Implementation of Mediation in Czech Legal Environment with Regard to Actual Evolution in Europe*

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Summary: The article deals with the systematic problem of an acceptance and implementation of foreign law instruments in Czech Republic, incoming from Anglo-American law system. Supporting partial methods of the ADR, European legislative is focusing on the mediation and using this method in civil procedure law, especially in family law matters. The practitioners have accepted the idea of mediation as a part of civil law procedure without analysing or studying the real nature of this method or instrument. The study is looking into the problematics of the Mediation model and comparing it with European situation in the member states. It is also trying to find the best possible future ways for the development in the area of mediation with the reflection of the results of the implementation of the European mediation directive.

Keywords: Mediation – European mediation directive – mediation as ADR – dispute resolution – appropriate dispute resolution – alternative dispute resolution – and European Union member states – Harvard Negotiation Project – Czech mediation

1. Directive 2008/52/EC of the European Parliament and of the Council

The main role in modern perspective of mediation played a model developed in the Harvard – based and forwardly supported by *Harvard Negotiation Project*. Mediation process, meaning the process of individual steps itself, leading to solution of the conflict, has enshrined so called "*Harvard*

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model "[1], which consists of separating people from the problem itself, concentrating on interests rather than on positions, creating as many solutions and making decisions as possible on the basis of objectively verifiable criteria.

Mediation in Anglo-American legal environment went through intensive and flexible development on which European environment reacted more fragmented. In the European mediation law in a modern sense gain mediation support through the directive of the European Parliament and of the Council 2008/52/EC from the 21st of May 2008, which dealt with some aspects of mediation in civil and commercial matters. Very positive contribution of this directive was a demand on the Member states, which lead to establishment of legal and other provisions necessary to comply with the Directive till the mid-year of 2011. Individual members states dealt with this task with different scope of intensity.

The Green book of alternative dispute resolution in civil and commercial matters[2] marked opinion lately considered as a wrong one, which stated that mediation and other tools should serve to elimination of shortcomings of individual courts dealing and besides that it supposed to lighten the justice system of their heavy burden. In the background of the expressed beliefs, the principles of the above-mentioned Harvard model and the emphasis on consensual dispute resolution can be seen, while it has been discussed and stated that mediation serves to *support EU citizens' access to justice.*[3]

The biggest problem in the system of finding a position and promoting the mediation method was to reconcile its nature and the methodological framework with other non-alternative ways of dispute resolution. The whole process was completed by the adoption of the European Code of Conduct for Mediators and by the abovementioned Directive of the European Parliament and of the Council[4]. Apart from the indisputable benefits of the Code of Ethics, which also stipulates the duty of mediators to conduct proceedings in an appropriate manner with the modern trends of mediation, we can mark the above-mentioned Directive on Some Aspects of Mediation in Civil and Commercial Matters as one of the key acts in setting up mediation in the system of finding a solution to a conflict

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1 FISCHER, R., URY, W. *Das Harvard-Konzept, Sachgerecht verhandeln – erfolgreich verhandeln*. Campus, 9. Auflage, Frankfurt/Main: 1990.

2 International Mediation Interaction: Synergy, Conflict, Effectiveness, Tobias Böhmelt, Springer Science & Business Media, 17. 2. 2011 – Number p. 145, p. 39.

3 HOLÁ, L., MALACKA, M. *Mediace a reflexe jejích aktuálních trendů*. Praha: Leges, 2014, p. 33.

4 International Mediation Interaction: Synergy, Conflict, Effectiveness. Tobias Böhmelt, Springer Science & Business Media, 17. 2. 2011 – Number of p. 145, p. 40.

The Directive brings with it the possibility of agreeing on the enforceability of the mediation result, the obligation of the Member States to ensure adequate rules on limitation and termination and the relationship of mediation to judicial proceedings. An important element is the anchoring of the precursor to justice and the possibility of using the arbitration procedure after mediation. Of course, individual Member States did not take over all of the provisions of the aforementioned norms, just as the Czech Republic and other Member States have diverged from these standards in many aspects. Despite the variations in national regulations, we can see a significant degree of unification and harmonization of problematics connected to the mediation and a significant shift in the situation from the point of view of situation in the European Union.[5]

The analysed mediation and the Directive 2008/52/EC underwent a demanding and long-term legislative process.[6] The preparation plans for the mediation directive were discussed at the end of the last century and the individual proposal of the Commission for the Directive for civil and commercial matters was from the point of first conception prepared in the 2004. Though this proposal was taken negatively by the Members States because of its content and wording. Critically was viewed especially the fact that the directive was applied both to the cross-border and national dealing and it was often doubted if such a wide field of reach is in the competences, which were stated in the Primary European Treaties which werevalid at the beginning of the century.[7] At the outset, the Commission was unwilling to accept deviations from its intentions and insisted on the scope of the directive as set out in its original proposal. Negotiations between the competent concerned authorities have come to a standstill, and in the 2007 the discussed issues were submitted to the European Parliament, which has dealt with the draft of the directive in question and it endorsed ultimately many of the amendments. Outputs from the European Parliament were discussed both in the Council and in the Commission, with the Council finally joining the amendments and the new texts that emerged from the European Parliament's deliberations in 2008. The Commission also insisted on its originally planned aspects of competence and at the same time it strongly criticized the limitations of the scope of the directive accepted by the Council and prepared by the European Parliament, nevertheless they have joined to the concept of a new proposal as a result of the political compromise. The final text of the Mediation Directive was published on 24 May 2008 and mediation entered into force on 13 June 2008.

