

Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union

Final Report

Client: European Commission - Directorate General for Justice

15th October, 2012



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Study carried out jointly with the ADR Center S.p.a.

Brussels, 15th October, 2012

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Executive summary

Background and objectives to the study

Disputes arise as part of business interactions. And with increasing numbers of such business transactions, increasingly complex outsourcing arrangements and ever more international supply and value chains, addressing B2B disputes is essential as part of the improvement of Europe's business climate for – especially in times of economic and financial crisis.

Within this context, this study has been carried out on request of EC DG Justice as part of the preparation of possible new initiatives dealing with ADR in B2B disputes, complementing the instrument on ADR for B2C disputes, and complementing the Mediation Directive and the Brussels I Regulation. The study was carried out in the period March-July 2012.

The **general policy objective** of this study is to provide the European Commission with an accurate and comprehensive view of European businesses' use of Alternative Dispute Resolution (ADR). To achieve this, the study has the following **specific objectives** (ToR, Chapter 4):

- a. Provide an overview of the B2B ADR legal frameworks in the EU;
- b. Provide an overview of existing ADR schemes and their main characteristics;
- c. Analyse the problems encountered by businesses which face a B2B dispute;
- d. Estimate the use of B2B ADR schemes;
- e. Review costs and savings of ADR schemes;
- f. Secondary effects.

a. Overview of the B2B ADR Legal Framework

First of all, an **absence of uniformity in legislation across the EU** can be discerned, in particular when it comes to mediation. After all, each Member State has a different need for ADR processes. Existing national-level regulations are mainly based on the historical characteristic that most B2B disputes are domestic. Hence, these frameworks fail to fully address the increasing levels of cross-border B2B. The full existence of an ADR Single Market in the EU is therefore hindered by fragmented practices and regulations across Member States. Despite attempts to transpose the EU Mediation Directive, the situation between Member States with regard to mediation is still widely variable. Cross-border arbitration legislation, on the contrary, is already well-established, and has not been significantly updated (for example to cover cross-border eCommerce) in a range of Member States.

Despite the advantages for individuals and Member States to take recourse to mediation, and despite the fact that the Mediation Directive allows for mandatory legislation, the majority of Member States have chosen to initially opt for a **voluntary approach to mediation**. However, some countries such as Italy, the UK, France and Slovenia have recently introduced different versions of mandatory mediation in specific fields of disputes. A range of other incentives to promote ADR have been identified, however they do not necessarily and always lead to a change in dispute resolution processes.

Mediation and mediators are generally more closely monitored by government institutions than arbitration and arbitrators, who are most often monitored by individual institutions. There is no law which pertains to professional mediators and arbitrators and the maintenance and development of their profession as a whole. This inevitably leads to questions and concerns about the quality of

services and reduces business trust in the ADR process. Particularly lacking are international conventions or standardised rules for mediation of cross-border disputes.

Online dispute resolution (ODR) has not been taken into account in almost any legislation. Most legislation does not refer to the Internet and is still based on the concept of “physical” face-to-face meetings for mediations and arbitrations. Most institutions are not equipped for making such a transition nor is there a significant demand for the offering of these services.

b. Existing ADR schemes and characteristics

Apart from some distinct ADR processes designed exclusively for B2C, almost all **ADR providers resolve both B2B and B2C disputes**. As a consequence, there is limited data which discriminates between B2C and B2B ADR. Furthermore, collected evidence shows large variance in ADR provider nature and quality across the EU, making it difficult to even group providers into fairly harmonised categories. Although some significant differences exist between Member States, a substantial number of individual professionals is available for ADR provision outside any structured institutions or public registers.

The majority of ADR providers are a small division of a public body, or operate part-time (eg. within a law firm) and are micro-entities that operate locally. Where the ADR market has been newly developed by law, most of the ADR providers listed in a national register are not active yet. Only very few ADR providers in the EU have a medium-size structure and none are present in more than three or four cities within a Member State. Almost none have their mediators and arbitrators working full time as ADR practitioner. This leads to significant within-country variability in addition to the variety between Member States.

Due to different ADR domestic legislations, the **quality of ADR providers varies greatly**. The different requirements (for example training and professional background) for becoming mediators and arbitrators have an impact on the quality of the processes. Furthermore, independence and neutrality are not clearly required attributes for ADR providers. ADR Monitoring bodies exist in 12 Member States, but their tasks vary greatly. They have been created by a process of accreditation and monitoring usually under the auspices of the Minister of Justice or the Judiciary.

Most existing ADR providers focus on mediation and arbitration – the two types of ADR procedures when it comes to managing B2B disputes. Despite some differences imposed by domestic laws on the designation and role of the dispute resolution entity and general procedure, the main features of the main ADR processes and the effects of the outcome is the same across the EU. Mediation tends to be more widely used than arbitration.

ODR is rarely provided in for B2B ADR. ODR has a different level of complexity requiring: an accessible website, an online form to register details, an ICT platform that helps the mediator and arbitrator in an online dialogue, e-filing, video conferencing on the web, and an online mechanism that helps the parties to find a solution. Despite some ADR providers offering some sort of ODR processes, ODR still remains in the pilot project phase with little or scarce use. Pure ODR providers in full activity that can sustain their costs do not exist yet. Most importantly, ODR is seen mostly as a tool designed to B2C and not B2B ADR.

Arbitration is more harmonised than mediation when it comes to existing cross-border practices. There are very few ADR providers that can effectively deal with cross-border disputes from foreign countries as a third neutral provider in a third country. However, a clear distinction should be made between mediation and arbitration. Since most of mediation should be administered in the country where the litigation would have taken place, cross-border ADR really

means a domestic process conducted in a foreign language with domestic rules. On the contrary, international arbitration rules are quite well established and differ from domestic ones.

The establishment of most of the B2B ADR providers is financed by private investors, Chambers of Commerce, or professional and business associations. The running costs for the continuation of ADR providers should be usually covered by the revenues of their service fees. However, the vast majority of ADR providers cannot self-sustain only with ADR revenues due to the lack of demand. For this reason, ADR providers tend to engage in related activities such as training, consulting, or the running of membership-based organisations.

c. Use of ADR B2B Schemes

With about 2.8 million cases per year, **court litigation remains by far the most common practice** for managing B2B disputes. ADR use amounts to about 3% of the total use of court. Overall, numbers of B2B court litigation have been increasing on average since 2005, with a sharp increase and a decline between 2007 and 2010 and a stabilisation if not a mild decline in the most recent years. The decline of Court cases is nonetheless balanced by an increase of ADR and particularly mediation, leaving the total amount of resolved business disputes through time relatively stable - around 4 million per year.

Albeit from low levels, **ADR and particularly mediation has shown a rapid growth in recent years**. Use of ADR and particularly mediation has recently increased. Still, the pattern of arbitration demonstrates some resemblance to that of court litigation – although overall growth levels are certainly higher. The growth pattern of mediation instead appears to be more robust and consistent, with growth rates of 20-30% in the years 2006 and 2008, followed by a period of decline and a moderate growth (10-20%) in the subsequent years.

Patterns in the use of ADR differ across Member States. Slovenia and Latvia record higher numbers of court litigations per businesses, followed by large Southern European countries such as Spain, France and Italy. Ireland, Hungary and Denmark, scoring below average in frequency of court litigations per businesses, are leading in relative terms when it comes to arbitration. Latvia, Italy and Poland score above EU average for both court litigation and arbitration per businesses. Greece, Cyprus and Italy are leading in terms of number of mediation per business, while Luxembourg, Slovakia and Hungary also score relatively high.

On average, SMEs tend to prefer mediation over arbitration or court, whilst medium-sized firms are open to various ADR processes. The propensity of SMEs to use any dispute resolution option is generally lower than that of larger enterprises. However when fully informed, SMEs might have a preference for the use of ADR, and particularly mediation, over court litigation. Interviews show that SMEs are reluctant to engage in disputes with businesses which are perceived as more powerful and might have at their disposal more resources to manage court litigations. SMEs tend to engage in informal negotiation with larger enterprises, which can be at their disadvantage. Medium-sized companies instead appear to be best placed to promote ADR. In the absence of large in-house legal departments, they are less inclined to opt for court litigation. But they demonstrate very strong interest both in mediation and in arbitration. This size group therefore appears to be most open to the various ADR processes available, with a clear preference for mediation above arbitration.

Strong differentiation also exists in the preference of particular ADR processes across economic sectors: **sector-specific conditions, answers and solutions are all important**, and so is the exposure of sectors to international trade and investment and therefore to cross-border disputes. When it comes to SMEs, then utilities, trade, retail and financial services are frequently mentioned

sectors for using ADR. The latter option can possibly be explained by the fact that SMEs in this sector are particularly exposed to disputes with large companies which have corporate cultures prone to internal arbitration, and which are backed up by extensive in-house legal departments.

Cross-border disputes are clearly less frequent on average, but still particularly relevant for micro and large enterprises in the EU, mostly in business relations with other EU countries, but also to a certain extent with non-EU business partners. Evidence and interviews show that arbitration is growing, as arbitration clauses are increasingly used in contracts with international business partners, as it is perceived as an essential element to mitigate the risks of dealing with disputes in countries where businesses have poor knowledge of existing legal systems and local dispute resolution practices. All evidence therefore points to the fact that **arbitration is potentially growing in the future when it comes to cross-country disputes** as a tool to resolve disputes, and particularly managing possible risks of facing disputes in an unfamiliar context – due to cultural, linguistic or legal differences.

Arbitration is for its very binding nature much more successful than mediation. Furthermore, whilst arbitration success rate is generally evenly spread across EU Member States, mediation success rates change significantly across Member States. Higher-than-average success is shown in those countries where mediation is an optional procedure. Below average rates are shown, amongst others, in most of the countries where some form of mediation is somehow mandatory for B2B disputes (i.e. Italy, Romania and Slovenia).

ODR is generally limited in B2B disputes Although ODR is considered to offer the potential to reduce costs and to be efficient, ODR is rarely used in B2B dispute resolution, and this is due to a lack of awareness, confidentiality issues, understanding about ODR service availability and costs, and limited experience of ODR. ODR is particularly appreciated in the case of simple disputes where disputed costs are limited and on-line procedures help in saving costs of dispute resolution procedures.

Direct conciliation is a more sector-specific practice. Relatively more use is made in utilities and in sectors such as finance, construction and insurance, where big players have an interest to avoid lengthy court procedures and keep their disputes with clients out of the public sphere. In some EU Member States conciliation is adopted by courts to avoid lengthy litigation procedures.

d. Problems encountered by business

Over the last 5 years, **the numbers of B2B disputes appear to be increasing**, which can be related to the economic, financial and public budget crisis. Numbers of disputes are particularly high in Southern European countries. On average, such dispute press relatively heavy on smaller companies than on larger companies.

The number of unresolved B2B disputes appears to be rising. An earlier study pointed out that 26% of B2B disputes remains unresolved, but this ratio has by now increased to 38% for domestic and 35% for cross-border disputes. The costs related to the increasingly high number of unresolved disputes are expected to be high, especially so for SMEs.

For example, payments are the main source (71%) of B2B dispute: the vast majority of B2B disputes. And payment loss due to the writing-off of debts is estimated to represent € 34 bln. Each year, an amount which has been rising sharply in recent years – due to the economic and financial crisis. Our estimate is that **€34 bln. of receivables lost can be attributed to disputes regarding goods and services delivered.** As most disputes are about payments, suppliers are

on the receiving end of these disputes. And these tend to be smaller organisations than the clients (e.g. Original Equipment Manufacturers), which are often backed up by in-house legal departments.

The legal system faces increasingly severe challenges to address B2B dispute resolution. The backlogs of courts are likely to increase in several European countries, especially so in Southern Europe as the judicial system appears not to be protected from such cuts. Hence, the case for B2B ADR appears to be growing.

Indeed, **ADR in general provides important advantages**: it can provide a common practice in industry, it can help to preserve business relations, provides direct cost and time savings, and avoids legal precedents. Business representatives state that direct cost and time savings are indeed important, but the preservation of the business relation is considered most valuable. However, **several barriers exist** for a wider take-up of these dispute resolution forms: the ADR process does not always follow clear legal procedures; the current template contracts do often not contain an ADR clause; and ADR processes could be abused by a more powerful opposing partner. Other barriers include a lack of awareness of ADR as a suitable means for solving disputes and a lack of (internal) company experience with ADR providers. ADR becomes particularly difficult if it is not already part of contractual relation. Without such clauses, it is often not used due to a lack of trust and communication barriers. Put in other words, the escalation of a conflict prevents businesses involved to agree on anything, including the mechanism for resolving the dispute.

Mediation has specific advantages and barriers. Key advantages of mediation include above all: direct time savings; direct cost savings; indirect cost and time savings (e.g. capital unblocking); preserving business relations and; more control over the dispute resolution outcome. Key barriers to using mediation include above all: lack of awareness of mediation as a suitable means for solving disputes; current template contracts do not contain a mediation clause; conservative attitude of lawyers; lack of mediation training and the corporate culture.

Arbitration has its own specific advantages and barriers. Key advantages of arbitration include: direct time savings; direct cost savings; indirect cost and time savings (e.g. avoidance of blocking funds); corporate policy (in case of large companies) and; reservation of business relations. Key barriers to using arbitration include: "business as usual" attitudes; lack of experience; lack of appeal possibilities; broken trust and; direct costs of arbitration.

Arbitration of cross-border ADR is favoured over cross-border mediation. This is due in part to specific cross-border barriers of mediation, including the limited legal certainty, the lack of trustworthiness, the difficulty of enforcement, and the management time involved in international travel.

e. Direct costs/savings

In the absence of greater ADR usage, **annual costs of dispute resolution for business are expected to grow to over € 100 billion in 2016 from about € 90 billion in 2011**. This increase would be due to a natural growth of 0.5% in overall disputes resolved through court litigation, arbitration and mediation, as foreseen in the baseline scenario. Analysis of the data suggests that, for an exemplar case, resolving a dispute through mediation costs a single business approximately € 9,300. These costs include the subsequent costs of resolving disputes, due to unsuccessful mediations (38% of cases). Costs for arbitration amount on average to € 8,700 and € 13,400 for litigation.

Within the above parameters, a 0.5% yearly increase in the use of ADR is likely to generate **€ 125 mln. savings for businesses in the first year (e.g. 2012), and € 679 mln. per year in the fifth**

year (e.g. 2016). Furthermore, business savings could further increase if the current success rate of mediation (62%) would improve to a better ratio in the future, possibly through better knowledge of the procedure and more appropriate usage. This leads to the importance of promoting high-quality provision of B2B mediation services, as well as the improved understanding of businesses to use ADR procedures.

