

# **The European Directive on certain aspects of mediation: some issues facing the Netherlands**

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## **Abstract**

Two important aspects of mediation are that it is voluntary and confidential. However, respecting both of these aspects is not an easy task. The importance of this issue has increased since 21 May 2008 when a European Directive was issued ‘on certain aspects of mediation in civil and commercial matters’, which Member States will have to implement before 21 May 2011.

In the Netherlands, there is some resistance to introducing too much regulation with respect to mediation. One reason for this is that it is considered to be at the expense of the flexibility of the process. Nonetheless, the legislator will be obliged to adopt some of the Directive’s provisions.

In the preamble to the Directive it is made clear that mediation is a voluntary process. In the Netherlands, when parties agree to attempt to settle their dispute by mediation they are obliged to engage in the process to the best of their ability. However, the extent of this obligation is questionable because the voluntary nature of the procedure is considered just as important; consequently, parties can terminate the mediation at any time.

Confidentiality is considered as one of the key advantages of mediation. Usually parties agree that they will not compel one another to produce evidence in relation to the mediation, or call the mediator as a witness if there are subsequent judicial proceedings. However, how the court should handle such an agreement in civil judicial proceedings is uncertain.

As a result of the Directive, Member States will now have to ensure that unless the parties agree otherwise, the mediator cannot, in principle, be compelled to give evidence concerning the mediation process in subsequent judicial proceedings. In the Netherlands, the right to refuse to give evidence in a civil procedure has been granted to a small number of professional groups. However, a conflict of interest may arise here: on the one hand, it is important for parties to have the opportunity to ask for legal advice without facing the risk that information concerning the dispute will become public. On the other hand, the interest of establishing the truth in civil proceedings must also be respected. Since the Directive prescribes that, in normal circumstances, the mediator cannot be compelled to give evidence in civil proceedings or arbitration, the Netherlands will have to adopt a provision to address this issue.

At present, the range of the Directive is limited to mediation in cross-border disputes. This may reduce the impact of the Directive. In addition to the issues raised

above, the paper examines the question of whether the provisions adopted by the legislator will apply to mediations in cross-border disputes only or also to internal disputes. The latter possibility seems to be the most preferable.

Keywords: mediation, voluntary, confidentiality, civil procedure, evidence