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5 The New EU Directive on Mediation: First Insights, Association for International Arbitration, Maklu, 2008 – Number of p. 95, p. 49.

6 LASÁK, J. Směrnice o některých aspektech zprostředkování v obchodních a občanských věcech aneb návrh právního rámce pro mediaci v EU. *Právní rozhledy*, 2007, č. 15, n. 2, p. 57.

7 TYLEČKOVÁ, M. Podpora mediace v legislativě ES. *Obchodní právo*, 2005, č. 14, n. 5, p. 13.

The final version was published in 2008 and it was divided into individual parts of the Mediation Directive. The general part of the Mediation Directive contained, among other things, the objectives of the adjustment set out for mediation itself. Among these goals have belonged the aspects of support of the internal market and its smooth functioning, since the functioning of the internal market is directly linked to the ability of citizens of the Member States to have free and unrestricted access to law and justice trough the free access to court proceedings**,** as a result of the implemented directive, the smooth handling of the disputed situations could be guaranteed. Without such a solution would be the internal market area practically an area of injustice and would only represent a set of high risk factors for those involved in this market.[8] According to the concept of European legislation, access to law and justice also includes access to out-of-court dispute resolution.[9] It is obvious that the Directive is focused and has been focused especially on this area. Implementation and reinforcement of the ADR[10] the way in which the dispute is dealt with is, according to the Directive itself, a guarantee of an unbalanced relationship between mediation and judicial proceedings, that intention is also reflected in Article 1 (1) of the mediation directive itself.

It should be noted that the intention to implement the Directive did not initially address the issue of multiple ways of resolving disputes and out-of-court procedures. Let us recall only the issue of distinguishing the meaning of the ADR abbreviation and the meaning of ADR's alternative dispute resolution as an amicable settlement of the dispute with regard to the conciliation procedure, which is characteristic especially for the Austrian and German legal environments, arbitration of the worldwide used and implemented area of property disputes, various mixed types of arbitration proceedings and mediation including etc.[11] Under the Mediation Directive was not implemented the support of these mixed and inter-institutional aspects. It is generally assumed that mediation as an instrument of out-of-court settlement represents a possibility of facilitating access to justice, as was already mentioned above, but it is not yet fully from the point of view of its capabilities implemented and applied, unlike the arbitrator's management, which have been already established from the continental perspective by the proper way. The Mediation Directive should therefore serve in particular to strengthen the importance of this method of friendly dispute resolution. The very reasoning behind mediation brings emphasis to the benefits

[8] HESS, B. *Europäisches Zivilprozessrecht*. 2010, Paragraph 10, Marginalities137.

[9] Eidenmüler/Prause, NJW 2008, p. 2737.

[10] There is a need to differentiate between the importance of ADR in the context of an alternative to judicial management and the appropriate way of solving amicable disputes.

[11] KÖNIG, B., MAYR, P. G. *Europäisches Zivilverfahrensrecht in Österreich.* 2, 2009, p. 137.

of mediation such as saving of finance and the time.[12] When applying mediation techniques and comparing time-consuming mediation and administrative requirements, mediation brings another significant positive result.[13] Through the mediation and during the implementation of the Mediation Directive should be strengthen the situations, where bilateral relations or relationships with an international element are to be addressed. This solution should be quicker and, in particular, due to the application of the Directive in the individual Member States, in its conclusion also legally binding.[14] Such a goal should be achieved through the flexibility of mediation management itself, since parties and participants of the mediation have many options to deal adequately with the disputed situation in question and during which in continental approach is procedural aspects of court proceedings often linked by a codified legal framework.[15] Paradoxically, especially this positive aspect, which is during implementation of the directive emphasized lead to its considerable limitation, both to as limitation in the method and the way in which the dispute is resolved and given to the paradoxical fear of the creation of the space in which is total freedom of way how to decide the dispute the directive itself states the necessity to secure it before creation of chaotic lawless state or space, which existence would be contradictory of the principles of the European Internal Market.[16] The purpose of the Directive itself is to set out the basic principles and basic content of the legal regulation of mediation in the individual legal systems of the Member States.[17] The actual text of the mediation directive is considered to be the minimum standard of the harmonization trend. As a result, individual Member States are allowed to implement legislation in a manner consistent with the understanding and perception of the nature and purpose of mediation in the national context. It is clear that the more detailed and extensive legal regulation of mediation in the individual national legal systems have not been considered as an obstacle, on the contrary, it was explicitly welcomed.

[12] Point 6 to the Directive.
[13] HIRSCH, ZRP 20 12, S. 189, and further also DE PALO, FEASLEY, ORECCHINI, Quantifying the cost of not using mediation – a data analysis, 2011, Brusel.
[14] SCHMIDT, F. H., LAPP, T., MONSEN, H. G. *Mediation in der Praxis des Anwalts*. München: 2012, p. 35.
[15] HIRSCH, ZRP 20 12, p. 189.
[16] Point 7 to the Directive.
[17] Eidenmüler/Prause, NJW 2008, p. 2737.

