUNDAMENTAL RIGHTS

Article 1 of the Charter human dignity  
Article 20 of the Charter equality before law  
Article 21 of the Charter non-discrimination  
Article 22 of the Charter cultural, religious and linguistic diversity

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**Chap.2:** The general principles of mediation agree in substance with the principles enshrined in the Charter of Fundamental Rights 1/5

INCLUSION OF THE GENERAL PRINCIPLES OF THE CHARTER OF FUNDAMENTAL RIGHTS

The Charter groups all fundamental rights into six chapters:

- dignity,
- freedoms,
- equality,
- solidarity,
- citizens' rights and justice.

**Chap.2:** Article 1 of the Charter: human dignity 2/5

THIS IS NOT SIMPLY A FUNDAMENTAL RIGHT,  
BUT THE VERY BASIS FROM WHICH RIGHTS  
DERIVE.

It follows that no right enshrined in the Charter may be used to attack a person's dignity.

**Chap.2:** Article 20 of the Charter:  
Equality before the Law

3/5

*THIS IS A GENERAL PRINCIPLE OF LAW  
ENSHRINED IN ALL EUROPEAN  
CONSTITUTIONS.*

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**Chap.2:** Article 21 of the Charter:  
non-discrimination

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Article 21 must be read in conjunction with Article 19 (1) of the Treaty on the Functioning of the European Union, which confers powers on the Union to take measures against discrimination on grounds of

- sex
- race or ethnic origins
- religion or beliefs
- Disability
- age
- sexual orientation

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**Chap.2:** Article 22 of the Charter:  
Cultural, religious and linguistic diversity

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Article 22 must be read in conjunction with Article 167 (1) & (4) of the Treaty on the Functioning of the EU.

The Union takes account of cultural factors in its measures to promote and respect cultural diversity.

**Chap.3:** Council Directives 2000/43/EC  
of 29 July 2000 & 2000/78/EC  
of 27 November 2000

**COUNCIL DIRECTIVE 2000/43/EC OF 29 JUNE 2000**

- Recital 23: “Member States should promote dialogue between the social partners.”
- Chap. II Remedies and Enforcement
- Art 7: “Member States shall ensure judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive”; Art 11 social dialogue and good practice

**COUNCIL DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000**

- Recital 33 on social dialogue
- Chap. II Remedies and Enforcement, Art 9(1) on conciliation procedures; Art 13 social dialogue and good practice



**Chap.4:** Recommendation no. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters

1. The use of mediation: Recommendation of the Council of Europe of the Committee of Ministers to member States
2. Recommendation no. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters
3. The role of mediation in relation to the traditional judicial system

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**Chap.4:Opting for mediation: A Council of Europe Recommendation from the Committee of Ministers to member states** **1/3**

RECOMMENDATION NO. R (81) 7 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON MEASURES FACILITATING ACCESS TO JUSTICE

The preamble to the recommendation refers to the advantages of mediation

- The right of access to justice and to a fair hearing as guaranteed under Article 6 ECHR is an essential feature of any democratic society.
- court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights in member states.

Principle of simplification

- Measures should be taken to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings

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## **Chap.4: Recommendation no. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters 2/3**

### **THE PREAMBLE TO THE RECOMMENDATION SETS OUT THE BENEFITS OF MEDIATION:**

- It is a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional proceedings.
- Victims have a legitimate interest in a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation. Potential offered by mediation to reach solutions that are more acceptable to those affected than in traditional procedure.
- It is important to encourage the offenders' sense of responsibility and offer them practical opportunities to make amends.

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## **Chap.4: The role of mediation in relation to the traditional judicial system**

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### **MEDIATION REQUIRES SPECIFIC SKILLS AND CALLS FOR CODES OF PRACTICE REFLECTING THE REQUIREMENTS OF ECHR, I.E. PROCEDURAL RIGHTS AND GUARANTEES:**

- Article 6(1) The right of access to a court: there must be a declaration of consent, and the parties must be fully informed of their rights.

There should be proper evaluation of the type of conflicts suitable for mediation, with charting the underlying issues.

This calls for a qualification in the field of discrimination law and the skills of a qualified mediator.

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**Chap.5:** Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008

DIRECTIVE 2008/52/EC OF THE EUROPEAN  
PARLIAMENT AND OF THE COUNCIL OF 21 MAY  
2008

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**Chap.5:** Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008

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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.

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.

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**Chap. 5:** Directive 2008/52/CE of the European Parliament and the Council of 21 May 2008

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RECITAL 6:

“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.”

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**Chap.5:** Directive 2008/52/CE of the European Parliament and the Council of 21 May 2008

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RECITAL: 10

“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.”

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**Chap.5:** Directive 2008/52/CE of the European Parliament and the Council of 21 May 2008

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RECITAL 19:

”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. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable.“

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**Part 2: Understanding why mediation is pertinent to discrimination law**

1. The benefits of the significant role exercised by the mediator as a third party
2. Linking the creation of a mediation framework and process to the principle of facts on the ground

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**1. The benefits of the significant role exercised by the mediator as a third party**

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- Neutrality
- Impartiality
- Independence
- Educational skills applied to dialogue about non-discrimination and to questioning the challenges and risks
- Confidentiality

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**2. The basic principles of mediation resulting from directive 2008/52/CE**

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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

*ARTICLE 3*

**Définitions :**

For the purposes of this Directive the following definitions shall apply:

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## 2. The basic principles of mediation resulting from directive 2008/52/CE

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- a) "Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

## 2. The benefits of the significant role exercised by the mediator as a third party resulting from directive 2008/52/CE

4/4

- b) "Mediator" means any third person who is asked 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.

