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POLICY BRIEF

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THE PATH OF MEDIATION IN THE REPUBLIC OF NORTH MACEDONIA



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Background

Mediation as an alternative way of resolving disputes was first introduced in the Republic of North Macedonia by the Law on Mediation of 2006, succeeded by a new law adopted in 2013, and then the current law on Mediation (hereinafter: the Law), which was adopted by the Parliament in December 2021.¹

The purpose of enacting the new law was to address mediation-related reforms as one of the strategic objectives of the Justice Sector Reform Strategy 2017-2022.²

Despite the adoption of the new law and the novelties it introduced, the potential advantages that mediation brings are not fully exploited by citizens.

1 Law on Mediation, («Official Gazette» No. 294/2021 of 27.12.2021)

2 Justice Sector Reform Strategy 2017-2022 with Action Plan, Ministry of Justice (Стратегија за реформа на правосудниот сектор за периодот 2017-2022 година со акциски план) Министерство за правда), https://www.pravda.gov.mk/Upload/Documents/Strategija%20i%20akciski%20plan_MK-web.pdf



Analysis of the application of mediation in the Republic of North Macedonia³

The Analysis for the application of mediation in the Republic of North Macedonia addresses in details the reasons for the insufficient application of the concept of mediation in the Republic of North Macedonia, and it was developed as part of the “Mediate, do not hesitate” project,⁴ implemented by the European Policy Institute (EPI) - Skopje in cooperation with the Academy of Judges and Public Prosecutors, “Pavel Shatev”, the Chamber of Mediators of the Republic of North Macedonia and the Mediators Federation Netherlands, and funded by the Embassy of the Kingdom of the Netherlands in Skopje.

The analysis is divided into two parts: (1) theoretical analysis of mediation, legal solutions for mediation and relevant legislation from the civil, criminal and children’s fields; and (2) quantitative analysis of the application of mediation in practice by all relevant stakeholders – courts, prosecution, mediators, the private sector.

³ Lazetic, Gordana, Koshevaliska, Olga and Nanev, Lazar (2022). (2022). Analysis on the application of mediation in the Republic of North Macedonia (Анализа за примената на медијација во Република Северна Македонија) European Policy Institute - Skopje

⁴ <https://epi.org.mk/post/15674>

MEDIATION IN CIVIL CASES

Mediation can be applied in a number of different types of civil disputes,⁵ and in accordance with the Law on Civil Procedure in Commercial Disputes for a monetary claim of up to 1,000,000 MKD, the parties before initiating legal proceedings shall try to resolve the dispute through mediation.⁶ However, the judges shared their opinion on whether the introduction of a mandatory mediation attempt in the above-mentioned disputes contributes to an increased application of mediation, and the survey showed that the majority of them are not in favour of increasing this legal threshold.

On the other hand, the share of parties requesting information from judges on mediation is extremely low (18%), but 39% of judges think it would be useful to have a mandatory legal obligation to refer parties to a mandatory mediation attempt in mediable disputes. Judges think that low prevalence of mediation is due to the low interest of the parties (35%), but also the fact that parties are not familiar enough with mediation (25%).

From their experience and knowledge, civil judges think that the the main reasons for the failure of mediation is the withdrawal of parties during the mediation procedure and a written statement from the mediator that no further mediation attempts are justified. The majority of judges are in favour of introducing a mandatory attempt at mediation when banks, financial companies and insurance companies, but also state bodies, institutions and public companies and LSUs are party to the dispute, which in some way reflects judicial confidence in mediation. Moreover, a considerable number of judges believe it would be useful to consider the possibility of a mandatory mediation attempt in an amicable divorce. But there is also a very small number of judges who disapprove expending the legal grounds for a mandatory mediation attempt in the above cases.

The most common views that prevail among civil court judges regarding mediation are that mediation is a useful mechanism and a real dispute resolution procedure (31%), and that mediation is a good attempt by the state without significant results so far (30%). 16% consider mediation as a partially successful project. For civil case judges, the most negative sides of mediation are the following: the parties' distrust in mediation, the insufficient legal conception of the mediation procedure and the mediators have no authority among the citizens.