2. To individual provision of the Directive, studies on the implementation of the Directive in the Member States

According to the current EU primary law at the time the of the issue of the directive, it has been necessary to consider the position of countries such as Great Britain, Ireland and Denmark, which reserved the right to autonomously decide whether to take any legal acts of the EU. While the Great Britain and Ireland complied voluntary with the relevant regulations[18] in the matter of their positions, Denmark opposed the participation in the Directive in the matter of the fact that mediation has already been properly legally grounded in its legal order.[19]In the terms of local scope, the Directive therefore applies to all Member States except Denmark. As a matter of principle, the mediation directive is related to cross-border disputes and its scope is significantly reduced in relation to the previous proposal. The Directive supposed to be a tool of harmonizing trends targeted at national legal order, but as a result of the abovementioned and competence disputes in the preparation of the Directive the result of the attitude of the European Parliament and the Council was in the end the reason for limiting the scope of the Directive. That all have happened in the context of authorization to regulate judicial cooperation in cross-border situations. Such a procedure was later identified as one of the biggest mistakes in the preparation and implementation of the Directive itself.[20]

Through such a procedure, it was not possible to require a global member establishment of the mediation in the appropriate range. However, it is clear from the text of the mediation directive that the legislature wishes to extend the scope of the Directive, which also makes it possible to apply the provisions of the Directive itself to national mediation procedures, despite the restrictions put in place explicitly by the Member states. However, the minimum framework for the transformation of the Directive is set for cross-border disputed situations. The cross-border disputes are characterized in the context of the Directive as situations in which a dispute arises between the parties having their domicile or habitual residence or usual habitual residence in the territory of different Member States and, in the context ofArticle 2 of the Directive, such a dispute can be then considered as cross-border. In relation to these aspects, the nationality of the parties of the dispute is not accentuated, but rather the question of residence or habitual residence, regardless of the nationality itself.

[18] Protocol (No 4) on the position of the United Kingdom and Ireland (1997).
[19] Protocol (No. 5) on the position of Denmark (1997).
[20] WALLIS, D. *Encouraging cross-border mediation.* adr & odr, Trier, 2013.

The question remains whether cross-border mediation is also the case when one of the parties involved in the negotiations is a party domiciled in a third state, meant in the non-EU country. The Directive itself does not take this into the account and the inspiration for the answer to this question can be found in the judgment of the European Court of Justice in Owus v Jackson and Others[21] which is related to a decision on a question linked to the Brussels Regulation 1. In the context of this decision, Union legal acts cannot bound third States without further action, and these conclusions can also be transferred to issues which are related to the concerning mediation directive. The directive needs to be interpreted in such a way to achieve the goal of this norm as much as possible with an easy procedure as possible. In such a perception of the Directive, the participation of a third party in mediation does not change anything, because in the end we could have a paradoxical result when the harmonization measures taken by the Directive in most proceedings involving a third country entity did not cover such cases of mediation, which European legislator could not intend.[22]

The relevant moment of the assessment of the different domiciles at the parties of the mediation proceedings is related to the point in time in which the court orders the mediation procedure or it is set by the law. But it can be also the moment where the mediation is assumed by the law or by the parties at the moment and it is negotiated for that moment. This approach is in order with Article 2 section 1 of the Mediation Directive. It is important to perceive the situation already during the negotiation of the mediation clause within the contracting process and to set in this context the corresponding time. In the mediation clause, the parties in the most cases commit themselves that any later disputes which will arise from the concern contract will be settled through mediation before the parties turn to the court for the settlement.[23] However, such a dispute can only arise after a longer period of time, which may be related to the nature of cross-border mediation with regard to the changes in the seat or the residence. In these cases, must be distinguished the timing of finalized negotiation of the mediation clause and the actual realization or initiation of the mediation process. Thus, the question of status within the meaning of Article 2 Section 1 of the Mediation Directive arises. However, part of paragraph 1a of this article discusses in a somewhat peculiar way the decisive time when it is necessary to consider the situation where the parties have agreed to use mediation after the dispute has arisen.

At first, it appears that the realization of mediation is tied to the moment of negotiation of the mediation clause, but the dispute usually arises after the

[21] Judgment of the ECJ, Owus in Jackson and Others, C-281/02.

[22] POTACS, EuR, 2009, p. 465–466.

[23] UNBERATH, NJW 2001, p. 1320–1321 and further RISSE, Wirtschaftsmediation, 2003, Paragraph 3, Marginalie 3.

implementation of this clause. However, such a perception would be very negative for the application of the harmonization rules of the Directive and, in the context of accentuating the autonomy of the parties' will, as well as Article 15 of the Directive[24] is necessary to stabilize the cross-border mediation needs at the time of negotiation of the mediation clause. Thus, we can state that the stabilization timeframe for the cross-border mediation will generally be used when the parties have decided to mediate, but only on the assumption that the parties themselves in this context have not negotiated a divergent procedure, or a deviation of the mediation provision, mediation clause.

The following court or arbitration proceedings are also integrated in the concept of mediation directive itself. In the context of cross-border disputes, the assessment of Article 2 Section 2 of the Directive is also important. However, this article is propriate to interpret in the context of the other provisions of the Directive, in particular Articles 7 and 8, relating to the mediation process's confidentiality by the mediator side but also by other parties involved in the proceedings itself in connection with the subsequent legal proceedings and with the possibility of denying testimony in this procedure. Here it is important that, according to Article 8 of the Mediation Directive, it is further determined that during the mediation proceedings, limitation periods are set and, in the case of unsuccessful mediation proceedings is allowed to the parties to initiate judicial proceedings.

The apparently incoherent provisions have very narrow relation given to the cross-border disputes and their solutions. Since in the context of the abovementioned and in the accordance with Article 2 Section 2 of the Mediation Directive, cross-border mediation and resolution of the dispute which occurred will be also considered as an arbitration even if there will be initiated court or arbitration proceedings in the Member State other than the one in which the parties had their registered office at the time of initiation of the mediation proceedings. Extending the cross-border nature of mediation in this context and its reflection by the national law should result in the avoidance of limitation due to the implementation of individual mediation proceedings, as well as the enhancement of the confidentiality aspect of mediation itself. The question of the place where the mediation should have been performed is not conclusive. The mediation may take place or be performed outside the EU. This results from Article 2 Section 2, which applies to the proceedings following after mediation and not only to the mediation proceedings itself. It is important to perceive the construction of a limitation period in meditation proceedings that took place outside the EU.