## 2. Linking a methodical process to the principle of facts on the ground

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### GUARANTEEING CONSENT & IDENTIFYING THE PARTIES

1. Provision of accessible, intelligible information: clear, comprehensive facts about the ethical principles and practical methods of mediation.
2. Obtaining the consent of the parties: mediation is organised with the personal direct consent of those affected with a view to encouraging them to take responsibility. This consent must be freely given in an independent manner and in full awareness of rights.
3. Information about the option parties have to consult a professional or service of their choice at any time in order to understand their rights and benefit from the assistance of their chosen counsel.
4. Particular vigilance called for with regard to undue influence or coercion which might affect the consent given by one party or the other.

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## 2. Linking a methodical process to the principle of facts on the ground

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### PROCESS OBJECTIVES:

Establish a climate of confidence and sincere dialogue between each of the parties and the mediator .

- Restore communication between the parties.
- Preserve the conditions for keeping the worker in the job while integrating the non-discrimination rule.
- Raise the question of rebuilding links with the company, and consider the consequences of possible difficulties in effectively implementing the non-discrimination rule in relation to the organisation of work.
- Give the individuals concerned the resources, while respecting each other's rights and duties, to explore and jointly construct solutions to their situation, which – if this fails – will be determined by judicial means.
- The mediator helps to create a relational space for listening and dialogue, sheltered from physical or emotional / mental constraints of any kind.

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## 2. Linking a methodical process to the principle of facts on the ground

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THE OBJECTIVES OF PROCESS WITHIN CONFLICT HELP TO DECONSTRUCT TENSION, INABILITY TO UNDERSTAND, SILENCE, DENIAL, THINGS UNSAID, EXCLUSION, HARASSMENT, VIOLENCE...

The conflict is a manifestation of blockages that have built up over time and which are exposed by an event. It is expressed:

- in the present, but largely composed of elements from the past;
- in an encounter with an Other who is different.

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## 2. Articulating a process in order to ensure a safe encounter between the protagonists

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THE PLACE OF THE OTHER IN THE CONFLICT ISSUE, THE MIRROR OF ITS REPRESENTATION

Prejudice and stereotypes in relations with others

Prejudices derive from negative beliefs, judgements, opinions and feelings that one group holds about another because they look different. When these prejudices lead people to act in a certain way, the result is discrimination.

A stereotype is a category of thought which helps us to perceive the social world about us, to interpret it, and to guide our behaviour.

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### **Part 3 :**

## **The limits to mediation and conclusion of the procedure**

- 1 The right to terminate mediation during the process
- 2 The conclusion of mediation with the formulation of an agreement protocol between the parties

### **1. The right to terminate mediation during the process**

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- The freedom of any party to terminate mediation at any time by moment by announcing the intention to do so
- The freedom of the mediator to terminate his mission at any time on the basis of ethical and professional rules

**2. The conclusion of mediation with the formulation of an agreement protocol between the parties**

1/1

- The mediator's observations and the statements he has taken cannot be reproduced or referred to in the procedure without the agreement of the parties.
- The mediator's professional secrecy and the duty to maintain confidentiality

**Part4:**

**The limits to mediation and conclusion of the procedure**

Step 1: How to approach mediation in the context of a disability

Step 2: Meetings with those affected during mediation

**Step 1:** How to approach mediation in the context of a disability

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- Accepting the mission
  
- Studying the documentation to establish the links between aspects of the disability and the legislation relating to discrimination

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**Step 2:** Meetings with those affected during mediation

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- The need for one-to-one interviews
  
- The need for plenary sessions
  
- The finalisation stage

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## Conclusions

*MEDIATION: AN APPROPRIATE SPACE  
FOR THE INTEGRATION OF FAIR AND  
EQUITABLE WORKING CONDITIONS  
PURSUANT TO ARTICLE 31 OF THE  
CHARTER OF FUNDAMENTAL RIGHTS*

The fluidity of the mediation procedure is a vector space for integrating the norm of non-discrimination in real time

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By interlocking mediation with, on the one hand,

- a thorough understanding of basic values: respect for dignity, respect for physical and mental integrity, respect for personal traits, equality before the law, non-discrimination, respect for cultural diversity and equality between men and women,

and, on the other,

- the tissue of multiple, complex factors: time, duration, risks and unforeseeable developments, costs and corporate brand image

the mediator, as an independent, impartial, properly qualified third party, is able to contribute through each new situation to the integration of Community law in a Europe united in its diversity.

Healthy management of social conflicts by respecting the principle of precaution and prevention in pre-mediation mechanisms

- Because mediation is relevant, it can gauge claims and possibilities in advance.
- Nothing is ruled out: mediation means demonstrating responsibly and consciously that the path of dialogue has been engaged.