An increase in the use of ADR will also have implications for State costs. In most countries, court fees do not cover the full cost to the State of administering litigation procedures. Therefore, a reduction in B2B litigation would be expected to deliver cost savings not just to business but also to the State. However, due to insufficient data, we are unable to quantify the magnitude of these savings. Costs incurred by ADR Providers can be additional costs for the States, in case State subsidies are required to support local demand for more ADR procedures. Similarly possible policy regulation aimed at strengthening monitoring and information requirements on ADR practices and procedures in each countries might require additional costs. These have been estimated in the study on the basis of exemplar cases and are reported in the following key points.

Analysis of supplier costs suggests that ADR revenues are not currently profitable for ADR providers. Assessment of a sample of ADR providers suggests a considerable variation of cost structures, particularly in terms of annual revenues and running costs. Furthermore, as the large part of ADR revenues comes on average from arbitrations, mediation-based ADR providers are particularly challenged unless they try to minimise their costs or have a larger portion of their revenues from additional services.

Compliance costs for ADR providers and the States are minor. Especially when these costs are compared with other incurred costs and with the potential value added by a thorough availability of ADR data across the EU. If we use the current requirements of the EU Directive on B2C ADR proposed on 29 November 2011¹ as a reference, an average possible cost for complying to monitoring regulation for Member States per year could be in a range of € 75,000 to € 220,000 for personnel and € 25,000 to € 160,000 for office costs. A total compliance cost could therefore be in range between approximately €100,000 and €400,000. This can be averaged to an approximate € 1.5 to € 6.0 per ADR case in each country.

f. Secondary effects of increased ADR use

Increased ADR can have various links with the broader economy and the business climate. The relation between an increase in the use of B2B ADR and its broader economic effects therefore deserves a specific analysis, especially in times of severe and lasting economic, financial and public budget crisis.

We expect the size of the secondary effects to depend strongly on the ability of ADR to reduce the number of unresolved disputes and the unblocking of passive capital. The initial assumptions on ADR use largely fails to address the large number of unresolved disputes. Hence we have introduced an additional assumption that ADR adds additional capacity to dispute resolution and hence addresses the chronic and increasing problem of unresolved disputes.

The overall value of unresolved domestic B2B disputes is estimated at a stock of € 114.2 bln. Increased use of ADR (by using the Scenario 1 which includes an additional 0.5% of cases per year to be resolved by ADR) would amount annually to € 190 mln. resolved (year 1), up to € 950 mln. (year 5) and € 1.9 bln. annually resolved (year 10).

¹ http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

The overall value of unresolved cross-border B2B disputes is estimated at a stock of €15.5 bln. Application of the above scenario on increased ADR use would lead to € 26 mln. annually resolved (year 1), €130 mln. annually resolved (year 5) and € 260 mln. annually resolved.

Furthermore, increased ADR use is expected to lead to a reduction of the amounts to be written-off by companies. Again, by using the above scenario, this annual amount would be € 36.5 mln. after 1 year, € 183 mln. annually after 5 years and € 365 mln. less written-off debt by year 10.

Evidently, the above amounts are based on a range of assumptions and their value can only be indicative for the orders of magnitude concerned. Furthermore, amounts gained by some companies are those lost by other companies. Hence, the above numbers are gross numbers which might have secondary effects for businesses although they do not provide net benefits to the economy.

Nevertheless, the unblocking of capital due to increased ADR leads in its turn to **important knock-on effects**, including:

- a) Securing better access to credit investment due to improved cash flow; this effect has gained substantially in importance due to the economic and financial crisis;
- b) Increasing the survival rate of firms; SMEs in particular are facing problems of liquidity due to an increased delay of payment as a consequence of the economic and financial crisis;
- c) Preserving existing trading relations and increased turnover; ADR clauses can be built in contracts, however only if the existing relations are good;
- d) Improving international trading potential; the reliability of the legal framework is amongst the two most important aspects considered by business when dealing with international business partners;
- e) More time secured for trading relations & increased turnover; if SMEs can make increased use of ADR this might result in more time secured for trading relations;
- f) Improved (foreign) business climate and attracting FDI. Reportedly, FDI businesses tend to use ADR providers from the country of their origin or internationally-recognised ADR providers.

In conclusion: the largest economic effects do not come from direct cost savings. In order to optimise economic benefits for companies, **it is vital to promote ADR in such a way that it can contribute to more effective dispute resolution** and to a reduction in overall (cross-border) transaction costs.

1 Introduction and background

1.1 Background and objectives of this study

This study has been carried out by Ecorys jointly with ADR Center S.p.a. on request of EC DG Justice as part of the preparation of possible new initiatives dealing with ADR in B2B disputes, complementing the instrument on ADR for B2c disputes, and complementing the Mediation Directive and the Brussels I Regulation.

The Terms of Reference identify the **general policy objective** of this study as being to provide the European Commission with an accurate and comprehensive view of European businesses' use of Alternative Dispute Resolution (ADR).

To achieve this, the study has the following **specific objectives** (ToR, Chapter 4):

- An overview of the B2B ADR legal frameworks in the EU;
- An overview of existing ADR schemes and their main characteristics;
- An analysis of the problems encountered by businesses which face a B2B dispute;
- An estimate of the use of B2B ADR schemes;
- A review of costs and savings of ADR schemes;
 - demand (businesses and particularly SMEs);
 - supply (State and private providers).

1.2 Understanding the rationale behind B2B ADR

There is a powerful rationale for using ADR in a business-to-business context. Disputes arise – to varying extents - as part of business interactions, and disputes have both a legal perspective (for example, who is at fault, what action is required and to what extent) and an economic impact (time and direct and indirect costs in pursuing and resolving disputes). So a key context is whether ADR contribute to improvement of the business environment, in ways similar to the reduction of administrative burden or other cost reduction measures². Figure 1.1 below positions disputes in an economic context, which varies between countries, sectors, business size, types of transactions as well as cross-border activity.

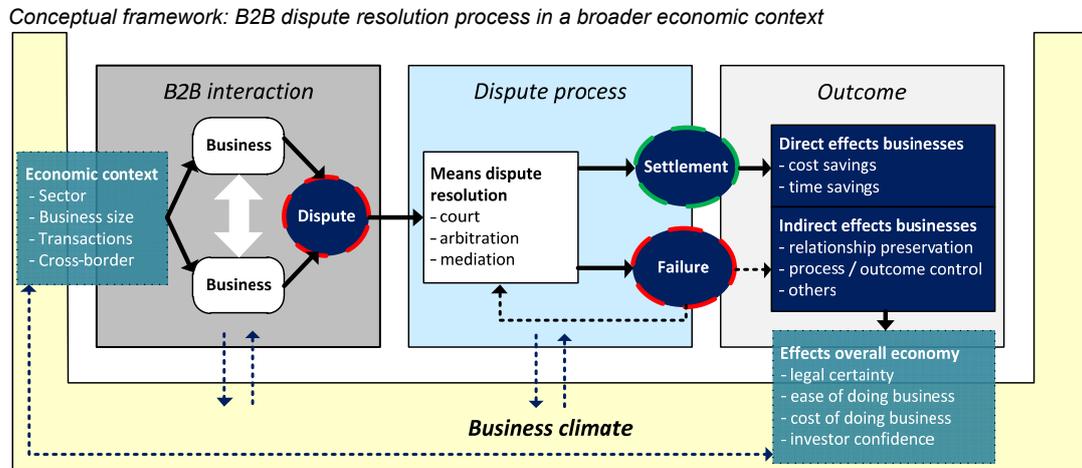
Concept for B2B disputes within a broader economic context

It is important to position the B2B disputes within their broader economic context. After all, secondary compliance effects are closely intertwined with not only a business context, but also a socio-economic context. Below is an attempt to conceptualise these relations. First of all, we need a broader understanding of the B2B interactions which are the origin for such disputes (Block 1). Subsequently, we need to know more about the dispute resolution process, and notably the reasons for businesses to choose for particular dispute resolution mechanisms and the problems that they encounter therein (Block 2). Thirdly, we need to know more about the outcomes of these processes. Court judgements, arbitration awards as well as all other outcomes (including settlement and failure) will lead to direct effects on businesses (cost and time savings), but also indirect effects including relationship preservation, process and outcome control. Some of these micro-effects will have further knock-on effects on the overall economy, in terms of legal certainty, ease and cost of doing business, investor confidence, etc (Block 3).

² See for example World Bank (2011) "Alternative dispute resolution guidelines". Investment Climate Advisory Services, p.1-3.

A crucial consequence in our concept lies in the feed-back loop to the economic context: international firms may be less inclined to invest in or trade with countries which have an unstable legal framework and a suboptimal dispute resolution capacity. And by the same token, domestic investors will feel uncomfortable and take this into account in their trade/investment pattern.

Figure 1.1



Source: Ecorys

The starting point: B2B interaction and the need for cost reduction

B2B interaction varies greatly, and the nature and volume of transactions is hardly comparable between (for example, the insurance sector, the construction industry, the tourism or the electronics industry) and varies in scale between them (for example, a huge bulk order for services or products or a one-off component purchase). Furthermore, there has been a trend towards outsourcing of business transactions (fragmentation of the B2B process which adds another stage of intermediation, making it B2BVM – business to business via mediator business), and the globalisation of supply chains, with recent experiences of stress in global supply chains through increased transport costs and rising wage levels in China. Such internationalisation and fragmentation of supply chains can have far-reaching consequences on the competitiveness of European industry³. It is therefore vital for European businesses, especially those competing in an international market, to reduce transaction costs at all levels – including those related to dispute resolution.

With many European economies severely affected by the economic crisis, the pressures on businesses are high. There has been a rapid increase in insolvent businesses, especially so in Southern European Member States which are facing not only a major economic and financial but also a public debt crisis.⁴ Currently 55% of businesses surveyed⁵ now suffer liquidity problems, and this level is considerably higher than in the years before the crisis broke out. The liquidity situation is leading to lower sales volumes. This leads to an even more pressing focus on cost reduction. If the only option is to cut direct costs, typical business responses are to reduce staffing, or to use inferior components etc. in their supply chain. This will often lead to a reduction in quality control efforts. And such responses likely to lead again to delays in delivery of goods and reduced quality – a further cause for B2B disputes.

³ See for example Ecorys/DTI (2012) "Study on internationalisation and fragmentation of value chains and security of supply". EC DG ENTR.

⁴ Source for insolvency data – Creditreform 209/10 "Insolvencies in Europe"

⁵ Intrum Justitia (2012) "European Payment Index"

Outcomes of the dispute resolution process

Outcomes of successful dispute resolution processes (including those making use of ADR) include direct cost and time savings for business, which are crucial for their competitiveness. But outcomes have also wider consequences, including market access, increased trust between businesses, confidence that disputes can be rapidly resolved, increased trade flows and foreign investment in competitive European companies. In their turn, these effects will have an effect on the wider economy, including the ease and costs of doing business, legal certainty and investor confidence.

1.3 An evolving policy context

A growing involvement at the EU-level

At the EU level, several initiatives have been taken to support Alternative Dispute Resolution. Such actions are justifiable under the subsidiarity principle, for the cross-border character of many disputes directly and negatively affects the Single Market. The Council and Commission Vienna Action Plan of 1998 for the area of freedom, security and justice, set out the possibility of drawing up models for non-judicial solutions to disputes. The Commission itself recommended in 1998 the use of arbitration for the resolution of consumer to business disputes and later on, in 2001, of mediation.⁶ As a follow-up of the Vienna Action Plan, the European Council urged for the creation by Member States of alternative, extra-judicial procedures to accelerate the resolution of cross-border disputes in its Tampere conclusions in October 1999.

First initiatives on ADR in the EU

The Justice Council then requested the Commission to conduct a consultation on the use of Alternative Dispute Resolution schemes (except those for arbitration) in civil and commercial law matters. Particular emphasis was given to the establishment of basic principles at the EU level providing guarantees for the use of such means. The results of the consultation were published in the Commission Green Paper of April 2002.⁷ In cooperation with some of the stakeholders involved, the European Commission elaborated a European Code of Conduct for Mediators, to which mediators can voluntarily commit. It was presented in a conference on self-regulation of mediation in Brussels on 2 July 2004.

The beginning of the regulation of ADR schemes in the EU

The first EU regulation covering ADR schemes was the Mediation Directive of 2008.⁸ This Directive attempted to take the use of ADR one step further: Member States were required to transpose it by May 2011. The Directive is however limited in scope, as it only covers cross-border disputes between Member States in civil and commercial matters, concerning rights and obligations of which the parties can dispose under the applicable law in their respective countries. The Directive also includes certain obligations for the Member States such as including the enforceability of agreements resulting from mediation, the confidentiality of the process, and the possibility of resorting to judicial or arbitration procedures if it fails. However, it leaves Member States a wide margin of flexibility.

⁶ European Commission, Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes followed up by Recommendation (2001/310/EC)..

⁷ European Commission, Green Paper on alternative dispute resolution in civil and commercial law of 19 April 2002, COM(2002) 196 final.

⁸ Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

A gradual development: other EU Regulations refer to ADR schemes

Directives such as the E-Commerce Directive⁹, the Postal Services Directive¹⁰, and the Markets in Financial Instruments Directive¹¹, encourage Member States to set up ADR schemes. Some legislative frameworks concerning the telecoms sector, the energy sector, consumers and payment services, require the establishment of adequate and effective ADR schemes. Some others take into account the existence of ADR schemes, such as the legal aid Directive¹², which extends legal aid for extra-judicial proceedings in certain circumstances to improve everybody's access to justice, whereas others covering cross-border civil and commercial disputes do not fully include ADR. The Brussels I Regulation for instance excludes from its scope arbitration, exposing thereby arbitral awards to legal challenges that can potentially undermine this ADR scheme¹³.

The current focus extending from consumer to business disputes

Most of the recommendations, strategies, documents and initiatives that have been developed since the Tampere Council have focused on consumer to business disputes. The 2009 Stockholm Programme and its Action Plan affirm for instance that efforts must continue to improve alternative methods of settling disputes, particularly those pertaining to consumer law. So to do the Commission Work Programme 2011 and the Digital Agenda, and particularly the more recent proposals issued on 29 November 2011 by the Commission on a Directive on Alternative Dispute Resolution for Consumers and the Regulations on Online Dispute Resolution. In the meantime, the application of ADR schemes to business to business disputes remains less covered by EU initiatives and legislation. This was noted by the European Parliament in its resolution of 25 October 2011. It argued for the inclusion of this kind of disputes in any new approach adopted at the EU level on ADR and some further legislative actions setting up minimum standards for these schemes including adherence to/agreement on ADR; independence, transparency, effectiveness, fairness, impartiality and confidentiality; effects on limitation and prescription; enforceability of resulting agreements; and qualification of third parties¹⁴.