[24] The text is referred to as a puncture to Directive 2008/52/EC.

The Mediation Directive covers civil and commercial matters. Therefore, those aspects are exclusively limited, as is also illustrated by the wording of Article 1 Section 2 of the Directive. In this context, the issue of the nature of civil and commercial matters must be properly understood within the EU, as there is a lack of specification of the range of disputes or legal disputes in the light of variability in the Member States. If it is purely in the context of national legal systems when it comes to implementing the Directive to consider civil and commercial matters, a situation could arise where the scope of the mediation standard issues in each national law would be regulated in a different way. In this situations, it is appropriate to interpret the terms connected with the civil and commercial questions or matters always autonomously, or to use the case-law of the European Court of Justice in the context of the decision.[25] The impact of the Directive in the EU Member States has been examined and several reports have been published.[26] In overall has been evaluated that the Directive has brought to the whole European Union an added value.

This approach also corresponds to the approach of the EU Member States which during its implementation within the framework of individual national legislative acts has extended its harmonizing influence beyond the scope of the Directive also to the national situations and cases. Only three EU Member States have strictly implemented the term for cross-border disputes.[27] As can be expected, the broadening of the harmonization impact of the Directive itself is welcome in most Member States and as already has been stated, the goal of the Directive was far wider than the harmonization trend for cross-border dispute resolution despite conflicts of competences. Thus, the provisions of the Directive in most Member States have an impact beyond the scope of the Directive itself for the benefit of mediation. This situation is positive because it demonstrates that Member States perceive the importance of mediation consistently both for national and cross-border disputes. Despite the autonomous interpretation of the term civil and commercial matters, it is currently possible to state that the Directive has found its application particularly in matters of family law across EU Member States. So far, the reserves are maintained in the context of the

[25] Eidenmüler/Prause, NJW 2008, p. 2739.

[26] European Commission: Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive' Final Report (update from the year 2016) [online], visited: May 2018. Available at: https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:52016DC0542&from=CS; DE PALO, G., D'URSO, L., TREVOR, M., BRANON, B., CANESSA, R., CAWYER, B., FLORENCE, R. L. *'Rebooting' The Mediation Directive: Assessing The Limited Impact Of Its Implementation And Proposing Measures To Increase The Number Of Mediations In The EU*, www.europarl.europa.eu [online], visited: May 2018. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

[27] DE PALO a kol. '*Rebooting' The Mediation Directive*. 2014, Brussel: p. 150 and following.

mediation of individual Member States over the entire range of the terms in the civil and commercial matters.[28] Especially underestimated and unrealized is the implantation of the mediation into the insolvency proceedings. Implementation of mediation would bring with it a significant correction of damaged relationships between the creditor and the debtor in these types of proceedings.[29]

Particularly in relation to Article 4 of the Directive, the introduction of ethical codes and the status of mediators' behaviour at national levels was an important step, which of course encouraged the quality of mediation. In most Member States, a mandatory code of conduct for mediators is currently prescribed.[30] In the Member States where this obligation is not being implemented, the various forms of ethical codes are prepared within individual interest groups or agencies offering mediation itself. An important element in this context is, of course, the European Code of Conduct for Mediators.[31] This code is either applied directly to individual national regimes or is recommended as a model code for questions during the realization of mediation issues.[32] It is therefore up to the Member States how they will incorporate them into the national legislation. Without any doubt, it is possible to say that the ethical aspects and the implementation of codes of ethics have a positive impact on the implementation of adequate legal regulation of mediation in the Member States and the establishment of a real state of matters. The quality of mediation and its standards are also related to the control mechanisms targeted at mediation providers. The form of registration or records of mediators is implemented in a different way in most EU Member States. It should be noted that different mechanisms for the quality evaluation of media service providers have been chosen across the EU, whether in an institutional or personal area. In most Member States the characteristic model is the one which who has been legally adapted forms of mediation and a corresponding register of mediators at the relevant central body of the state.[33]

In connection with Article 4 of the Directive and the question of mediator education, it is also clear that mediation in most Member States is linked not only to the issue of guarantee of quality, but also that the quality assurance is tied to an adequate mediator training platform. The EU Member States, in line with the harmonization trend in the Directive, address the issue of mediator

[28] Ibid., p. 142.
[29] Ibid., p. 79 and following.
[30] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brussel: p. 158 and following.
[31] Available at: http://www.forarb.com/wp-content/uploads/2013/01/Evropsk%C3%BD-kodex-chov%C3%A1n%C3%AD-pro-medi%C3%A1tory.pdf
[32] SVATOŠ, M. *Evropské aspekty mediace a dalších ADR*. Available at: https://www.epravo.cz/top/clanky/evropske-aspekty-mediace-a-dalsich-adr-88570.html
[33] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 16 and following.

training in most or all cases by the concerned national legal systems.[34] However, it is a question of whether it is a good idea that most Member States regulate beyond the text of the Directive and they lay down the mandatory formalities and conditions of a particular type of education as an approach to performance of the mediation.[35] The nature of mediation as such tends to be suppressed in many national regulations by a targeted tendencies towards legal professions.[36] Besides the different forms of compulsory education for mediation, most of the legal framework has also set up a mediator training framework, but its scope and frame are still inconsistent at the moment.[37] As objectively correct have been seen the presumption of the existence of a system of further mediator education. Nevertheless, in the future we can expect a minimal harmonization effort in uniting the approach to recognition, further education and the formation of the profession of mediator in the context of widely diverging national.[38]