Civil case judges mostly give the following **proposals** for improving the application of mediation: promotion of the advantages of mediation, establishment of a more favorable environment for court proceedings, holding seminars and work meetings to indicate shortcomings, mediation to be conducted in court in the presence of a mediator and a judge with experience in that type of cases, to indicate to the parties the chances of success, caselaw, costs, etc., lower costs and greater confidence in the parties, mediators to know the laws, be more open to the public and not

5 Mediation as a way of dispute resolution is mentioned in the Law on Free Legal Aid, the Law on Civil Procedure, the Law on Criminal Procedure, the Law on Justice for Children, the Law on Genetically Modified Organisms, the Law on Provision of Financial Services on Distance, the Law on Consumer Protection, the Law on Protection from Environmental Noise, the Law on State Market Inspectorate, the Law on Environment, the Law on Ambient Air Quality, the Law on Peaceful Settlement of Labor Disputes, the Law on Social Protection, the Law on Commercial Companies, in the collective agreements in the field of education, etc.

6 Article 461 of the Code of Civil Procedure.

guided by personal interests, better legal solutions, the mediation to be conducted by a judge in the role of mediator, more training for mediators, reduced costs in mediation, approving free legal aid, inclusion of more experienced judges, inclusion of retired judges in order to gain trust of the citizens, promotion of mediation through public fora, including the public, education of parties on mediation.

MEDIATION IN CRIMINAL CASES

Pursuant to the provisions of the Code on Criminal Procedure Code,⁷ in cases of a private criminal lawsuit, the competent judge at the settlement hearing for reasons of expediency may make a proposal to the parties to give their consent for referral of the case to mediation. After the consent of the parties, the judge shall make a decision to refer the parties to mediation. If within the specified period the parties do not give their consent, the judge shall rule that the proposal for referral to mediation has not been accepted and shall schedule a main hearing under the provisions for a shortened procedure. Within three days after the consent is given, the parties shall mutually appoint one or more mediators from the Mediators' Directory and inform the individual judge thereof.

Regarding mediation in criminal cases, 56% of the judges surveyed believe that mediation in private lawsuits does not yield positive results, while only 13% of the surveyed judges think otherwise. In the last 5 years, 75% of these judges never applied mediation, and 89% of them indicated that the parties never asked for information on mediation.

The mediation procedure in children is regulated by the provisions of the Law on Justice for Children,⁸ providing that procedure against adult offenders is adapted to the legislation on children, and reference is made to the Law. The Law on Children's Justice regulates the conditions under which mediation can be conducted, the manner of appointment of a mediator, the conditions that need to be met in order for a person to appear as mediator in the procedure involving a child, the duration of the mediation procedure, its course and the ways in which the mediation procedure can be completed. The main purpose of mediation in children is a dialogue that will allow the child to understand what he or she has done, to understand the position of the victim during and after the act, to hear the victim's suffering and the consequences suffered by the victim.⁹

45% of judges in proceedings against children believe that mediation would yield positive results, while 35% have a negative attitude on this issue. 75% of the judges surveyed have never referred the parties to mediation proceedings in the last five years, 20% of the respondents referred the parties in some cases to mediation proceedings. For reasons of failure of mediation in criminal cases against children, more than half of the judges surveyed did not provide an answer, and the judges who answered this question cite as reasons either the expiration of the 45-day deadline or the cancellation of the parties.

7 „Official Gazette of the Republic of Macedonia“, no. 150 dated 18.11.2010; Coded on Criminal Procedure.

8 Law on Children's Justice („Official Gazette“ no. 148/2013).

9 Lazetic, Gordana, Koshevaliska, Olga and Nanev, Lazar (2016). <https://eprints.ugd.edu.mk/16502/> Restorative Justice for Children (Ресторативна правда спрема деца.) Macedonian Review of Criminal Law and Criminology, 1 (1), pp 1-24 (Македонска ревија за кривично право и криминологија, 1 (1), pp.) 1-24.