1.4 Characteristics and definitions

Over the years, different nomenclatures and various criteria of classification have emerged in the field of ADR. Equivalent names have therefore often different meanings or to the contrary, different names have the same meanings¹⁵. Some Member States count large variants of ADR processes¹⁶ with small or large differences while others have two or less. Even a notable difference can be found in each Member State between ADR processes very developed in the literature and ones effectively used in practice. Across Europe, businesses have a choice of ADR processes at their disposal, and the practice and legislation for using these procedures varies extremely across the EU. The most common forms of ADR are mediation and arbitration, but there are also some other forms including adjudication, conciliation, fact finding and minitrials. This study will focus on the most common types of B2B ADR, mediation and arbitration, but will be open to any other types that

⁹ Directive No. 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular Electronic commerce, in the Internal Market.

¹⁰ Directive No. 2008/6/EC of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services.

¹¹ Directive No. 2004/39/EC of 21 April 2004 on markets in financial instruments

¹² Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

¹³ European Commission, Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 December 2010 (Recast), COM (2010) 748 final, p.3.

¹⁴ European Parliament Resolution 2011/2117/ (INI)

¹⁵ The equivalent translation of Mediation and Conciliation have different meanings in some countries but not others.

¹⁶ In some Member States, a varieties of ADR process such as: Mediation, Conciliation, Neutral Evaluation, Mini Trial, Ombudsman, Dispute Review Board, Med-then-Arb, Non-Binding Arbitration, Arbitration, etc..., can be found.

may be practiced in Member States. Specific attention will also be put on Online Dispute Resolution (ODR). Table 1.2 overleaf presents an overview of the main characteristics of these ADR types.

Conflicts are an unavoidable phenomenon part of human relationship that are not solved by a binding decision and so they do not have legal relevance. Many conflicts arise and/or are solved without any outside intervention.

Disputes are those conflicts that are settled in front of an impartial third party – it may be recognised by law with the power of granting a binding decision (judge, arbiter) or another external third party (mediator, conciliator).

ADR processes (or procedures) can be defined as a set of rules that govern the litigants in resolving their disputes with the intervention of a third neutral party. Direct negotiations with or without parties assistance and judicial mediations within the courts are excluded. The main three types of ADR processes have been grouped into three main categories according to outcomes:

Mediation (amicable solution) is an ADR process which is structured, whereby two or more parties attempt to reach a settlement of their dispute with the assistance of a neutral third party (e.g. a mediator) who facilitates a voluntary agreement. The mediation is an agreement and not a binding decision.

Arbitration (imposing a solution) is an ADR process where parties refer their dispute to a neutral third party (e.g. an arbitrator or arbitration board), and they agree to be bound by that decision (the award) they agree to be bound. It is a settlement technique in which the neutral third party reviews the case and imposes a decision that is legally binding for both sides.

ADR providers (or entities, centres, institutions) can be defined as organisations that offer and administer one or more ADR procedure face-to-face or entirely or partially with online tools (ODR). They have been grouped in Figure 1.3 into 6 main categories according to their organisation structure and funding.

Table 1.2 *Main categories of ADR providers*

Main Categories	General description
Court-annexed	Public nature. Within the court or strictly connected to the court. Offers mediation. No recommendation or arbitration. Set-up and fixed running costs are usually financed by public fund. Usually offer the services for free or for a small fee.
Public/State financed	Public nature. Within the State Agency or strictly connected. Offers mediation, recommendation, and arbitration. Set-up and fixed running costs are usually financed by public fund. Usually offer the services for free or for a small fee.
Chamber of Commerce	Semi-Public nature. Within the Chamber of Commerce. Offers mediation, recommendation, and arbitration. Set-up and fixed running costs are usually financed by public fund or funds from business associations. Usually offer the services for a fee.
Professional Associations	Private or Semi-Private nature. Professionally oriented, usually within the BAR (lawyer association) or other professional associations. Offers mediation, recommendation, and arbitration. Set-up and fixed running costs are usually financed by member contributions and fees. Usually offer the services for a fee.
Business or Sector Associations	Private or Semi-Private nature. Business sector oriented (banking, constructions, etc.) or usually within the BAR (lawyer association). Offers mediation and arbitration. Financed by member contributions and fees.

Main Categories	General description
Private	Private nature. For profit or not-for-profit organisations. Offers mediation, recommendation, and arbitration. Set-up and fixed running costs are usually financed by private fund as an investment or a public fund. Offer the services for a fee.

Source: ADR Center

The private ADR providers include independent practitioners and ‘solo’ mediators who provide mediation or arbitration services, often as part of other services (e.g. lawyers, notaries, etc.).

‘ADR schemes’ is a term that we aim not to use in this report, as it causes confusion across Member States and ADR experts¹⁷. The main reason for the confusion lies in the fact that ADR schemes can both refer to processes and to providers.

1.5 Methods and sources for this report

This report is based on multiple sources that have been systematically triangulated. The methods and sources for this report differ for each of the chapters, and are presented below:

Chapter 2: B2B ADR Legal Framework

To collect reliable primary and secondary data on the use of **ADR schemes and their legal framework** in the 27 Member States, our analysis is based upon data collected from national experts. The information collected by the experts is based on:

1. Official statistics, from national statistical offices and/or other relevant statistical bodies;
2. Websites of ADR providers;
3. Additional literature and publications as they are circulating and in use in the Member State concerned;
4. Interviews with relevant actors and their expertise of the legal framework in their own country.

Chapter 3: Existing ADR processes and providers

To collect reliable primary and secondary data on existing **ADR processes and providers** in the 27 Member States, our analysis has been based upon:

1. Data collected from national experts (Country Profiles). The information collected by the experts is based on publically available statistics, interviews with relevant actors, their expertise of the existing ADR processes and providers, and characteristics in their own country;
2. Additional information derived from case studies. Although the case studies are focused on particular providers, the findings can complement parts of the data collected in the country profiles.

Chapter 4: Use of ADR B2B Schemes

To collect reliable primary and secondary data on the **use of ADR schemes in the 27 Member States**, our analysis is based upon:

1. Data collected from national experts (Country Profiles). The information collected by the experts is based on publically available statistics, interviews with relevant actors and their expertise of the use of ADR in B2B in their own country;
2. Additional information deriving from case studies. Even if the case studies are focused on a particular sector, we have found particularly relevant interviewing experts and business

¹⁷ ADR schemes was used in the Term of Reference of this project.

- representatives on their perception of the use of ADR in a certain business. In particular, they are instrumental to the collection of practical examples;
3. UEAPME Questionnaire. The members of UEAPME contributed in providing us with an overview of the sectors where ADR is more used. This contributes to have an overview of the use of ADR in the MS;
 4. Eurobarometer. The data gathered by the questionnaire on Alternative Dispute Resolution provided us with a solid background which has been used to verify and triangulate with other sources.

1.6 Limitations of this report

This study has been carried out in the period March-September 2012, and therefore it was undertaken within a limited timeframe. The study has been on a subject area which is only partially documented, and where data and information are scattered and fragmented across a wide range of actors. This wide variety is partly due to different legal frameworks in each Member States' jurisdiction.

A particular challenge for this study has been to make **use of official statistics** where:

- No reliable and consistent EU-wide data on mediators and arbitrators exist - ADR is not classified as a profession in official statistics;
- In most of the Member States, there is no clear distinction between B2C and B2B ADR providers and processes. Apart from some distinct ADR processes designed exclusively for B2C, almost all ADR providers and processes resolve both B2B and B2C disputes. As a consequence, there are only few data with a clear breakdown between B2C and B2B ADR;
- A distinction between B2B and B2C disputes is rare, especially so when using official statistics on court proceedings, where such a breakdown is rare or non-existent;
- Criteria, classifications, definitions and indicators vary strongly between Member State statistics on this subject.

Furthermore, limitations arise from the partial willingness of respondents to take part in interviews on this subject, due to the following reasons:

1. Overall limited interest from the legal profession in contributing to a study on ADR (this statement will be qualified later in the report);
2. Limited experience of businesses in practicing ADR, especially so from SMEs, and depending on the Member State concerned;
3. Reluctance of businesses to discuss their disputes (often of a confidential nature) with any outside partner;
4. Willingness of interviewees to participate on the basis of anonymity and on the condition that transcripts remain confidential;
5. Some hesitation to take part in an EU-funded study, as this subject is considered by some as a national competence only (comment applicable to UK respondents only).

As participation from ADR experts and practitioners has been satisfactory to good, the study team has been attentive to possible biases in the study findings. It has done its utmost to address these wherever they could occur, however they cannot be fully excluded.

1.7 Structure of this report

The table 1.3 provides an overview of the questions from the Terms of Reference and their coverage in each of the following chapters.

Table 1.3

Confrontation of the report chapters with the Terms of Reference questions (Chapter 5-7 will be part of the Final report).

Chapter	Terms of Reference
Chapter 2: Overview of the B2B Legal Framework (and Country Reports)	<ul style="list-style-type: none"> • Provide an overview of the legal framework that exists in every Member State in relation to ADR (Section IV); • Precise references to any national legislative instruments that have an impact on the ADR procedure in the 27 EU Member States (Section IV).
Chapter 3: Existing ADR schemes and characteristics (and Country Reports)	<ul style="list-style-type: none"> • List and describe existing B2B ADR schemes (including ODR schemes) that deal with B2B disputes (Section I); • Describe their main procedural characteristics (Section I); • Indicate whether these schemes deal with both domestic and/or cross-border disputes (Section I); • Describe who operates and finances these schemes and how much the establishment and continuation of the scheme costs (Section I).
Chapter 4: Use of B2B ADR schemes (and Country Reports)	<ul style="list-style-type: none"> • Calculate the average number of disputes involving EU businesses handled by court procedures and ADR schemes per year (Section II); • Set out the average monetary amount that is in dispute, the average time taken to resolve the dispute and the success rate; • Provide detailed tables and charts on difference in the use of B2B ADR (Section II); • Analyse if there are schemes which are more likely to be used by SMEs (Section II); • If there has been a significant increase or decrease in ADR cases in certain countries or sectors, analyse why that has been the case; • Assess to what extent businesses are aware of the different types of ADR • Estimate the number of cases in which businesses decide to go to court after having failed to resolve a dispute with ADR for cross-border transactions • Estimate the number of cases in which businesses decide to write off a dispute and decide not to go to ADR or court (Section II); • Give for each Member State two real life case examples where ADR has been used successfully and unsuccessfully (including at least one SME) (Section II); • Assess and present the trend for ADR schemes over the last 10 years (Section II).
Chapter 5: Problems encountered by businesses (and Case Studies)	<ul style="list-style-type: none"> • Analyse what are the main reasons for the use of the different ADR schemes by SMEs (Section II); • Provide an in-depth analysis of the problems encountered by business, in particular SMEs in resolving disputes with other businesses (Section III); • Analyse why businesses decide for or against going to court (Section III); • Analyse the reasons why businesses decide not to use ADR (Section III); • Distinguish between the different mechanisms of ADR (Section III); • Analyse why businesses choose one particular method of resolving a dispute over another (Section III).
Chapter 6: Direct costs/savings	<ul style="list-style-type: none"> • Identify all the costs for businesses to resolve a B2B dispute via court procedures and via ADR (Section V); • Include the amount of time needed, the number of employees involved, and monetary costs including lawyers' fees (if any). (Section V); • Distinguish between the different types of schemes used (Section V); • Identify the costs incurred by private or public bodies (Section V); • Estimate the cost savings for businesses and Member States connected with an increase of the number of disputes resolved by ADR schemes and a corresponding decrease of court cases (Section V).
Chapter 7: Secondary effects of increased ADR use	<ul style="list-style-type: none"> • Estimate the cost savings for businesses and Member States connected with an increase of the number of disputes resolved by ADR schemes and a corresponding decrease of court cases (Section V).

2 Overview of the B2B ADR Legal Framework

2.1 Legal Framework Overview

In general, for both mediation and arbitration, legal distinctions between B2C and B2B dispute resolution are not clearly made, although some Member States make such distinctions in the area of legal aid. Legal aid is rarely available for mediation and arbitration generally, and particularly not for B2B mediations or arbitrations. Provisions for ODR are not common.

2.1.1 Mediation legal framework

The majority of the Member States have enacted, or are in the process of enacting, legislation responding to the 2008 Directive. They have taken a variety of approaches, including enacting new legislation to transpose the Directive, changing existing legislation to conform more closely to the Directive, issuing executive or legislative orders or decrees, updating codes of conduct, or using some mixture of these and other approaches. As a consequence, mediation legislation in a number of Member States consists of a number of laws, and there is quite a bit of variation among the States as to how mediation is regulated.

Part of the reason for the variation may be the inherent differences in the legal and other cultures of the States. For some of the States, mediation has long played an established role in dispute resolution; for others, mediation is relatively new although there are existing conciliation schemes). Even in some Member States that have “completed” implementation, the experts and local stakeholders observed that there still will be future amendments, clarifications, and updates.

The Member States have, however, demonstrated a certain amount of consensus in their approach to certain aspects of mediation. Specifically, while the Directive explicitly offered the option of making mediation compulsory, few States have chosen that route. Instead, the strong trend is to retain mediation as a voluntary process, consistent with the historical approach. Italy has opted for mandatory mediation in certain broad areas, and other States, such as France or Slovenia, require attendance at mediation information sessions. A minority of States, while stopping short of mandating mediation, have established incentives for participating in mediation or sanctions for refusal to participate in mediation in good faith or for refusal to participate in a mediation information session. Typically, such incentives and sanctions are financial. Judges frequently have certain responsibilities with regard to suggesting or providing information about mediation to parties already involved in a dispute.

Otherwise, the regulatory schemes of the States reveal a range of approaches. While not required to do so, some States have developed mediation legislation applicable to domestic disputes as well as cross-border disputes as part of implementing the 2008 Directive. In many States, the fee for mediation is not regulated; the approach taken to fee determination where it is regulated varies. Government supervision of mediator quality varies, with some States closely regulating mediator accreditation and training, some States leaving such work to private mediation organizations or bar associations, and some States deferring regulation until mediation practice is more developed. Generally, only mediators who are licensed or accredited in some way—by a court, ministry of justice, government council, bar association, or private organization—are regulated. But training requirements to achieve accreditation or licensure vary.

Provisions imposing a duty for mediators to maintain the confidentiality of information revealed during mediation are also common, although there is variation as to related confidentiality matters, such as whether the obligation extends to others involved in a mediation, and what exceptions, if any, are made to the duty.