Considering and making mediation available is different in the various national legal systems. Most Member States, in connection with disclosure and consideration of the mediation process itself and also in connection with Article 5 of the Mediation Directive, expects that their judicial authorities to at least call on the parties to have the mediation possibility on their mind, or to participate in information sessions which are concerned with selected aspects of benefits of mediation and the introduction of mediation. Issues of taking into consideration a compulsory mediation are often accompanied by a discussion on the mandatory implementation of mediation, which is linked to Article 5 Section 2 of the Mediation Directive, but the aspect of acquittance with mediation and, possibly, the 1st mandatory meeting with the mediator falls under the question of the use and availability of mediation. This aspect is governed by Article 5 Section 1 of the Mediation Directive. The disclosure and taking into account of mediation can therefore be perceived in different intensities, from the statutory duty for lawyers and advocates to inform their clients about the possibilities and purpose of the mediation process trough the finding in the petitions that mediation is not possible and for what reasons to regular mentioning about the possibility and suitability in most proceedings and during the whole court proceedings with the invitation for the parties to participate in mediation itself.[39] In general, other EU

[34] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: s. 155 and following.

[35] REPORT FROM THE COMMISSION on the implementation of Directive 2008/52 / EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, p. 6. Available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/CS/1-2016-542-CS-F1-1.PDF

[36] Ibid., p. 7.

[37] Ibid., p. 6.

[38] Compare Article 5 (1) of the Directive.

[39] REPORT of the EU Commission on the implementation of Directive ..., p. 8.

harmonization activitiescan be seen despite the inconsistent approach and the varying intensity of reflection and motivation for mediation in individual national jurisdictions as very likely. From the point of view of mediation as a tool for facilitating access to justice and simplifying and shortening court proceedings, it would be appropriate to impose measures such as mandatory statements by parties or lawyers on whether an attempt was made to mediate and to take in to the account this obligation both by the legal representatives and also by the representatives of judiciary bodies, to consider the issue of information obligations regarding mediation in court proceedings and their scope and content. Also consider the question of approach of the court to mediation in the context of its regulation at each stage of the proceedings, which supposed to match with the case and also with the position of the parties.

The Directive in its Article 5 deals with another aspect of implementation effort. Article 5 deals with mandatory mediation as well as sanctions, which should be implemented in the event of a breach of the stated obligation. Here again, it is necessary to draw attention to the difference between the perception of the term "notice" on the mediation, taken mediation on consciousness, or the acquaintance with mediation and their obligatory forms in connection with compulsory mediation as part of the solution itself. As a result of the Mediation Directive, in the context of the provisions of Article 5, there has been a stratification in the Member States as regards mandatory mediation in a horizontal and vertical manner. Horizontally, as to mandatory mediation in civil judicial proceedings, vertically, as to the individual types of mediation, that is, the use of mediation in civil and commercial matters.[40] In the various scales of mandatory mediation, financial incentives are also used in terms of individual instruments, namely to reduce the costs associated with the court proceedings or their reimbursement supposing it mediation was used.[41] This motivation aspect is implemented either by reducing court fees or with obligatory mediation by link with the claim for compensation.[42] Aspects of mandatory mediation are also tied to sanction measures that respect this obligation. Sanctions are directed against non-compliance with the mediation agreement or even against unauthorized refusal to mediate. They are also tied to disablement of costs, even if the parties succeed. However, this whole range of options does not clearly answer the question of whether to be prescribed as mandatory in the context of the European future integration of mediation.[43] The general regulation of mandatory mediation would be probably against the sense of the current text of the Directive and its intentions. The

[40] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 146 and following.
[41] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 147.
[42] REPORT of the EU Commission on the implementation of the Directive..., p. 9.
[43] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 146 and following.

question remains whether to conceive compulsory mediation in aspects where its use has already proved its worth. In the future, therefore, it will be necessary to answer the question of whether to mandate compulsory mediation in the family matters for all EU Member States and how the individual civil and commercial matters will be towards obligation mediation compared with the question of its compulsory use. Therefore, there is a need further clarification of the situation regarding business-related matters, labour law and consumer affairs. The question of motivation factors is most likely associated with financial motivation and a corresponding adjustment in the amount of court fees in case of recourse or refusal of mediation.[44]

The Directive supposed the confidentiality aspect of the mediation process and enshrines the scope of confidentiality in Article 7, but the scope of confidentiality is approached diversely in mediation. Aspects of confidentiality are tantamount to the obligation to maintain confidentiality regarding the mediation agreement and to tie the aspects of confidentiality to the autonomy of the parties' will, together with public law implications.[45] The position of mediators, as well as lawyers seems especially problematic. For mediators, the issue of confidentiality continues to be a problem, unrelated to the general regulation of the right to refuse to testify or witness testimony in the context of mediation proceedings, as a result of which mediators are unequal in their position as lawyers.

Furthermore, the mediation directive assume possibility to allow to the parties who decided to settle the mediation dispute to still have the opportunity, despite the expiry of the limitation periods in the mediation proceedings, to initiate proceedings. Judicial levying of a limitation period is particularly important when it comes to statutory time limits, cases that are important for the protection of specific interests, etc. Mostly, this harmonization tendency is accepted positively and practically in all Member States is also legislatively enacted.[46]

As regards information on mediation, whether in relation to the society or the professional public, it is important to note in the context of Article 9 of the Directive that Member States have used various procedures for the promotion of mediation when transposing the Directive. One of the most intense was to promote the introduction of mediation in Poland.[47] Since the Directive has been effective, it has been possible to perceive the use of various instruments consisting

[44] REPORT of the EU Commission on the implementation of the Directive..., p. 9.