In addition to the judges, the focus group included prosecutors, among which 35% said to have referred parties to mediation.

In general, judges in adult criminal cases, judges for children, as well as public prosecutors agree on the following most common reasons for the under-representation of mediation in court practice: lack of interest among parties, insufficient information on mediation and insufficient promotion of the advantages of mediation in public.

Judges trying in criminal cases state the following **recommendations** to improve mediation: greater promotion of the advantages of the mediation procedure; in the case of private lawsuits, after being admitted to the court, they must be submitted to an authorized mediator, and returned to the court after the procedure has been carried out, that is, after an attempt at mediation has been made or proof that the mediation failed; the mediation procedure should be more accessible and better designed; mediators should be more open to the public, should know the laws in order to succeed in helping the parties and not be guided by personal interests; legal changes, a campaign for public debate before any legal changes start, a campaign to affirm mediation as a procedure, by affirming the positive aspects of mediation, to have the views of practitioners - those who face everyday problems; greater transparency through familiarization with media coverage; education of lawyers to advise the parties on the mediation procedure.

Recommendations from judges for children, in order to improve the application of mediation, are: it is mandatory to conduct a mediation procedure before filing a request for a preparatory procedure before the judge for children; greater awareness of the parties about the mediation procedure; motivation of mediators by subsidizing most of the costs through the Ministry of Justice; more education for parties, open discussions and debates.

The Public Prosecutor's Office **proposals** for improving the application of mediation are the following: greater awareness about mediation, more training on this topic, the procedure for children is of an urgent nature, thus mediation is used less often (it usually prolongs the procedure), and the usual procedure is followed; on the part of the Ministry of Internal Affairs, when submitting the criminal charges, separate reports should be filed containing more information about the circumstances under which the crime was committed and about the readiness of the parties to come to an agreement so that no criminal proceedings are initiated; the duration of the mediation procedure should be shortened from 45 days to 30 days; to find mechanisms to raise citizens' awareness, i.e. the public should be made aware about the possibility of solving cases through mediation, and especially to inform them about the positive effects of solving criminal cases against children through mediation, especially avoiding victimization of children by going to the institutions responsible for dealing with criminal charges and avoiding the existence of a criminal record for children perpetrators of crimes; to train mediators who would work exclusively in criminal proceedings for children; the costs of the mediation procedure should entirely be covered by the state.

PERCEPTION OF MEDIATORS IN THE REPUBLIC OF NORTH MACEDONIA

Most of the respondents - mediators believe that the introduction of a mandatory mediation attempt in commercial disputes gave positive results, and according to their data, in 25% of cases the mediation was successful. The most common disputes for mediation are labor and commercial disputes, parties most often seek information from mediators themselves and opt for mediation or their lawyers advise them on this, and on the other hand, most often the defendant does not agree with the proposal for mediation. They consider that under-representation of mediation in practice is due to lack of information about mediation – 33%, 27% of mediators see the under-promotion of the advantages of mediation in public as an issue, while 18% believe that lawyers often advise clients not to accept mediation.

The mediators highlighted the following problems/obstacles they had encountered in conducting the procedure: the room where the mediation is conducted; insufficient engagement of parties in the mediation procedure; parties uninterested to conclude a settlement; difficulties in recovering costs; unpaid subsidies despite meeting all requirements, etc.

For greater application of mediation, mediators **suggest**: greater promotion of mediation and informing the public about the advantages of the mediation procedure; greater engagement of judges and PPO for the application of mediation; continuous training of mediators and their continuous improvement, which will contribute to better management of proceedings; carrying a tariff for the costs in the mediation procedure; checking the number of cases with a mandatory attempt at mediation (commercial cases) that were received in court and were not previously mediated; official reminder to the state authorities about the Government's Conclusion on the application of mediation – the state authorities before starting court proceedings should be required to initiate a mediation procedure exclusively through the Chamber of Mediators; mediation should find a place in disputes of small value, especially for overhead costs (electricity, water, heating, telephone, etc.), as well as for amicable divorce proceedings; creation of a mediation center with its own premises and bodies that will take care of the promotion of mediation, support of mediators with resources - a room for conducting mediation, rooms for seminars and trainings, technical equipment, legal and other professional assistance, etc.; adoption of legal amendments for greater application of mediation in the justice system for children and family and marital disputes; the seal of the mediator should have an enforcement power of the Agreement; obligation of mediation in payment orders; introduction of a mandatory meeting with a mediator, before the start of court proceedings, in order to give the parties the opportunity to clarify the dispute.