The Member States generally provide for the suspension of limitation or prescription periods upon the start of mediation and the reactivation of such periods should mediation end without agreement or only a partial agreement.

Member States generally provide for enforcement of agreements reached as a result of mediation, although the processes used to accomplish enforcement vary. Laws about whether and how States enforce contractual agreements to mediate disputes, however, differ in both content and effect.

2.1.2 Arbitration legal framework

In most Member States, arbitration is governed by an arbitration act, sometimes with accompanying procedural rules or rules for specialized arbitrations. Certain aspects of arbitration, such as the training or monitoring of arbitrators, are generally less closely regulated than in the mediation field. In a number of States, legislation addressing arbitration is significantly older than legislation addressing mediation, and it may not have been updated in recent years. Some States' acts are modelled either on the 1958 New York Convention on Recognition and Enforcement of Foreign Awards or one of the UNCITRAL Model Laws on International Commercial Arbitration (1985 or 2006 amended version), and a number of States are signatories to such conventions.

In most countries, arbitrations may be either administrated or ad hoc. The particular arbitration institution administering the arbitration, or the parties themselves, may have some ability to determine the applicable rules. Usually, the procedure is one of law, rather than equity. In about a quarter of the countries, the agreement to mediate must be in writing.

In certain areas, there is little to no regulation. The fees for arbitration are generally not regulated. Training of arbitrators is not generally required, although individual private arbitration institutions may provide training. Similarly, with the exception of Spain, there is generally no monitoring of arbitrators. In most countries, there is no widespread of arbitration or no information available about its promotion.

With regard to other aspects of arbitration law or regulation, there is a fair amount of variation. In about a quarter of the countries, arbitrations are confidential by law; in others, there is no requirement for confidentiality. In yet others, the parties may agree on confidentiality. While most countries generally do not allow arbitration awards to be challenged on the merits, there are a variety of ways in which the award may be challenged on other grounds. In most countries, awards may be enforced, but the way enforcement happens is varied.

2.2 Status of implementation of the 2008 Eu Directive on Mediation

Country	Status	Mediation Legislation
Austria	Implemented	Act on certain aspects of Cross border Mediation in Civil and Commercial matters in the European Union (the EU Mediation Act).
Belgium	Not formally implemented. Belgium already has legislation that corresponds with the provisions of the Directive to a large extent	Code judiciaire. Mediation provisions were included in 2005 via an amendment to the code.

Country	Status	Mediation Legislation
Bulgaria	Implemented	Mediation Act of 2004, as amended in 2011 implemented the EU Mediation Directive.
Cyprus	Law still in draft	Cyprus Mediation Bill (Draft).
Czech Republic	Implemented	Mediation Act 2002/2012.
Denmark	Opted out	----
Estonia	Implemented	Conciliation Act, 1 January 2010.
Finland	Implemented	Act on Mediation and Confirming Settlements in Courts (394/2011, "the Mediation Act 2011").
France	Implemented	Ordonnance no 2011-1540 and Décret n° 2012-66 du 20 janvier 2012.
Germany	Implemented	German Mediation Act (July 2012).
Greece	Implemented	Law 3898/2010 (Mediation Act).
Hungary	Implemented	Implemented through the combination of pre-existing laws and the addition of some regulations. <ul style="list-style-type: none"> - Act no LV of 2002 on Mediation - Decree No 3 of 2003 (III.13.) of the Minister of Justice on the roll of mediators - Decree No 3 of 2006 (I. 26.) of the Minister of Justice on the administrative fee payable for the registration on the roll of mediators - Decree No 63 of 2009 (XII.17.) of the Minister of Justice and Law Enforcement on the professional qualification and training of mediators - Act No III of 1952 on the Civil Procedure Code - Act No LIII of 1994 on judicial Enforcement.
Ireland, Republic of	Implemented	European Communities (Mediation) Regulations 2011('Mediation Regulations') SI 209/2011.
Italy	Implemented	<ul style="list-style-type: none"> - Law 69/2009 - Legislative Decree 28/2010 - Ministry Decree 180/2010 - Ministry Decree 145/2011
Latvia	Implemented (but a single Mediation Law still in draft)	Latvia implemented the Directive by making amendments to already existing Latvian laws + a single comprehensive law ('the Mediation Law'), not adopted yet.
Lithuania	Implemented	Law on Conciliatory Mediation in Civil Disputes ('the 2008 Law') as amended in 2011 (Mediation Law).
Luxembourg	Implemented	Law of 24 February 2012.
Malta	Implemented	Mediation Act, 2004 as amended by Act IX of 2010.
Poland	Implemented (Poland already had a mediation legislation)	Civil Procedure Code as amended by Law of July 28, 2005.
Portugal	Implemented	Inventory Law No 29/2009, Article 79 amended the Code of Civil Procedure to include 3 articles on mediation.
Romania	Implemented	Mediation Law no 192/2006 amended by Law no 370 of 3 December 2009 on the amendment and completion of Mediation Law, and by Law no 202 of 26 October 2010 on steps for the speeding up of the proceedings.) <ul style="list-style-type: none"> - Civil Procedure Code as amended in 2010
Slovakia	Implemented	Mediation Act no 420/2004 Coll on mediation as amended by Act no 141/2010, and by Act no 136/2010 on services in the internal market and amending the Law of the Slovak National Council.
Slovenia	Implemented	Mediation in Civil and Commercial Matters Act (2008).
Spain	Implemented	Real Decreto—ley 5/2012, dated 5 March 2012 ('RD5/2012') on mediation in civil and commercial matters, implementing the Directive.
Sweden	Implemented	Act on Mediation in Certain Civil and Commercial Disputes 1 (Mediation Act') on 16 June 2010.
The Netherlands	Not implemented yet	The draft law implementing the Directive by making modification of Code of Civil Procedure was adopted by the House of Representatives; however the Senate rejected the bill in July 2012. Currently a private bill for a full Dutch Mediation Act, is being drafted on initiative of MP Van der Steur.
The United Kingdom	Implemented	Cross- Border Mediation (EU Directive) Regulations ('the Cross-Border Regulations') and the Civil Procedure (Amendment) Rules ('the Civil Procedure Amendment Rules').

2.3 Comparison table on Mediation Legal Framework

Table 2.1 Comparison table on Mediation legal framework

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
Austria	<p>Voluntary: always</p> <p>Mandatory: never</p>	Judge may invite (not order) parties to mediation.	<p>Incentives: None</p> <p>Sanctions: None</p>	<p>Regulated: Only mediators registered with the Federal Ministry of Justice.</p>	<p>Max duration: None</p>	<p>Regulated: Fee not regulated.</p>	N/A	<p>Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.</p> <p>Mediators cannot testify in a possible future civil and criminal trial.</p>	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations.	<p>Basic: 220 - 365 hours.</p> <p>Advanced: 50 hours within 5 years.</p> <p>Accredited training entity: institutions registered with the Federal Ministry of Justice.</p>	<p>Entity: Austrian Ministry of Justice.</p>	No provision related to mediation promotion in national legislation.
Belgium	<p>Voluntary: always</p> <p>Mandatory: never</p>	Judge may invite (not order) parties to mediation in all pending and new cases in all	<p>Incentives: None</p> <p>Sanctions: None</p>	<p>Regulated: Only mediators or entities accredited by the Federal</p>	<p>Judicial mediation:</p> <p>Max. Duration: 3 months</p>	<p>Regulated: pro deo fees are regulated.</p>	N/A	<p>Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.</p>	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations.	<p>Basic: 90 hours by an accredited training entity</p>	<p>Entity: Federal Mediation committee within a department of Ministry of</p>	No provision related to mediation promotion in national legislation.

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
		matters (family, civil, commercial).		Government.	Voluntary mediation: Max Duration: None.			Mediators cannot testify in a possible future trial.			Advanced: 18 hours every 2 years.	Justice.	
Bulgaria	Voluntary: always. Mandatory: Never	Judge may refer (not order) parties to mediation in all pending and new cases in civil and commercial matters.	Incentives: financial incentives (refund of half of the stamp duty; 50% refund of the state fee in case of settlement agreement) Sanctions: None	Regulated: Only accredited mediators in a Uniform Register of Mediators kept by the Ministry of Justice.	Max duration: 6 months	Regulated: free in court-annexed schemes.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. Mediators cannot testify in a possible future trial.	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations.	Basic: 60 hours by an accredited training institution. Accredited training entity: Ministry of Justice approved.	Entity: Ministry of Justice.	No provision related to mediation promotion in national legislation.

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
Cyprus (based on Bill under consideration)	Voluntary: Always Mandatory: Never	Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters.	Incentives: None Sanctions: None	Regulated: Only providers accredited by the Cyprus Bar Association or the Chamber of Commerce.	Max duration: 6 months	Regulated: based on the value of the dispute	If no settlement agreement, mediation fails.	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. Mediators cannot testify in a possible future trial.	Agreement has the same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations.	Basic: None	Entity: Ministry of Justice and Public Order.	No provision related to mediation promotion in national legislation.
Czech Republic (based on Mediation Act proposal)	Voluntary: Always Mandatory: Never	Judge may order a 3 hour meeting with the mediator in order to familiarize parties with the process.	Incentives: None Sanctions: If the party rejects to join the meeting ordered by court, it may be denied costs.	Regulated: Only providers accredited by the Ministry of Justice.	Max duration: None	Fee not regulated.	The mediator shall terminate an already commenced mediation if the parties to the conflict did not meet the mediator for more than 1 year.	Unless the parties agree otherwise, the mediator and other persons who helped with the conduct of the mediation, but not the parties, are bound by the duty of confidentiality. Mediator is not bound by the duty of confidentiality before a court.	Agreement has same effect as a court judgement when approved by court or by notary or executory deed.	Mediation can toll the statute of limitations during the whole process of mediation.	Basic: None	Entity: Ministry of Justice. Czech Bar Association monitors mediators who are advocates.	No provision related to mediation promotion in national legislation.
Denmark	Voluntary: Always Mandatory:	Judge may invite (not order) parties to mediation but both	Incentives: None Sanctions:	Regulated: in court-annexed mediation, only	Max duration: None	Regulated: € 950 for 4.4 hours in court-annexed	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot	Agreement in writing has same effect as a court judgement	Court annexed mediation will toll the statute of	Basic: Courses are mandatory for court-annexed	Entity: The Danish Court Administration .	No provision related to mediation promotion in national

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
	Never	litigants have to request the mediation.	None	mediators appointed by the Administration of the Courts.		mediation		be used in court. Mediators cannot testify in a possible future trial.	when approved by court.	limitations.	mediators. Accredited training entity: the Courts of Denmark and the Law Society for court-annexed mediators.	The Register of accredited mediation providers and training entities is available online.	legislation.
Estonia	Voluntary: always Mandatory: When the parties agree in a written agreement	Judge may order parties to mediation if they consider it necessary.	Incentives: None Sanctions: None	Regulated: Only providers accredited by an organisation.	Max duration: None	Regulated: 63.90 EUR to enforce the mediation agreement in court.	If mediation fails, the parties can request a proof of mediation, which can be used at court.	All information presented in a mediation cannot be used in court. Mediators cannot testify in a possible future trial or act as legal counsel/ representative for one of the parties concerning the same dispute.	Agreement has same effect as a court judgement when approved by court or attested by the notary.	Mediation can toll the statute of limitations.	Basic: no compulsory training requirement for mediators.	Entity: the Ministry of Justice supervises attorneys-at-law and notaries.	No provision related to mediation promotion in national legislation.
Finland	Voluntary:	Judge has duty to	Incentives:	Regulated: Only trained	Max duration:	Regulated:	N/A	Confidentiality of proceedings/docu	Agreement in writing has	Mediation can toll the	Advanced: mediation	Entity: The Finnish Bar	No provision related to

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
	Always Mandatory: never	explore possibility that parties could settle dispute. Court may suggest mediation to parties on its own initiative.	None Sanctions: None	judges or members of the bar accredited by Bar Association.	None	Processing fee in court mediation. In mediation under the Mediation Rules of the Bar Association, the mediator charges an hourly fee, split equally between the parties.		ments is assured in out-of-court mediation. Confidentiality of court mediation not guaranteed.	same effect as a court judgement when confirmed by court. Agreement must have been organized as structured, facilitative mediation procedure.	statute of limitations for the duration of mediation procedure.	training module. Accredited training entity: Ministry of Justice and Bar Association	Association supervises the activities of its members.	mediation promotion in national legislation.
France	Voluntary: always Mandatory: some designated High Courts in family law. Labour Law: some matters (harassment)	Judge may invite (not order) parties to go for information at all levels, in ever case.	Incentives: None Sanctions: None	Regulated: Only with knowledge of the subject or field in which conducting mediation.	Max duration: 6 months for judicial mediation.	Regulated: Judge decides the amount of the fees which will be equally paid by each in pending case. In the Court of Appeal with the social chambers, mediation	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations once for a period of 6 months.	Basic: Ombudsman must have training or experience National Federation of Mediation Center: 60. hours Advanced: National Federation of Mediation Center: 300	Entity: National Federation of Mediation Center.	No provision related to mediation promotion in national legislation.

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
						costs € 600.					hours. Accredited training entity: No information available.		
Germany	Voluntary: always Mandatory: never (but see article 15a EGZPO – not restricted to mediation, but mandatory out of court settlement in 8 Laender before litigation)	Where appropriate, the court can suggest to the parties that they pursue dispute resolution proceedings out of court	Incentives: yes, court fee reduction Sanctions: None, at least not formal ones, but courts do have the freedom of imposing non-formal sanctions e.g. longer waiting times for scheduling a court hearing	No information available.	average one to 10 sessions (2 to 20 hours)	Fee not generally regulated, only for lawyers as mediators; fees usually on an hourly basis	No information available.	Mediation law Article 4 protects confidentiality for mediations	Enforcement can be reached the same way as for other private contracts too if parties wish to do so.	In BGB – German Civil Code Article 203 and 204 give a suspension of limitation also during mediation	Will be stated in a new regulation - Accredited training entity: private organizations like BMWA, BAFM, and BM.	Entity: None so far, probably it will be a certification institution which will do some monitoring, too.	Mediation law Article 2 and 3 stipulate intensive information duties for mediators
Greece	Voluntary: always	Judge may invite (not order) parties to mediation in all pending	Incentives: None Sanctions:	Not regulated.	Max duration: 6 months	Fee not regulated.	No proposal made by the mediator if mediation	Unless the parties agree otherwise, all information presented in a mediation cannot	Agreement has same effect as a court judgement when approved	Mediation can toll the statute of limitations.	Basic: 40 hours. Advanced: 10 hours	Entity: None.	The Ministry of Justice takes necessary measures to ensure by all

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
	Mandatory: never	and new cases in civil and commercial matters.	None				fails.	be used in court. Mediators cannot testify in a possible future trial.	by court.		every 2 years. Accredited training entity: the Ministry of Justice and the Mediators Accreditation Commission.		available means, especially via Internet, the access to any information.
Hungary	Voluntary: always Mandatory: never	Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters.	Incentives: Court costs reduced by the mediator's fees, including value added tax, not to exceed 50,000 forints. However, the amount of duty payable may not be less than 50 per cent of the normal rate of duty.	Regulated: Only mediators accredited by the Ministry of Administration and Justice.	Max duration: None.	Fee not regulated.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court or arbitration.	Agreement has the same effect as a civil law contract or court judgement when approved by court.	Mediation can toll the statute of limitations.	Basic: 60 hours	Entity: Ministry of Administration and Justice.	No provision related to mediation promotion in national legislation.