[45] Ibid., p. 10

[46] Compare Article 8 of the Directive and the REPORT of the EU Commission on the implementation of Directive..., p. 10.

[47] PANIZZA, R. *The development of mediation in Poland*. Brussels: 2011. Available at: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19605/20110518ATT19605EN.pdf

of the use of the Internet, television spots, prints and other media. However, it is possible to demonstrate on the example of the Czech Republic that, despite the funds and considerable effort put in the promotion of the mediation the awareness about the it is still low. The same situations we can see in general in the EU, although it may be noted that, on the one hand it is also caused in the developed Member Stated by the other out-of-court ways of resolving disputes that have already occurred and they are more typical for the society. For example, in Italy, mediation has become part of societies' awareness quite successfully. The aspects of the necessity to promote mediation within the public as well as the professional public, especially the lawyers, have been constantly emphasized. Especially the last lawyers should be involved more effectively in the promotion and popularization of mediation, also through material involvement in its more frequent use.

3. Transposition of the Mediation Directive from the 2008 and the Act on Mediation in the Czech Republic

As mentioned above, EU Member States, despite initial and erroneous tendencies to restrict the scope of the Directive only to cross-border disputes reactedin most cases with a national legislation not only to cross-border dispute resolution and regulation, but also to the issues related to national aspects of the application of mediation methods and realization of the mediation. The current legal regulation of mediation in the Czech Republic does not distinguish the aspects of cross-border mediation from the national mediation proceedings.[48]The cross-border issue is mentioned in the Czech legal norm – Act on Mediation No. 202/2012 Coll., mentioned in the context of a single internal market related to the Czech legal regulation on the activity of the guest mediator. The Act in the § 2 defines mediation as *a conflict resolution procedure with the participation of one or more mediators who promote communication between the parties of the conflict in order to help them reach a friendly solution to their conflict by concluding a mediation agreement*. *Family mediation is then mediation, which focuses on solving conflicts arising from family relationships.* The current Czech legislation does not exclude mediation being carried out outside the regime of the Mediation Act, respectively by unregistered mediators. However, the mediation carried out this way does not have consequences for the commencement of mediation under the

[48] PAUKNEROVÁ, M., PFEIFFER, M. Mediation, more particularly, cross-border and judicial mediation [online]. Příspěvek ve sborníku. In: *The Lawyer Quaterly*. Vol 5, No 2 (2015). Available at: http://www.ilaw.cas.cz/tlq/index.php/tlq/article/viewFile/148/132, p. 127.

law, which includes, in particular, the setting of limitation and preclusion periods. Also, aspects related to ensuring access to justice, even when a friendly way of resolving a dispute has been used, i. e. in situations concerning the running of limitation and preclusion periods, are associated with cross-border aspects and European integration. This reflects the minimalist adaptation in Article 1 of the Directive with significantly higher implications for the possibility of using mediation in the national environment.

As regards Article 2 of the Directive, this is reflected in the national law on mediation[49]. The Directive itself deals in Article 2 with the nature of the cross-border dispute. For a long time in the Czech Republic the legal regulation of mediation procedures within the criminal law area was given and the definition of mediation in terms of its terminology was directed to the public sector. The Mediation and Probation Service Act have spoken about mediation as an out-of-court arrangement. For this arrangement, there was involved unspecified subject in the conflict and for the purposes of settling the conflict.[50]

As to the definition, the Directive defines mediation as a formal procedure in which two or more parties of the dispute voluntarily strive to reach an agreement, to resolve the dispute with the help of a mediator as it is stated in the Article 3. This broad concept corresponds to the harmonization instrument and, therefore, that most implementing Member States deviated from this concept. As well as the Mediation Act in the Czech concept, which deals with mediation as a process of conflict resolution with the participation of one or more mediators, while it is specifying their role by promoting communication between the persons involved in the conflict. The method of their support should aim at achieving a successful solution and concluding a mediation agreement.[51]This definition rather recalls other kinds of friendly ways of resolving disputes and does not reflect the phasing and structuring of the mediation process. At the same time permits a wider interpretation of mediation, especially with regard to the phrase "promote communication".

Article 3 of the Directive includes not only the definition of mediation, but also refers to judicial mediation, in the sense of mediation led by a judge who is impartial and at the time in question does not conduct proceedings and does not decide in any court proceedings associated with the dispute. This question remains unaffected by the provision of § 2 of the Czech law.

An important aspect which refers to the provisions of § 2 of the Act on Mediation in the Czech legislation opposite to Article 3 of the definition is the dictum

[49] PAUKNEROVÁ, M., PFEIFFER, M. Mediation, more particularly, cross-border and judicial mediation [online]. Příspěvek ve sborníku. In: *The Lawyer Quaterly*. Vol 5, No 2 (2015). Available at: http://www.ilaw.cas.cz/tlq/index.php/tlq/article/viewFile/148/132, p. 129.

[50] Compare with § 2 of the Act and Mediation Service No. 257/2000 Coll.

[51] Compare § 2 of the Mediation Act No. 202/2012 Coll.

relating to the modification of the mediation agreement and the achievement of the mediation agreement in the Czech legislation as compared to Article 3 of the Directive which talks about the resolution of the dispute and the achievement of the agreement which is a wider concept, allowing for a general perception of the parties' agreement without its being incorporated into the mediation agreement.