MEDIATION DATA FROM THE MINISTRY OF JUSTICE

The analysis also collected data on mediation from the Ministry of Justice, which showed that the data for the application of mediation in the e-registry were not entered according to the planned expectations, as it was not a mandatory legal obligation, which was corrected in the new law. The data in the e-registry is still being updated and entering data for previous years has been enabled.

The data obtained from the Ministry of Justice, clearly show that the application of mediation in the proceedings against children is just starting, and that whenever it is applied it is successfully completed by settlement. Regarding the registered cases in the e-registry for mediation **from 2016 to 2021, there are 2511 entered agreements, of which 1377 or 55% have been completed with a settlement after a successful application of mediation**, which is worth a lot of credit. Most of the time, labour disputes are successfully concluded with a success 91%, and business disputes are ranked second with a percentage of success of 18%.

PRIVATE SECTOR PERCEPTION OF MEDIATION IN THE REPUBLIC OF NORTH MACEDONIA

For the purposes of the analysis, a focus group with representatives from the private sector was also conducted, specifically from the Chamber of Commerce of the Republic of North Macedonia, the Union of Chambers of Commerce of the Republic of North Macedonia, the Business Confederation of the Republic of North Macedonia, which made a particular contribution to this research, representing the interest and views of their membership and the business community.

Regarding the opinion of the focus group, and in connection with the expected positive results of the introduction of a mandatory attempt for the mediation procedure in the cases pursuant to Article 461 of the LPO (for commercial disputes concerning a monetary claim of up to 1,000,000 denars), the representatives of the domestic chambers of commerce consider that the mandatory attempt did not contribute to the actual application of the mediation, but only its formal application. The introduction of a mandatory attempt cannot be a permanent solution, but only a temporary solution for stimulation, which as a goal should familiarize the entities with mediation and its benefits, and making them opt for it upon their own initiative in the future. The number of attempts in this part has increased, but that figure, according to them, does not contribute to the success of mediation, because the figure does not give a realistic picture of its application, as is evidenced by the percentage of successfully completed mediations in the mandatory attempt. They are unanimous that companies refuse something that is mandatory, they see it as an additional financial burden, so they find ways to avoid the mandatory attempt. This is where they also find the reason for failed mediation attempts. They are of the opinion that the parties approach mandatory nature of mediation it with a lot of skepticism and do not engage in any attempt at mediation. This is

the reason for the high number of cases, but also for the high degree of failure in these cases. The success of mediation in 99% is in labor disputes, because parties there appeared voluntarily, took action, gave a chance to resolve the dispute through mediation and saw that the dispute can be resolved without initiating legal proceedings.

The business community has given the following **recommendations** for improving and enhancing mediation solutions: better promotion that will be implemented in an efficient way among all stakeholders and will raise awareness among all; taking the opinion of the business community regarding the adoption of new legal solutions, but also for the application of existing legal solutions for mediation; organize promotion conferences and activities through the media; breaking down taboo topics on mediation; more joint mediation projects; consideration of the advantages of mediation in bankruptcy proceedings and more activity in this area; improving the application of mediation in consumer disputes; synchronized strategy for the promotion of mediation; pilot (free) mediation in the construction sector; producing mediation research and analysis that will provide guidance in areas requiring intervention; considering the prospects for online mediation.