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
			<p>Sanctions:</p> <p>either of the parties brings the case before the court in spite of having reached an agreement may be ordered to cover all costs of the proceedings irrespective of its outcome.</p>										
Ireland	<p>Voluntary: always</p> <p>Mandatory: never</p>	Judge may invite (not order) the parties to consider mediation in civil and commercial cases.	<p>Incentives: None</p> <p>Sanctions: for parties who do not participate in good faith where mediation would have had a reasonable</p>	<p>Regulated:</p> <p>Only mediator from a particular entity for certain mediations coming from courts.</p>	<p>Max duration: None</p>	Fee not regulated.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.	Agreement has same effect as a contract or court judgement when approved by court.	Cross-border mediation can toll the statute of limitations once.	<p>Basic: None</p> <p>Accredited training entity: Mediators Institute of Ireland</p>	<p>Entity: Ministry of Justice.</p>	No provision related to mediation promotion in national legislation.

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
			prospect of success.										
Italy	<p>Voluntary: always.</p> <p>Mandatory: for some civil and commercial disputes.</p>	Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters.	<p>Incentives: financial incentives (tax credit, exemption from stamp tax).</p> <p>Sanctions: for parties who do not participate in good faith even if the mediation is voluntary.</p>	<p>Regulated: Only providers and mediators accredited by the Ministry of Justice.</p>	<p>Max duration: 4 months.</p>	<p>Regulated: max fees based on the value of the dispute per procedure (regardless of the number of hours or meetings). In case of success, the fee could be increased by 25%.</p>	If mediation fails, the mediator could make a proposal even in the absence of one party. The judge can evaluate the mediator's proposal in order to sanction the party that did not accept it.	<p>Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.</p> <p>Mediators cannot testify in a possible future trial.</p>	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations once for a period of 4 months.	<p>Basic: 50 hrs.</p> <p>Advanced: 18 hrs. every 2 yrs.</p> <p>Accredited training entity: Ministry of Justice.</p>	<p>Entity: A Department within the Ministry of Justice. The Register of accredited providers and training entities is available on line.</p>	The Ministry of Justice finalized a fund for the promotion of mediation with TV commercials and on the internet.

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
Latvia	<p>Voluntary: Always</p> <p>Mandatory: Never</p>	<p>Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters.</p> <p>Judge may invite (not order) parties to mediation in all pre-trial criminal procedure only if both parties take first step.</p>	<p>Incentives: None</p> <p>Sanctions: None</p>	<p>Regulated: Only licensed mediators.</p>	<p>Max duration: none</p>	<p>Fee not regulated.</p>	<p>N/A</p>	<p>Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.</p> <p>Mediators cannot testify in a possible future trial.</p>	<p>Agreement has same effect as a court judgement when approved by court or public notary.</p>	<p>Mediation can toll the statute of limitations.</p>	<p>Basic: None</p>	<p>Entity: Association “Mediation Council” on behalf of the Ministry of Justice (only once the Draft Mediation Law will come into force) .</p>	<p>No provision related to mediation promotion in national legislation.</p>
Lithuania	<p>Voluntary: Always</p> <p>Mandatory: Possibility of mandatory referral in some international</p>	<p>Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial</p>	<p>Incentives: None</p> <p>Sanctions: None</p>	<p>Regulated: In judicial mediation, only judges, assistants to judges, or other people possessing special</p>	<p>Max duration: None</p>	<p>Fee not regulated.</p>	<p>N/A</p>	<p>Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.</p>	<p>Agreement has same effect as a court judgement when approved by court.</p>	<p>Mediation can toll the statute of limitations once.</p>	<p>Basic: None (except the requirements to complete mediation courses for judicial mediators or accredited training</p>	<p>Entity: None. Judicial mediators list and requirements for enrollment are available on the National</p>	<p>No provision related to mediation promotion in national legislation.</p>

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
	civil disputes.	matters.		training and accredited by the Judicial Council.							entities.	Courts Administration website.	
Luxembourg	Voluntary: Always Mandatory: Never	Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters.	No information available.	Regulated: In judicial mediation, only mediators accredited by the Ministry of Justice	Max duration: 3 months	No information available.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. Mediators cannot testify in a possible future trial.	Enforcing agreements by at least one party requesting judicial approval from the district court.	Mediation can toll the statute of limitations.	Basic: None	Entity: Ministry of Justice	No provision related to mediation promotion in national legislation
Malta	Voluntary: always Mandatory: never	Mediation may commence following an order by a court or other adjudicating authority. This court referral provision applies equally to cross-border	Incentives: None Sanctions: for parties who do not participate in good faith even if the mediation is voluntary.	Regulated	Max duration: None	Fee is regulated.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.	Agreements resulting from mediation are enforceable provided all parties agree.	Mediation can toll the statute of limitations once.	Basic: None	Entity: Malta Mediation Centre	No provision related to mediation promotion in national legislation

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
		disputes.											
Poland	Voluntary: always Mandatory: never	Judge may order parties to mediation in all pending and new cases in civil matters with the parties' agreement.	Incentives: refund of ¼ of the court fee if agreement signed. Sanctions: court may refrain from applying "loser pays the costs" principle if the winning party refused to take part in mediation, even though it had agreed before.	Regulated: Only providers recommended by non-governmental organisations and universities to regional courts.	Max duration: 30 days	Regulated: 1% of the value of the case (no more than 1.000 PLN (€ 250) for court ordered civil mediation. 60 PLN (€ 15) for first mediation meeting and 25 PLN for the following in non monetary value civil cases	N/A	Mediator cannot testify in possible future trial.	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations as long as the mediation proceeding is ongoing.	Basic: None	Entity: None.	No provision related to mediation promotion in national legislation
Portugal	Voluntary: always Mandatory: never	Judge may invite (not order) parties to mediation in all pending and new cases in civil and	Incentives: None Sanctions: None	Regulated: Only in the small claims courts by mediators part of an	Max duration in public mediation systems - up to 60 days	Fee not regulated.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.	Agreement has same effect as a contract or court judgement when approved by court.	Mediation can toll the statute of limitations once in public mediation	Basic: 40 hours Advanced: 140 hours in specialized	Entity: Direcção-Geral de Política da Justiça (DGPJ)	No provision related to mediation promotion in national legislation

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
		commercial matters.		official list.						system.	field.		
Romania	Voluntary: always Mandatory: never	Judicial and arbitral bodies may invite (not order) parties to information session about mediation in all pending and new cases in civil and commercial matters.	Incentives: financial incentives (full reimbursement of judicial stamp charges). Sanctions: for parties who do not participate in the information session.	Regulated: Only providers accredited by the Romanian Mediation Council.	Max duration: in criminal mediation: 3 months	Fee not regulated.	Mediator has the right to refuse to take a certain case, with the obligation to recommend another mediator.	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.	Agreement has same effect as a court judgement when approved by court or notary public.	Mediation can toll the statute of limitations until the mediation procedure is closed.	Basic: 80 hours within 14 days Advanced: 20 hours Accredited training entity: Romanian Mediation Council.	Entity: Romanian Mediation Council.	No provision related to mediation promotion in national legislation
Slovakia	Voluntary: always Mandatory: never		Incentives: 90% of the paid fee if settlement at beginning of proceeding. 50% of the paid fee if settlement after beginning of	Regulated: Only providers registered in the register of mediators.	Max duration: None	Fee not regulated.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court.	Agreement has same effect as a court judgement when approved by court, arbitration body or notary public.	Mediation cannot toll the statute of limitations.	Basic: 100 hours (except natural persons holding law degree) Advanced: seminar at	Entity: Ministry of Justice.	No provision related to mediation promotion in national legislation

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
			proceeding. 30% of the paid fee if settlement of only part of the dispute. Sanctions: None								least every two years		
Slovenia	Voluntary: always Mandatory: Never	Judge may invite (or order after information session) parties to mediation in all pending and new cases in civil and commercial matters.	Incentives: First 3 hours free in civil and family litigation Sanctions: for parties who do not participate in good faith	Regulated: Only accredited mediators in each court	Max duration: three months	Regulated: Hourly based and increased in case of settlement for fixed amount regarding whether it is a family, civil or commercial dispute.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. Mediators, parties and any third person cannot testify in a possible future trial or arbitration.	Agreement has same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations.	Basic: 40 hours Advanced: 16 hours every year	Entity: Courts and ADR Council	No provision related to mediation promotion in national legislation
Spain	Voluntary: always Mandatory:	Judge may invite (not order) parties to mediation in all pending and new	Incentives: none Sanctions:	Regulated: Only public or private entities and corporations	Max duration: None	Fee not regulated.	If the amount of the dispute is 600 Eur or less, parties are	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court	Agreement has same effect as a court judgement when approved	Mediation can toll the statute of limitations.	Mediators must have specific training in mediation prior to	Entity: Ministry of Justice.	No provision related to mediation promotion in national

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
	never	cases in civil and commercial matters.	none	of public law accredited by the Ministry of Justice.			obliged to use electronic means.	or arbitration procedure.	by court.		providing mediation services (details of this training to be determined in a future law).		legislation
Sweden	Voluntary: always Mandatory: never	Judge is obliged to examine the possibilities for settlement between the parties. Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters.	Incentives: losing party will reimburse the winning party for its costs should the settlement attempt fail. Sanctions: none	Regulated: Only judges or expert or any lawyer/lay persons with specific professional knowledge relevant to the dispute.	Max duration: two months in a mediation administered by the SCC.	Regulated: <i>Special mediation:</i> parties are jointly and severally liable for paying the mediator and any other costs. <i>Private mediation:</i> max fees based on the value of the dispute.	N/A	<i>Special mediation:</i> Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. <i>Private mediation:</i> Unless the parties agree otherwise, all information presented in a mediation cannot be used in court or arbitration. Mediators cannot testify in a	Agreement has the same effect as a court judgement when approved by court.	Mediation can toll the statute of limitations for a period of one month after the termination of the mediation. Not applicable to court-annexed mediations.	Basic: None	Entity: none	No provision related to mediation promotion in national legislation

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
								possible future trial or arbitration.					
The Netherlands (based on Bill under consideration)	Voluntary: always Mandatory: never	Judge may invite (not order) parties to mediate in all pending and new cases in all cases.	Incentives: none Sanctions: none	Regulated: Only mediators of the list of the Legal Aid Board (registered at the Netherlands Mediation Institute and fulfil extra criteria set by the Ministry of Justice).	Max duration: No information available.	Fee not regulated.	N/A	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. Mediators cannot testify in a possible future trial.	Agreement has same effects as a court judgement or notarial deed when approved by court.	Mediation can toll the statute of limitations until the end of mediation.	Basic: minimum of 18 day of at least 3 hours per day. Accredited training entity: The Netherlands Mediation Institute.	Entity: The Netherlands Mediation Institute provides a register.	No provision related to mediation promotion in national legislation
UK	Voluntary: always Mandatory: MOJ are seeking opt-out in Small Claims cases in 2012.	Judge may invite (not order) parties to mediation in all pending and new cases in civil and commercial matters. Mandatory mediation information	Incentives: none Sanctions: for parties who do not consider or participate in mediation.	Regulated: Only providers accredited by the Civil Mediation Council. Smalls claims court mediators are civil service employees and not	Max duration: none	Regulated: Free in small claims cases – up to 2 hours telephone service. Fast track – agreed fee schedule with MOJ. Over	Mediator has no further role in mediation if agreement not reached.	Unless the parties agree otherwise, all information presented in a mediation cannot be used in court. Mediators cannot testify in a possible future trial.	Agreement has the same effect as a court judgement when approved by court.	Mediation cannot toll the statute of limitations.	Basic: 40 hours plus assessment plus direct case experience. Advanced: Annual	Entity: The Civil Mediation Council.	No provision related to mediation promotion in national legislation

Country	Recourse to mediation			Mediation procedure				Relation with the civil procedure			Ensuring quality		Ensuring information
	By law	By court	Incentives or sanctions	Entity or mediator	Duration	Fee	Other	Confidentiality	Enforcement	Statute of limitation	Required Training	Monitoring	
		and assessment sessions for family matters from April 2011.		connected to providers.		50,000 GBP private rates as agreed with parties.					Accredited training entity: accredited by the Civil Mediation Council (CMC).		

2.4 Comparison table on Arbitration Legal Framework

Table 2.2 Comparison table on Arbitration legal framework

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
Austria	Ad hoc or administrated.	Law	Fee not regulated	The Austrian Code of Civil Procedure does not distinguish between domestic and international arbitration.	No confidentiality	Domestic and foreign awards are enforceable if they comply with the formal requirements of the Austrian Enforcement Act. Austria has also ratified the NYC 1958 and the European Convention on International Commercial Arbitration 1961.	Can be challenged if the conditions of section 611 CCP are fulfilled.	No provision regarding the qualification of arbitrators.	No monitoring.	No provision related to arbitration promotion in national legislation.
Belgium	Ad hoc or under the auspices of arbitral institutions	In an institutional arbitration, the procedure will be determined by the arbitration rules of the relevant	Fee not regulated	N/A	The deliberations of the arbitral tribunal are confidential.	The arbitration award can be made enforceable by the Court . Enforcement of international arbitration awards follows the rule of the New-York	An appeal against an award may only be made if the parties have expressly provided for such possibility in the arbitration	No Training.	There exists no protection of the arbitrator profession. The quality of the arbitrator is often attested by its accreditation	No provision related to arbitration promotion in national legislation.