Article 3 of the Directive also deals with the person of the mediator when it is describing a person who is asked to have perform effective, impartial and qualified leading of the mediation, irrespective of his or her designation or profession in the concerned Member State and regardless of the way how this3rd person was appointed or requested to lead a mediation. In this context of the implementation has the § 1 of the Mediation Act connection to the Directive, i.e. the subject of the mediation regulation itself in the Czech legal norm, when the law regulates the performance and effects of mediation by registered mediators, and the provisions of § 2, where the basic concepts are under the letter c stipulated that the mediator is a natural person who is registered in the list of mediators, that is natural persons registered in the list of mediators, which according to § 15 paragraph section 1 is an information system of public administration led by the Ministry of Justice.[52]

As part of the resonance of implementation and related harmonization efforts, it is important to mention Article 7 of the Directive and the question of the confidentiality of mediation where mediation should take place in a confidential manner. Member States should seek to ensure that mediators and persons involved in administrative support do not disclose mediation procedures. They also should not be forced to mention or submit further information resulting from mediation proceedings or obtained in connection with the circumstances surrounding the meditation procedure. These aspects do not have to be realized unless, in the scope of the autonomy will of the parties is agreed upon a different procedure. Member States have the right to make exceptions to these situations and situations particularly affected by public policy, by ensuring protection of the legitimate interests, in particular the interests of the child, as a result of harm to the physical or mental integrity of a person. The Directive furthermore refers to the disclosure of the content of the agreement resulting from mediation itself for the purpose of implementing or executing the mediation agreement. The directive also talks about the possibility of implementing stricter measures beyond the directive.[53]

The § 9 of the Czech Act on Mediation refers to the facts on which the mediator is obliged to maintain *confidentiality*. This concerns the information which he learned in connection with meditation proceedings, that is in connection with

[52] Compare with § 13 of the Mediation Act and the purpose of Act No. 522/1991 on state control.
[53] See also Article 7 (1) and (2) of the Mediation Directive.

the preparation and performance of mediation, which is interesting from the point of view of the law to compare with the definition of mediation itself. This confidentiality should continue to be maintained, even if it is removed from the list of mediators. The mediator is forced to maintain silence even if no contract of execution of mediation has been concluded, which must be distinguished from the mediation agreement.[54] The Directive is implemented in accordance with the principle of considering the autonomy of the parties' wishes where the mediator's duty of confidentiality may relieve by all parties involved in the mediation. However, it is necessary to interpret adequately the dictum of the law with respect to the wording "all sides of the conflict". The right to dispose the mediator of his confidentiality passes in the event of his death or his declaration of dead to the legal successor of the mediator himself.[55] Confidentiality is not stated for a mediator in proceedings before a court or other authorities if the dispute is the result of mediation between a parties of the conflict, by itself or possibly between the legal counsellor of the conflict and the mediator. The mediator is further relieved of confidentiality to the extent necessary for his or her own defence and protection in the event of any situation related to the oversight of the mediator's activities, or disciplinary proceedings. When we compare discretionary adjustments in mediation or mediation confidentiality, in the revision of the Directive, the UNCITRAL Rules, the ICC Rules, the ICDR Rules where the confidentiality adjustment is wider in the circle of persons it binds, and in terms of the information circle it covers. Mediation in the international trade is from this perspective more advantageous and more secure than an adaptation according to the Czech Mediation Act.[56] The reflection of the confidentiality of the persons involved in the administration of mediation proceedings, stipulated in the mediation directive, is further the legal regulation in the Czech Mediation Act[57], when the duty of confidentiality laid down for mediators is further extended to those who have participated with mediator in the preparation and conduct of mediation. Furthermore, it is clear from the Czech regulation that the duty of confidentiality applies to the mediator, but it does not apply to the parties of the conflict and their legal counsel, but the obligations of confidentiality and possible sanctions for the violation can be appropriately modified in a mediation agreement.[58]

[54] Closer to Article 9 (1) of the Mediation Act.

[55] See above for the unequal status of mediators and advocates with regard to the duty of confidentiality.

[56] BUHRING-UHLE, CH., KIRCHHOFF, L., SCHERER, G. *Arbitration and Mediation in International Business*. WK, p. 223–224.

[57] Section 9, paragraph 4 of the Mediation Act No. 202/2012 Coll.

[58] Explanatory Report to the Mediation Act, p. 26 (§ 8 and § 9).

The cross-border nature of mediation as well as the reflection of cross-border situations is surprisingly more rigorously regulated in the Czech Act on Mediation, where the mediator pursues his or her activities under the law of another Member State in a position where he cannot be compelled to breach the confidentiality obligation to the extent imposed on him by the legal legislation of that Member State.[59]

The internal market and the free service sector are mentioned in Article 5 of the Mediation Directive, where the Directive clearly refers to the non-restriction of the provision of services in terms of professional qualifications in another Member State. Questions which are in concern which relates to the provision of a service in accordance with the law in force in a particular Member State for the purpose of pursuing their profession in relation to situations arising as a result of the relocation of a service provider are also addressed, as well as on the circumstances of the ad hoc case assessment. In Czech legislation, the provisions of Article 5 of the Directive are reflected in the Treatise on Visiting Mediators.[60] For nationals of another Member State, this provision provides for the possibility to perform mediatory activities in the Czech Republic on a temporary or occasional basis under the conditions laid down by this Act. The paragraph 19 section 2 deals with the necessity and the possibility to be included in the list of mediators in the form of a guest mediator, accompanied by a document in the form of a certified copy which proves that the person is in accordance with the legislation of another Member State able to perform an activity comparable to that of a mediator accompanied with an affidavit of non-refusal and non-disqualification of this authorization. The guest mediator's activity itself is then subject to Czech law and the visiting mediator is entitled to provide services in the Czech Republic once the Ministry submits all the documents required by law. The Mediation Directive also deals with ethical rules and procedural rules, which Czech law does not explicitly mention.