Legal novelties

To begin with, it is necessary to point out that the Law follows the directive 2008/52/EC on mediation in civil and commercial disputes¹⁰ and the Mediation Development Toolkit of CEPEJ of 2018¹¹, bringing the Republic of North Macedonia closer to the European standards of mediation. Support for the development of mediation follows through the measures and means provided for by the mediation development program carried out by the Government for a period of at least four years, as well as the special mediation support program carried out by the Judicial Council (under the new law, the Supreme Court is no longer subject to this obligation). Additionally, as an incentive for citizens, as before, the law provides for state subsidies to cover the costs incurred in the mediation procedure between the same parties for a disputed relationship, however, the law establishes a maximum amount of 4,000.00 denars per case from the attached mediator's tariff. Another advantage for citizens is the quick resolution of disputes through mediation compared to litigation – the procedure must be completed within 90 days, and according to the Law on Justice for Children the mediation shall be completed within 45 days.

10 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, CELEX 32008L0052, OJ L 136, 24.5.2008, pp. 3-8.

11 Mediation Development Toolkit, European Commission for the efficiency of justice (CEPEJ), CEPEJ(2018)7REV, <https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52>.

Another very important novelty in the Law is the expansion of the range of mediable disputes – meaning that now mediation can also be applied in disputes arising from the procedures of notarial payment orders, disputes in the field of safety and health at work, disputes in the field of health care and disputes related to civil liability for insult and defamation.

The objectives for which the Law was adopted were achieved by: revising the mediators' exam, inserting the possibility of initiating the mediation procedure electronically and introducing mandatory entry of all received requests for mediation in the Electronic Register and mandatory entry of data on the course of the procedure. In addition to these novelties, the Law introduces a National Mediation Council and makes a closer arrangement of its operation and competences, which will be composed of a National Mediation Coordinator, four members and a secretary. The Council shall have its own budget and the national coordinator and members need to meet certain criteria to be elected by the Government. At the 54th session of the Government, the Vice President of the Economic Chamber of the Republic of North Macedonia and the President of the Chamber Mediation Association, Dr. Jelisaveta Georgieva Jovevska, was appointed as the first National Mediation Coordinator.¹²

In April 2022, pursuant to the Law, the following by-laws were adopted and promulgated:

- Regulations on the criteria, method of providing subsidies, the disbursement, the remuneration template, the fees of the mediator, the template of the request for subsidies and the necessary documentation that is submitted in support of the request for subsidies to cover part of the costs for mediation;¹³
- Regulation on the manner of supervising the work of the Chamber of Mediators of the Republic of North Macedonia;¹⁴
- Regulation on the content of the Register of mediation requests and the manner of entering the received requests for mediation;¹⁵ and
- Regulations for the Mediator Examination Program, the manner of organizing and passing the examination, the manner of conducting the examination, as well as the form and content of the examination certificate.¹⁶

The Law is expected to be implemented consistently in carrying out the appointment procedure of members of the National Mediation Council (a Public Call for the expression of interest is currently open, and the deadline for application is August 5th)¹⁷, and other bylaws deriving from this Law.

12 Dr. Jelisaveta Georgieva Jovevska appointed by the Government as National Mediation Coordinator, July 2022, <https://www.mchamber.mk/Default.aspx?mId=3&lng=1&evId=90305>

13 („Official Gazette“ No. 91/2022 of 12.04.2022)

14 („Official Gazette“ No. 100/2022 of 26.04.2022)

15 („Official Gazette“ no. 100/2022 dated 26.04.2022)

16 („Official Gazette“ no. 101/2022 dated 27.04.2022)

17 Public call for the expression of interest in participating in the National Mediation Council, Government of the Republic of North Macedonia, 20.07.2022 (Јавен оглас за искажување на интерес за учество во Националниот совет за медијација, Влада на Република Северна Македонија, 20.07.2022 година.), <https://vlada.mk/node/29660>



Conclusion

A part from the lack of information and unwillingness of citizens to apply mediation before moving to initiating legal proceedings and the skepticism among Macedonian judges, public prosecutors and the private sector, it is clear that mediation has significant advantages compared to legal proceedings.

Mediation is a voluntary, equitable, neutral, informal, confidential, non-public, fast and a cost-effective procedure. Therefore, it is necessary to continue with its promotion in order to increase its application, both by state bodies and by representatives of the non-governmental sector and representatives of the Chamber of Mediators.