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
		institution such as CEPANI.				Convention.	agreement and provided that such appeal is to be submitted to arbitration		by an arbitration centre.	
Bulgaria	Administered (regulated by law) or ad hoc	Law and commercial customs	Fee not regulated	N/A	Confidentiality regulated only in the Rules of the arbitration courts.	Upon request of the interested party, the Sofia City Court shall issue a writ of execution. The enforcement of awards in foreign jurisdiction is possible by 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.	May be set aside by the Supreme Court of Cassation on limited grounds.	There is no required training or monitoring entity. The Bulgarian Chamber of Commerce and Industry is the main institution providing trainings for arbitrators.	No monitoring.	No provision related to arbitration promotion in national legislation.
Cyprus	Majority ad hoc.	Mainly Law.	Fee regulated only for the Cyprus Scientific and Technical Chamber.	N/A	No confidentiality but contracts frequently include provisions.	Enforced by application to one of the district courts.	The grounds for challenge are limited for both domestic and international arbitrations.	Training is not required but many arbitrators are trained by the Chartered	No monitoring.	No provision related to arbitration promotion in national legislation.

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
								Institute of Arbitrators.		
Czech Republic	Administrated or ad hoc.	Mainly law but arbitrator may decide according to equity if the parties expressly authorize.	Fee not regulated	Consumer disputes are subject to stricter provisions.	Confidential.	Enforceable after delivery to the parties.	May be challenged in court under certain conditions stipulated by law.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Denmark	Administrated or ad hoc.	Danish or foreign law	Fee not regulated	N/A	Parties can decide on confidentiality.	Enforcement has to be made clear in the sentence.	Challenged only for formal reasons.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Estonia	Both- ad hoc and administrated	Based on law.	Fees are not regulated.	An arbitral agreement must be in writing unless parties agree to the resolution of the dispute by an arbitral tribunal.	Confidential.	The court has to recognize the decision of the arbitration court and declare it to be subject to enforcement unless the arbitral court is a permanent arbitral tribunal.	The award can be challenged in the court if the formalities have not been followed properly or on other occasions prescribed by law. The decision cannot be challenged	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
							on the merits.			
Finland	Both administrated or ad hoc.	The parties to arbitral proceedings have the right to agree upon the procedural rules. Tribunal shall base its decision on the applicable rules of law.	Parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for their work and expenses. The arbitral tribunal may also order a party to compensate the other party for his normal legal costs.	Agreement must be in writing.	Confidentiality not regulated	An application for the enforcement of an arbitral award, submitted to the court of first instance, shall be accompanied by the original arbitration agreement and the original arbitral award.	The court may refuse an application only if it finds that the award is null and void or if the arbitral award has been set aside by a Court.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
France	Administrated or ad hoc.	Law (unless decide on equity)	Fees are not regulated.	N/A	Confidentiality	The award rendered by the arbitral tribunal can be enforced.	The award may be challenged only if the parties decide	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Germany	Ad hoc or administrated.	Law.	Fee regulated by statute.	N/A	No information available.	Domestic: declared enforceable by the	The jurisdiction to decide challenges to awards lies with	No training.	No monitoring	No provision related to arbitration promotion in

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
						German courts. Foreign: governed by the New York Convention.	the Higher Regional Court (OLG) designated in the arbitration agreement, or failing such agreement, the OLG in whose district the seat of arbitration is situated.			national legislation.
Greece	Ad hoc is predominant.	Law and the international commercial arbitration	Fee regulated by statute	N/A	Confidentiality not regulated	Article 904.2 b & 903 CCivP. Article 35 law 2735/1999. The award has the same effect as a court judgement.	Under Article 897 et seq CCivP. Article 34 law 2735/1999 The award is not subjected to an appeal unless otherwise agreed in the arbitration agreement.	No training (experience and knowledge are the main criteria).	No monitoring.	No provision related to arbitration promotion in national legislation.
Hungary	Both ad-hoc and permanent	Law and the special rules of proceedings	Fee not regulated	N/A	The arbitration proceeding is not public unless	The award has the same effect as a	The award may be challenged only in a few	No training.	No monitoring.	No provision related to arbitration

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
	court of arbitration.	of the permanent arbitration institutions.			award is challenged by either party.	court judgement.	cases, and never on the merits.			promotion in national legislation
Ireland	Ad hoc or administered.	Law	Fee not regulated	N/A	Confidentiality not regulated.	Arbitral awards are enforced in the same manner as a judgment or order of the Court with the same effect The procedure for enforcing an award: originating notice of motion grounded upon an affidavit.	Limited grounds of challenge exclude a challenge on the merits of the award.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation
Italy	Administrated or ad hoc.	Most based on Italian law.	Fee not regulated	To be enforceable, an agreement to refer disputes to arbitration must be in writing.	Confidentiality not regulated.	The award can be enforced by the court, provided that it complies with formal requirements.	The award can be challenged only in few cases and never on the merits.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Latvia	No information available.	Civil procedure Law	Fee not regulated	To be enforceable, an agreement to refer disputes to arbitration must be in writing.	Confidential	The award is obligatory. Writ of execution of the arbitration award is issued by national district	No challenge.	No training.	No monitoring.	No provision related to arbitration promotion in national

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
						courts.				legislation
Lithuania	Both administrated and ad hoc.	Law on Commercial Arbitration and procedural rules adopted by particular arbitration institutions.	Fee not regulated	N/A	Confidential	The award can be enforced by the court, provided that it complies with formal requirements and is adopted in accordance with legal regulation.	Award can be challenged at the Court of Appeal on the grounds embodied in the Law on Commercial Arbitration, except on the merits.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation
Luxembourg	Administrated or ad hoc	Procedure is according normal rules applicable to court proceedings	Fee is not regulated	N/A	No information available.	An arbitral award must be made enforceable by an enforcement order of the chairman of the district court in whose jurisdiction the award has been rendered.	No information available.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Malta	Administrated or ad hoc	No information available.	Fee not regulated.	N/A	The law does not establish the confidentiality of arbitral proceedings	Agreements are enforceable unless contrary to national law	No provision for an appeal mechanism against arbitral awards.	No training	Malta Arbitration Center (MAC)	No provision related to arbitration promotion in national legislation.

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
Poland	Administrated or ad hoc.	The procedure is according to both law and equity	Fee is not regulated	N/A	The law does not establish the confidentiality of arbitral proceedings	The court must recognise the award and grant an exequatur declaring the award to be enforceable	The award can be challenged only under limited grounds, consistent with UNCITRAL Model Law.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Portugal	Both institutional or ad hoc.	Generally, Portuguese law.	Fee are oftentimes calculated with regards to the value in dispute, but may vary in an ad-hoc arbitration.	To be enforceable, an agreement to refer disputes to arbitration must be in writing.	Confidential	The award can be enforced by the court, provided that it complies with formal requirements.	The award can be challenged only under limited grounds, and may be challenged on the merits except if expressly provided otherwise by the parties.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation
Romania	Both institutional or ad hoc.	Usually, the arbitration award is based on the law that applies to the contract between parties.	The fee is a registration tax of € 150 and an arbitration fee in relation with the claim matter value, determinate by the Court of	N/A	Confidential	Arbitration awards are final and mandatory for the parties. On the parties request, the arbitration award can be enforced by law.	The Civil Procedure Code enumerates the grounds on which an arbitral award may be challenged.	No training.	Entity: Court of Arbitration College.	No provision related to arbitration promotion in national legislation

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
			Arbitration Secretarial Office. In domestic arbitration, fees include also the arbitrators' fees.							
Slovakia	Both institutional or ad hoc.	Most based on the law (Slovakian Arbitration Act)	Fee not regulated.	An arbitration agreement must be in writing in order to be valid	Confidential	A binding arbitration agreement has the effect that the courts shall have no jurisdiction to decide the dispute unless such matter is determined otherwise by the arbitral tribunal.	The award can be challenged if the arbitration judgement opposes law.	No training.	No monitoring	No provision related to arbitration promotion in national legislation.
Slovenia	Either administrated or ad hoc.	Most can be based on the law.	Fee not regulated.	To be enforceable, an agreement to refer disputes to arbitration must be in writing.	Confidential only if agreed by the parties	The award can be enforced by the court, provided that it complies with formal requirements.	The award can be challenged only in few cases and never on the merits.	No training.	No monitoring.	No provision related to arbitration promotion in national legislation.
Spain	No information	Based on law	Fees are not	N/A	Confidential	Forced execution of arbitration	Action for annulment of	No training.	Entity: Civil Court and	No provision related to

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
	available	and equity	regulated			award or resolutions will have competence the Court of First Instance of the place where the decision has taken place.	the award shall be brought to the Civil Court and Criminal Court of Justice of the Autonomous Community where it was made.		Criminal Court of Justice of the Autonomous Community where the arbitration takes place.	arbitration promotion in national legislation.
Sweden	Both institutional or ad hoc.	Law.	Fee not regulated.	N/A	Confidentiality provided under institutional rules and Rules of Conduct of the Swedish Bar Association, unless where it is necessary to challenge an award.	The award can be enforced by the court, provided that it complies with formal requirements.	The award can be challenged only in few cases and never on the merits.	No training. However, in practice, the SCC Mediation Institute provides training.	No monitoring.	No provision related to arbitration promotion in national legislation.
The Netherlands	No information available	Law	Fee not regulated.	N/A	Confidential only if agreed by the parties	Enforcement possible after the judge of the court where the judgment was filed has granted enforcement.	An appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have	No training	No monitoring	No provision related to arbitration promotion in national legislation.

Country	Arbitration procedure				Relation to civil procedure			Ensuring quality		Ensuring Information
	Ad hoc or administrated	Law or equity	Fee	Other	Confidentiality	Enforcement of the award	Challenge of the award	Training for arbitrators	Monitoring	
							agreed thereto.			
UK	Both institutional or ad hoc.	Law	Fee not regulated.	N/A	No information available	Enforceable if conducted in accordance with the Arbitration Act 1996.	Challenged only in specific circumstances and never on the merits	Training depends on institute.	No monitoring.	No provision related to arbitration promotion in national legislation.

2.5 ADR legal framework in Member States

2.5.1 Austria

Trends for ADR

Mediation: The most significant changes in the law in last ten years have been the Mediation Act of 2004, which has significantly contributed to the recognition and establishment of mediation in Austria, and the transposition of the Directive through the act in 2011.

Arbitration: Arbitration became the preferred method of resolving international disputes in the second half of the twentieth century. Change is planned for arbitration law through efforts to more fully implement the UNCITRAL Model Law in 2012.

Key Mediation Legislation: Mediation is governed by the Mediation Act (2004), the Mediation Training Decree (2004), and the Federal Law on Cross Border Mediation in Civil and Commercial Matters (2011), the last of which implemented the 2008 Directive and governs only cross-border mediations.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation. The law provides for no sanctions or incentives.

Mediation Procedure: Mediators must be registered in the list of the Federal Ministry of Justice. The maximum duration and fee for mediations are not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, information presented in a mediation process cannot be used in court. Mediators cannot testify in a possible future civil or criminal trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Recourse to mediation may suspend the statute of limitations, therefore if a mediation procedure is in place all the terms of the judgment can be suspended.

Ensuring Quality Training entities must be registered with the Federal Ministry of Justice, and the Ministry also monitors mediators. Basic required training, varies from 220-365 hours. Advanced training is 50 hours within 5 years.

Ensuring Information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Austrian Code of Civil Procedure (CCP). In the most recent amendment of the CCP, in July of 2006, the UNICITRAL Model law was almost fully implemented.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is according to law. Fees are not regulated. The CCP does not distinguish between domestic and international arbitration.

Relation to Civil Procedure: Arbitration is not confidential. Domestic and foreign awards are enforceable if they comply with the formal requirements of the Austrian Enforcement Act. Austria has also ratified the NYC 1958 and the European Convention on International Commercial Arbitration (1961). Awards can be challenged if the conditions of section 611 of the CCP are fulfilled.

Ensuring Quality: There is no training required nor there is a monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.2 Belgium

Trends for ADR

Mediation: Mediation in civil and commercial matters was regulated for the first time in February 2005. The adoption of the mediation directive did not require further adaptation of the legislation.

Arbitration: There has been no evolution of the legislation applicable to arbitration during the past 10 years.

Key Mediation Legislation: Belgium has not specifically implemented the 2008 Directive; it instead regulates mediation through its general code of civil procedure: the Law of February 21st, 2005 pertains to all types of individual disputes (family, civil, commercial and social). There are also specialized laws for specific types of mediation. The Law of February 10th, 1994 pertains to victim-offender mediation. The Law of February 19th, 2001 pertains to Family mediation.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in all matters (family, civil, commercial). The law provides for no sanctions or incentives.

Mediation Procedure: Mediators do not have to be accredited by the Federal Government, but homologation may require that the mediator was accredited. Judicial mediation has a maximum duration of three months; voluntary mediation has no maximum duration. Pro deo fees are regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, information presented in a mediation process cannot be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Recourse to mediation may suspend the statute of limitations, therefore if a mediation procedure is in place all the terms of the judgment can be suspended.

Ensuring Quality: The Federal Mediation committee, which is within a department of the Ministry of Justice, monitors mediators. There is no information available about accrediting training entities. For required training, basic training is 90 hours by an accredited training entity. Advanced training is 18 hours every 2 years.

Ensuring Information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation:

Arbitration Procedure: Arbitration in Belgium may be conducted on an ad hoc basis or under the auspices of arbitral institutions. There is no specific provision in Belgian arbitration law which deals with the issue of arbitrators' fees and expenses. It is, therefore, up to the parties to determine in their arbitration agreement how the fees and expenses will be advanced by and finally allocated between the parties. If the arbitration agreement does not address this issue, it is generally accepted that the arbitrators have the power to determine the amount of their fees as well as the party or parties who will finally bear them. In practice, the general rule is that "costs follow the

event" (i.e. the losing party pays). In arbitrations conducted under the rules of an arbitral institution, the matter will generally be dealt with by the rules of the relevant arbitral institution.

Relation to Civil Procedure: The arbitration award can be enforced by the court. Enforcement of international arbitration awards follows the rule of the New York Convention.

Ensuring Quality: There exists no protection of the arbitrator profession. The quality of the arbitrator is often attested by its accreditation by an arbitration centre.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.3 Bulgaria

Trends for ADR

Mediation: In the last ten years legislation has played a significant role in increasing the practical implementation of mediation, including the adoption of the Mediation Act to transpose the 2008 Directive, some changes to the Civil Procedure Code that helped clarify the relationship between mediation and court proceedings, and Ordinance No 2 of 15 March 2007 on the implementation of Article 8 of the Mediation Act, which contributed to the quality of mediation and mediators by setting minimum standards for mediation training and requirements for certification of mediators and training institutions.

Arbitration: In addition, this period saw the most recent amendments to the International Commercial Arbitration Act, in 2007.