The Article 1 Section 2 of the Directive and its definition of the scope of the Directive in the aforementioned cross-border civil and commercial disputes is governed by the provisions of paragraphs 28 of the Act on Mediation, where this law incorporates the relevant EU regulations. It should be noted here that the incorporation of EU regulations and their implementation into the national law does not yet indicate how the Member State will assume the scope of transposition of the implementation of the Directive. In this context, it is appropriate to mention the scope of the law itself, which applies both to national mediation and mediation with an international element. Concerning mediation with the

[59] Section 9 paragraph 5 of the Mediation Act.
[60] § 19 of the Mediation Act No. 202/2012 Coll.

cross-border element, the Directive is criticized for the absence of a conflict clause dealing with the applicable law on the admissibility of mediation, the mediation agreement for the performance of the mediation and the mediation agreement itself.[61] However, it addresses three important aspects of cross-border mediation. The first of them is the enforceability of mediation agreements under Article 6 of the Directive which allows to the parties of the dispute in a Member State to request that their mediation agreement be rendered enforceable, and this is rendered impossible if the content of such an agreement is contrary to the law of the Member State where the parties or such content cannot be enforced under such law.[62]If the mediation agreement is thus rendered enforceable in a Member State, it should be recognized and declared enforceable under EU law, that is in the civil and commercial matters under the Brussels I Regulation.[63] Therefore, if mediation is terminated by the conclusion of mediation agreements, this agreement must be written and contain the signatures of all parties, the date of its conclusion and the signature of the mediator by which the mediator confirms the conclusion of such mediation agreement. Under the Czech law, the mediator is not responsible for the content of the mediation agreement, since only the parties of the conflict are responsible for the content of the mediation agreement.[64] Although this is not further specified in the Czech Mediation Act, the mediation agreement is not directly enforceable by tiself and is therefore not a type of enforceable title.[65] The mediation agreement can be enforced by entering this agreement into a notarial or enforceable enactment or by having the mediation agreement approved by the court.[66]

Mentioned provision of Article 8 of the Directive concerns with the obligation of the Member States to ensure that mediation which the parties of the conflict choose as a way of the conflict resolution not to become an obstacle at a later stage in access to justice, that is the opening of judicial or arbitration proceedings in the same matter following the expiry of the limitation or preclusion period. On the basis of the adoption of the Act on Mediation, an amendment to the SPD was further elaborated and the provision of § 100 section 3 stipulates the possibility for the court to order the parties to meet with the mediator and to discontinue the proceedings whenever it deems appropriate and at the same time is kept the mediation as a voluntary option and remains

[61] PAUKNEROVÁ, M., PFEIFFER, M. *Mezinárodní mediace a české právo*. p. 22.
[62] BŘÍZA, P. Evropská unie přijala směrnici upravující přeshraniční mediaci. *Bulletin advokacie*, 2008, n. 12, p. 59.
[63] GRYGAR, J. *Zákon o mediaci a prováděcí předpisy s komentářem*. p. 40–44 (§ 7).
[64] Ibid.
[65] Explanatory Report to the Mediation Act, p. 25–26 (§ 7).
[66] Ibid.

only on the parties of the dispute whether they undergo mediation.[67] As stated in the enforcement of the mediation agreement, the mediation agreement can be approved by the court in the form of a reconciliation, in accordance with § 67 of the Civil Procedure Code. In addition, it is necessary to mention the aspect of the alert on the possibility of using the mediation, followed by the directive, which is reflected in § 99 of the Civil Procedure Code. The court informs the parties about the possibility of using mediation pursuant to the Act on Mediation, if it is appropriate due to the nature of the case, as well as in the preparation of the proceedings pursuant to § 114a and the preparatory act pursuant to § 114c of the Civil Procedure Code.[68] The information obligation of the court on the possibility of mediation is also mentioned in the Act on Special Procedures in § 9.[69] In favour of mediation, the Civil Code also admits that it allows for the establishment of a limitation and limitation period in the course of an extrajudicial hearing in the event that an agreement has been concluded between the parties on any out-of-court hearing.[70]

4. Conclusion

From the Report of the European Parliament's Committee on the implementation of Directive 2008/52 / EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters arises a fundamental closure. The Commission noted that "*some difficulties have been identified regarding the functioning of the national mediation systems in practice. These problems are mainly related to the lack of mediation culture in the Member States, lack of knowledge how are the cross-border cases handled, a low level of mediation awareness, and with the functioning of quality control mechanisms for mediators."*[71] Emphasis on quality standards and Ethical Codes for mediators should be part of the training of a mediator. It can only be added that even in the Czech Republic, mediation is not automatically part of the conflict resolution culture, which is also related to the set-up of barriers for citizens during the access to mediation.

[67] HRNČIŘÍKOVÁ, M. Vynutitelnost mediačních doložek. *Právní fórum*, 2012, č . 9, n. 12, p. 530.
[68] Act No. 99/1963 Coll., the Civil Procedure Code, as amended.
[69] Act No. 292/2013 Coll., on Special Procedures, as amended.
[70] HRNČIŘÍKOVÁ, M. *Vynutitelnost mediačních doložek*. p. 530.
[71] https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:52016DC0542&from=CS, p. 4, cited on 28. 6. 2018.

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