Key Mediation Legislation: **Mediation Act** (Promulgated, State Gazette No. 110/17.12.2004, last amended and supplemented, SG No. 27/1.04.2011 (The main legislative act governing mediation adopted by the Parliament); **Ordinance No 2 of 15 March 2007** (Promulgated, State Gazette No. 26/27.03.2007, last amended, SG No. 29/ 8 April 2011) (Statutory instrument on the implementation of Article 8 of the Mediation Act; **Code of Civil Procedure**, (Published, State Gazette No. 59/20.07.2007, effective 1.03.2008, last amended, SG No.5/14 January 2011) (Rules on referral to mediation).

Recourse to Mediation: Mediation is always voluntary, but a judge may refer the parties to mediation in all pending and new cases in civil and commercial matters. The law provides for no sanctions, but offers financial incentives in the form of 50% of the fee paid by the plaintiff in the case a settlement agreement is reached.

Mediation Procedure: Mediators must be accredited and listed in the Uniform Register of Mediators kept by the Ministry of Justice. The maximum duration for mediations is six months. There is no fee for court-annexed mediations.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations.

Ensuring Quality: The Ministry of Justice is the mediator monitoring entity and accreditor for mediation training entities. For required training, basic training is 60 hours by an accredited training institute. Advanced non-mandatory training is 30 hours.

Ensuring Information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the International Commercial Arbitration Act (1988, last amended 2007), which governs both international and domestic arbitrations.

Arbitration Procedure: Arbitration can be ad hoc or administrated (regulated by law). The procedure is according to law and commercial customs. Fees are not regulated.

Relation to Civil Procedure: Confidentiality is regulated only in the rules of the arbitration courts. Hearings are generally closed to the public. Upon request of the interested party, the Sofia City Court issues a writ of execution to enforce an award. Enforcement of civil awards in foreign jurisdictions is possible because Bulgaria is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Awards can be set aside by the Supreme Court of Cassation, on limited grounds.

Ensuring Quality: There is no required training or monitoring entity. The Bulgarian Chamber of Commerce and Industry is the main institution providing trainings for arbitrators.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.4 Cyprus

Trends for ADR

Mediation: A law to comply with the directive is currently in development. There has not previously been a mediation law.

Arbitration: The Arbitration Law is viewed by most practitioners as in need of updating because court powers under the Law often fall short of meeting the demands of modern arbitration practice. In addition, the Law does not sufficiently address the powers of the arbitrator or the conduct of the reference. However, Cyprus's International Commercial Arbitration Law is currently seen as making Cyprus a favourable and user-friendly environment for international arbitrations.

Key Mediation Legislation: A draft bill to comply with the 2008 Directive is currently in development, and the information provided is based on that bill.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. The law provides for no sanctions or incentives.

Mediation Procedure: Mediations can only be administered by providers accredited by the Cyprus Bar Association or the Chamber of Commerce. The maximum duration for mediations is six months. The fee is based on the value of the dispute. If no settlement agreement is reached, the mediation fails.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations.

Ensuring Quality: The Ministry of Justice and Public Order is the monitoring entity for mediators. There is no required training for mediators.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Domestic arbitration is governed by the Arbitration Law (1944). International commercial arbitration is governed by the International Commercial Arbitration Law of 1987, which was closely modelled on the UNCITRAL Model Law on International Commercial Arbitration (1985). A more recent law, the Cyprus Scientific and Technical Chamber Law of 1990, governs arbitrations administered by the Chamber in construction and engineering disputes.

Arbitration Procedure: Most arbitration is ad hoc and mainly according to law. The fee is regulated only for the Cyprus Scientific and Technical Chamber.

Relation to Civil Procedure: There is no mandatory confidentiality, but contracts frequently include confidentiality provisions. Enforcement of an award is made by application to one of the district courts. The grounds for challenge are limited for both domestic and international arbitrations.

Ensuring Quality: Training is not required but many arbitrators are trained by the Chartered Institute of Arbitrators. There is no monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.5 Czech Republic

Trends for ADR

Mediation: The Mediation Act was adopted by the Parliament on 2.5.2012. It is the first legislation on mediation in the Czech Republic.

Arbitration: The Act on Arbitration Proceedings and Enforcement of Arbitration Awards is used primarily for B2B disputes of both domestic and international natures, as well as for consumer disputes. In April 2012, the Act was amended to protect the weaker party in consumer disputes by tightening up the requirements for the requisites of the arbitration clause and the requirements for a person who intends to become an arbitrator.

Key Mediation Legislation: Mediation is governed by the Mediation Act, adopted on 2 May 2012. Certain provisions of the Code on Civil Proceedings and the Commercial Code also apply to mediation.

Recourse to Mediation: Mediation is always voluntary, but a judge may order the parties to a 3 hour information meeting with a mediator to familiarize the parties with the process. The law provides for no incentives, but a party who refuses to attend the information meeting may be denied costs.

Mediation Procedure: Mediators must be accredited by the Ministry of Justice. The maximum duration and fee for mediations are not regulated. The mediator must terminate a mediation, once started, if the parties have not met with the mediator for more than a year.

Relation to Civil Procedure: Unless the parties agree otherwise, the mediator and other persons who helped with the conduct of the mediation, but not the parties, are bound by the duty of

confidentiality. The mediator is not bound by the duty of confidentiality before a court. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court, mediator, or notary deed. Mediation can toll the statute of limitations for the whole mediation process.

Ensuring Quality: The Ministry of Justice is the monitoring entity for mediators. The Czech Bar Association is a monitoring entity for those mediators who are advocates. There is no required training for mediators.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Act on Arbitration and Enforcement of Arbitration Awards (1994, last amended 2012), which covers both domestic and international arbitration. Certain provisions of the Czech Code on Civil Proceedings and the Commercial Code also apply to arbitration.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is mainly according to law but the mediator may decide according to equity with the parties' express authorization. Fees are not regulated. Consumer disputes are subject to stricter provisions.

Relation to Civil Procedure: Arbitration is confidential. The arbitration award is enforceable after delivery to the parties. Awards may be challenged in court under certain conditions stipulated by law. The Czech Republic is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.6 Denmark

Trends for ADR

Mediation: Mediation is a relatively young discipline. Court-annexed mediation, which became part of the law in 2008, has not been a success due to the small number of cases—perhaps as low as 2%—that have been mediated. There are no statistics on mediation other than court-annexed mediation.

Arbitration: Arbitration has long been a part of the Danish dispute resolution system and lends itself well to commercial and contractual disputes.

Key Mediation Legislation: Denmark is not subject to the 2008 Directive, but it did enact a decree in 2008 amending provisions of Chapter 27 of the Danish Administration of Justice law to govern court-referred mediation. Law of the Danish Administration of Justice 1063 of 17 November 2011 set up provisions and rules for a very simple regulation of court-annexed mediation.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation at the request of both parties. The law provides for no sanctions or incentives.

Mediation Procedure: Mediation procedure is regulated only in court-annexed mediation. Mediators for court-annexed mediation must be appointed by the Administration of the Courts. The maximum duration for mediations is not regulated. The fee for court-annexed mediations is regulated at € 950 for 4.4 hours.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment if it is in writing and approved by a court. Court-annexed mediation tolls the statute of limitations.

Ensuring Quality: The Danish Court Administration is the monitoring entity for mediators. The Register of accredited mediation providers and training entities is available online¹⁸. The courts of Denmark and the Law Society are the accredited training entities for court-annexed mediators.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Domestic arbitration is governed by the Law of Arbitration (2005). Denmark is also a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 Convention on International Commercial Arbitration, and the 1965 ICSID Convention, all governing international arbitration.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is according to Danish or foreign law. The fee is not regulated.

Relation to Civil Procedure: The parties can decide on confidentiality for arbitration. Enforcement has to be clear in the arbitration sentence. The ruling of the arbitration court can be challenged only for formal reasons.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.7 Estonia

Trends for ADR

Overall: In the last ten years, there have been two legislative acts covering ADR proceedings: the addition of part XIV, regarding arbitral tribunals, to the 2006 Code of Civil Procedure; and the 2010 Conciliation Act that implemented the EU Mediation Directive. Rules and regulations of the arbitration courts and mediation bodies have also been added. According to the Estonian Ministry of Justice, no further developments in ADR regulation are foreseen in the near future.

Arbitration: While there has been a gradual growth in arbitration, the share of arbitration, in terms of all commercial disputes, remains low. In ordinary commercial disputes there is no significant difference relating to domestic parties and those with one international party. But in certain types of disputes, such as, for example, Mergers & Acquisitions, arbitration seems to be the preferred option for all parties.

¹⁸ www.domstol.dk

Key Mediation Legislation: Mediation is governed by the Conciliation Act (2010), which implemented the 2008 Directive.

Recourse to Mediation: Mediation prior to court proceedings is only mandatory when the parties agree so in a written agreement. Additionally, courts have the right to order parties to mediate, but they hardly ever exercise such a right. The law provides for no sanctions or incentives.

Mediation Procedure: Attorneys-at-law and notaries must be listed as mediators on the website of the Bar Association and on the website of the Chamber of Notaries. There is no general maximum duration established for mediation proceedings. The cost of mediation is subject to the agreement between the mediator and the parties involved.

Relation to Civil Procedure: Mediation proceedings are confidential. The mediator is bound to keep confidential all the information related in the mediation proceedings. An agreement reached in mediation must be approved by the court to enforce it. Mediation can toll the statute of limitations.

Ensuring Quality: There is no compulsory training requirement. Attorneys-at-law and notaries are subject to supervision by the Ministry of Justice. The activities of other mediation organisations and providers are unsupervised.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Although arbitration was originally governed by Section D of the Civil Procedure law (1998), arbitration is now governed by Part XIV of the new Code of Civil Procedure (2006).

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is according to law. Fees are not regulated. An arbitral agreement must be in writing unless the parties agree to the resolution of the dispute by an arbitral tribunal.

Relation to Civil Procedure: Arbitration is confidential. The court has to recognize the decision of the arbitration court and declare it to be subject to enforcement unless the arbitral court is a permanent arbitral tribunal. The award can be challenged in court if the formalities have not been properly followed or for other reasons prescribed by law. The award cannot be challenged on the merits.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.8 Finland

Trends for ADR

Mediation: The 2011 implementation of the Directive repealed the existing Act on Mediation in the Courts, enacted in 2006, but the changes it brought were relatively small. Therefore, the implementation did not generate much debate.

Arbitration: Arbitration has long been the standard dispute resolution mechanism for commercial disputes. The Arbitration Institute of the Central Chamber of Commerce of Finland was established in 1911 and remains the only arbitration institution of practical relevance in Finland to this day.

Key Mediation Legislation: Mediation is governed by the Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts (2011), the Enforcement Code, and the Code of Judicial Procedure.

Recourse to Mediation: Mediation is always voluntary, but a judge must explore the possibility of settlement and may suggest that the parties participate in mediation on his own initiative. The law provides for no sanctions or incentives.

Mediation Procedure: Only trained judges or members of the bar accredited by the Bar Association may be mediators. The maximum duration for mediations is not regulated. There is a processing fee for court mediations. In mediations under the Mediation Rules of the Bar Association, the mediator charges an hourly fee, split between the parties.

Relation to Civil Procedure: In out-of-court mediation, confidentiality of proceedings is assured. For court mediation, confidentiality is not guaranteed. If the parties reach an agreement, it has the same effect as a court judgment if it is in writing, confirmed by a court, and is the result of a structured, facilitative mediation procedure. Mediation can toll the statute of limitations for the duration of the mediation procedure.

Ensuring Quality: The Ministry of Justice and the Bar Association are the accredited training entities. There is no entity that monitors mediators. Only the Finnish Bar Association supervises the activities of its members. There is a mediation training module for advanced training.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Arbitration Act (1992), which broadly reflects the main principles of the UNCITRAL Model Law on International Commercial Arbitration. Finland ratified the New York Convention of 1958 in 1962.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the parties to the arbitral proceedings have the right to agree upon the procedural rules. The tribunal will base its decision on the applicable rules of law. The parties are jointly and severally liable to pay reasonable compensation to the arbitrators for their work and expenses. The tribunal may order the payment of an opposing party's normal legal costs. The arbitration agreement must be in writing.

Relation to Civil Procedure: Confidentiality is not regulated. An application for the enforcement of an arbitral award, submitted to the court of first instance, must be accompanied by the original arbitration agreement and the original arbitral award. The court may refuse the application only if it finds that the award is null and void under a specific legal provision or if the arbitral award has been set aside by a court.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.9 France

Trends for ADR

Mediation: Despite the absence of official statistics on mediation, ADR centers interviewed in the scope of this report confirmed that from 2003/2004 to 2011 they observed a significant number of mediation request from Courts or directly from the parties, and this trend is also confirmed by the experts interviewed. During the 2000's, mediation was noticeably in the spotlight of commentators. In this respect, the Magendie's Report ordered by the Ministry of justice and the Guinchard's Report for the French Parliament, raised many possibilities that could foster the growth of Court mediation in France. The directive was transposed on November 16th, 2011 and the decree of implementation was passed on January 2012. Even if it is too soon to measure the impact on French law on the transposition, many experts have already expressed their disappointment by deploring the absence of real incentives to boost mediation.

Arbitration: The growth of arbitration and the multiplication of case law due to the appeals or actions to vacate arbitral awards from the 1980's to recent years, made the French arbitration law outmoded.

The Prada's Report on March 2011, related many points on the obsolescence of the French arbitration law, notably concerning case in which a public entity is a party. The necessity to update the law was urging. The government reformed the French arbitration law with the January 16th, 2011 decree.

Key Mediation Legislation: Order n° 2011-1540, dated November 16, 2011, the "Order of implementation of the EU directive 2008/52 CE on some aspects of civil and commercial mediation," the Decree of implementation, dated January 20, 2012, and the "Decree related to friendly dispute resolutions" are the most recent legislation addressing mediation. Earlier legislation from 1995 and 1996 covers both mediation and conciliation, with Decree n° 96-652, dated July 22, 1996, "Court Conciliation and mediation" introducing mediation in the civil procedure code.

Recourse to Mediation: Mediation is always voluntary in the B2B context (there are some mediation requirements in the family and labour law contexts), but a judge may invite the parties to get information about mediation at all court levels in every case. The law provides for no sanctions or incentives.

Mediation Procedure: Mediators must have knowledge of the field in which they conduct mediation. The maximum duration for judicial mediations is six months. The judge determines the amount of the fee, which is equally split by the parties. In the Court of Appeals with the social chambers, the fee for mediations is € 600.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations once for six months.

Ensuring Quality: There is no information about accredited training entities. There is no mandatory specific training required to become a mediator. An ombudsman must have training or experience. Basic training is 60 hours at the National Federation of Mediation Center. Advanced training, instead, is 300 hours at the National Federation of Mediation Training Center. This authority monitors mediators too.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Decree n° 2011- 48, dated January 13, 2011, the “Decree reforming arbitration,” repeals the distinction between national and international arbitration. It changes the remedies against an arbitration award, notably by bringing the right of appeal for domestic disputes. The procedure to set aside the award (annulment) remains possible.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is according to law unless the parties agree that it can be a matter of equity. Fees are not regulated.

Relation to Civil Procedure: Arbitration is confidential. An award by a tribunal can be enforced. For domestic arbitrations, the award may be challenged only if the parties decide to make it appealable. For international arbitrations, no appeal is available, but the parties can seek to vacate the award.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.10 Germany

Trends for ADR

Mediation: A new Mediation Law implementing the Directive just completed the parliamentary process and became effective on July 26, 2012. But the last ten years have seen various mediation-related developments, including allowing lawyers with prior education and training in mediation to advertise as mediators, and a law allowing the courts to suggest to the parties that they pursue dispute resolution proceedings out of court where appropriate.

Arbitration: Germany’s arbitration law in its current form entered into force on 1 January 1998. It largely follows the structure and the wording of the Model Law (1985) and is the result of a reform process that was initiated in the late 1980s and early 1990s. The main purpose of the reform was to modernise German arbitration law on the basis of the Model Law (1985) and to improve Germany’s position internationally as a suitable seat for arbitral proceedings. German arbitration law is set out in the Tenth Book of the Code of Civil Procedure (Zivilprozessordnung (ZPO)).

Key Mediation Legislation: A new Mediation Law implementing the Directive just completed the parliamentary process and became effective on July 26, 2012.

Recourse to Mediation: Mediation is a voluntary process in Germany, there is no obligation for the parties to participate in mediation.

Mediation Procedure: Three different forms of mediation that have evolved over the past few years: 1. independent of judicial proceedings (out of-court mediation); 2. related to court proceedings but outside of the court (court-annexed mediation), or 3. within the court system by a judge who has no decision-making power in the case (mediation by judge-mediators).

Relation to Civil Procedure: No information available.

Ensuring Quality: There are no accreditation requirements for mediators in Germany so far, and the new Mediation Law brought no change to this situation. The new law only adds the option to

become a 'certified mediator' to refer to someone who has completed a training as a mediator and who is attending regularly on-going training.

Ensuring information: Mediation Law, Article 2-3, stipulates intensive information duties for mediators.

Key Arbitration Legislation: Code of Civil Procedure – Zivilprozessordnung (30 January 1877, latest amendment December 2011).

Arbitration Procedure: Arbitration can be ad hoc as well as administered by institutions such as the DIS, ICC, LCIA or ICDR. Fees are regulated by statute.

Relation to Civil Procedure: A domestic award can be enforced if it has been declared enforceable by the German courts. The enforcement of foreign awards is governed by the New York Convention. The award has the same effect as a final judgment by a state court.

Ensuring Quality: No monitoring.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.11 Greece

Trends for ADR

Mediation: For mediation, the last several years have seen a number of developments. In addition to the Mediation Act in 2010, a presidential decree was published in 2011, regulating mediation training issues. A Mediation Certification Committee has also been founded, dealing with certification and accreditation issues. A Code of Conduct has been enacted, also in 2011. In that same year, a new mediation scheme was introduced exclusively for commercial rent review disputes (Law 4013/2011, Art 15). It is an out-of-court dispute resolution system, based in the country's administrative regions. These mediations are overseen by a three-member Panel, whose members are a judge, a representative of the professional associations, and a representative of the Panhellenic Federation of Immovable Property Owners. Finally, Article 7, Law 4055/2012 introduced court mediation, a court-annexed process governed by an appointed judge acting as mediator.

Arbitration: Several arbitration panels embedded within professional chambers exist, but the majority of them are entirely inactive. There have been no further legislative developments in the last ten years.

Key Mediation Legislation: Mediation generally is governed by the Mediation Act (Law 3898/2010), which transposed the Directive. Court mediation is governed by Article 214B of the Code of Civil Procedure. Article 15 of Law 4013/2011 sets out a mediation scheme exclusively for commercial rent review disputes.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. The law provides for no sanctions or incentives.

Mediation Procedure: Mediators and mediation entities are not regulated. The maximum duration for mediation is six months. The fee is not regulated. If the mediation fails, the mediator does not make a settlement proposal.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations during the entire mediation process.

Ensuring Quality: The Ministry of Justice and the Mediators Accreditation Commission are the accredited training entities. Basic training consists of 40 hours. Advanced training consists of 10 hours every two years.

Ensuring information: The Ministry of Justice takes measures to ensure access to information by all available means, especially via the internet.

Key Arbitration Legislation: Arbitration is governed by the Code of Civil Procedure, Article 867 et seq (domestic; not exclusively for B2B) and the Law on International Commercial Arbitration (1999) (harmonizes domestic legislation with the UNCITRAL Model law).

Arbitration Procedure: Ad hoc arbitration is predominant, and the procedure is according to Greek law and the law covering international commercial arbitration. Fees are regulated by statute.

Relation to Civil Procedure: There is no confidentiality in arbitration. Enforcement of an agreement reached in mediation is governed by the Code of Civil Procedure. The award has the same effect as a court judgment. Article 897 CCivP for domestic, and 34 Law 2735/1999 for international arbitration awards, govern conditions under which an award can be challenged. The award is not subject to appeal unless otherwise agreed in the arbitration agreement.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.12 Hungary

Trends for ADR

Mediation: With regard to mediation, the last ten years have seen significant developments. The 2002 Act LV was seen as already incorporating most of the aspects of the 2008 Directive. But additional legal changes were implemented to complete the transposition. A 2009 Resolution of the Ministry of Justice established the qualification requirements of mediators. Changes were also made to the Civil Procedure Code. They required business entities with legal personality engaged in a legal dispute to make an attempt to settle the case out of court before lodging the claim. This procedure is not required if the parties make out a joint statement about their disagreement. However, the provision does not require the parties to use mediation. As the result of another change to the Code, if, in spite of having reached an agreement for the settlement of the dispute in a mediation proceeding, a claimant brings a case to court, the claimant may have to pay costs.

Arbitration: With regard to arbitration, there have been no significant legislative developments in the last ten years except for some limitation of types of disputes that may be resolved by arbitration.

Key Mediation Legislation: Mediation is governed by Act LV. of 2002 on Mediation and the 2009 Decree of the Ministry of Justice on the training of mediators.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. As an incentive, court costs may be reduced by the mediator's fees, including the value added tax, not to exceed 50,000 forints. However, the amount of duty payable may not be less than 50 per cent of the normal rate of duty. As a sanction, if a party brings a case to court despite having reached an agreement in mediation, the party may be ordered to cover all costs of the proceedings irrespective of outcome.

Mediation Procedure: Mediators must be accredited by the Ministry of Administration and Justice. The maximum duration and fee for mediations are not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court or in an arbitration. If the parties reach an agreement, it has the same effect as a civil law contract or a court judgment when approved by a court. Mediation can toll the statute of limitations.

Ensuring Quality: The Ministry of Administration and Justice monitors mediators. For required training, basic training is 60 hours.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by Act LXXI of 1994 on Arbitration.

Arbitration Procedure: Arbitration can be ad hoc; there is also a permanent court of arbitration. Procedure is governed by law and special rules of proceedings of the permanent arbitration institutions. Fees are not regulated.

Relation to Civil Procedure: The arbitration proceeding is not public unless the award is challenged by either party. The award has the same effect as a court judgment. The award may be challenged only in a few cases, and never on the merits.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.13 Ireland

Trends for ADR

Mediation: Mediation is provided for in Rules of Court which allows for judicial activism in the promotion and uptake of mediation. A number of legislative provisions also provide for court referral to domestic mediation. As with the Rules of Court, these provisions do not mandate that the parties attempt mediation, but rather provide that a court may invite the parties to consider using mediation in appropriate cases. Ireland has also implemented European Community Directive 2008/52/EC through the European Communities (Mediation) Regulations 2011('Mediation Regulations'). The provisions of the law went into effect 5 May 2011.

Arbitration: For arbitration, as a result of the Arbitration Act 2010, arbitrations now have the benefit of a sophisticated arbitration law which imports all of the key features of modern arbitral practice. These features include the separability of the arbitration agreement and the competence-competence of the arbitrator. The new legislative regime also sets the tone for limited but supportive judicial intervention, as provided for under the provisions of the UNCITRAL Model law. The Model Law provides for limited challenge of the award and removes the possibility of appealing certain decisions of the High Court to the Supreme Court. There is no appeal to the Supreme Court on decisions including, inter alia, decisions to stay proceedings, challenges to the arbitrator's jurisdiction or independence and impartiality, and challenges to the Award and the refusal of recognition and enforcement of the award. The recent reform of arbitral legislation is therefore viewed as a significant development in arbitration practice in Ireland and is in line with international best practice. The 2010 Act allows maximum party autonomy to manage their arbitration in the manner they see fit, whilst at the same time provides for efficient and supportive national court intervention, if required during the course of the arbitration.

Key Mediation Legislation: Ireland is still in the process of completing its mediation legislation. It implemented the 2008 Directive through the European Communities (Mediation) Regulations 2011 ('Mediation Regulations'), effective in May 2011. The Irish implementation of the Directive was minimal: the Mediation Regulations are not applicable to domestic mediation and the Mediation Regulations do not go beyond the wording of the Directive. In March 2012, however, the Government published Draft General Scheme of Mediation Bill 2012, which will provide a comprehensive statutory framework for domestic mediations.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to consider mediation in civil and commercial cases. There are no incentives, but there may be sanctions for parties who do not participate in mediation in good faith if the mediation would have had a reasonable prospect of success.

Mediation Procedure: For certain mediations coming from courts, only a mediator from a particular entity may be used. The maximum duration and fee for mediations are not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. If the parties reach an agreement, it has the same effect as a contract or a court judgment when approved by a court. Cross-border mediation can toll the statute of limitations.

Ensuring Quality: The accredited training entity is the Mediators Institute of Ireland. The Ministry of Justice monitors mediators. There is no required training.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Arbitration Act 2010, an adoption of the 2006 UNCITRAL model law. The Act covers both domestic and international arbitrations, and it replaced earlier, separate acts for the two types.

Arbitration Procedure: Arbitration can be ad hoc or administered, and procedure is governed by the Arbitration Act. Fees are not regulated.

Relation to Civil Procedure: Arbitration confidentiality is not regulated. Arbitration awards are enforced in the same manner as a judgment or order of a court with the same effect. To enforce an

award, there must be an originating notice of motion grounded upon an affidavit. There are limited grounds to challenge an award, and it may not be challenged on the merits.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.14 Italy

Trends for ADR

Mediation: Mediation legislation has a long history, going back to conciliation in an 1865 code and various laws in the twentieth century, leading to 2003, when Legislative Decree 5/2003 was passed and moved mediation into the corporate, financial, and intermediation areas. Despite these first efforts, mediation remained a procedure largely unknown to the masses and not widely used. Data gathered over the last decade can essentially be summed up as demonstrating an apparent paradox characterised by a low number of mediation requests alongside success in most mediation cases administered by mediation organisations using trained mediators. In 2009, in response to the 2008 Directive, the Italian Parliament issued Law n. 69 of 19 June 2009, whose Article 60 recognised mediation as an option in civil and commercial disputes and issued a delegating power to the Italian government to issue a legislative decree on mediation.

In 2010, Legislative Decree n. 28 was enacted as a result of the delegation and went beyond the mandate of the Directive by making mediation mandatory for many civil and commercial disputes. A few months later, Ministry of Justice Decree n. 180 of 18 October 2010 provided specific requirements needed to effectuate the legislative decree governing mediation organisations, mediators, mediator training, and mediation costs. Recently, Ministry of Justice Decree n. 145 of 6 July 2011 (effective 26 August 2011) was issued with provisions that increased requirements for mediator qualification and decreased the costs of mandatory mediation procedures. The majority of the recent changes in Italian mediation stem directly from the 2008 Directive. Italian law has incorporated each part of the Directive that was not already a part of the legal system and went beyond the basic requirements in several areas, including providing for mandatory mediation.

Arbitration: Arbitration has long been a part of the Italian dispute resolution system and lends itself well to commercial and contractual disputes. Arbitration is governed domestically by Code of Civil Procedure Arts. 806-40. Italy is also a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 Convention on International Commercial Arbitration, and the 1965 ICSID Convention.

Key Mediation Legislation: Mediation is governed by Law n. 69 of 18 June 2009, plus Legislative and Ministerial Decrees.

Recourse to Mediation: Mediation is generally voluntary, but a judge may invite the parties in disputes to participate in mediation in all pending and new cases in civil and commercial matters. In addition, mediation is mandatory for certain civil and commercial disputes because an attempt to mediate is a condition precedent to trial. Financial incentives in the form of tax credit and stamp tax exemptions are offered, and sanctions may be imposed for parties who do not participate in good faith in mediation, even if it is voluntary.

Mediation Procedure: Mediation providers and mediators must be accredited by the Ministry of Justice. The maximum duration is four months. The maximum fees are based on the value of the

dispute, per procedure (regardless of the number of hours or meetings). If the mediation is successful, the fee could be increased by 25%. If the mediation fails, the mediator can make a settlement proposal even in the absence of one party. A judge can evaluate the mediator's proposal in order to sanction the party that did not accept it.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations once for a period of four months.

Ensuring Quality: The accredited training entity is the Ministry of Justice. A department within the Ministry of Justice monitors mediators. The Register of accredited providers and training entities is available on-line¹⁹. For required training, basic training is 50 hours. Advanced training is 18 hours every two years.

Ensuring information: The Ministry of Justice has finalized a fund for the promotion of mediation by TV commercials²⁰ and on the internet.

Key Arbitration Legislation: Arbitration is governed by the Code of Civil Procedure - Book IV - Title VIII - Arbitration (articles 806-840), as amended by legislative decree 2 February 2006, No. 40 (2006 Arbitration Reform). Italy is also a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 Convention on International Commercial Arbitration, and the 1965 ICSID Convention.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and, in practice, the procedure is mostly based on Italian law. Fees are not regulated. To be enforceable, an agreement to refer disputes to arbitration must be in writing.

Relation to Civil Procedure: Confidentiality is not regulated. The award can be enforced by the court, provided that it complies with formal requirements. The award can be challenged in few cases and never on the merits.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.15 Latvia

Trends for ADR

Mediation: In 2009, Latvia started work on incorporating mediation into its system and, in December 2010, made amendments to the Civil Procedure Law which came into force on January 01, 2011. The aim of these amendments was to promote mediation in two ways: 1) increasing the court fees; and 2) providing the possibility for the parties to regain 50% of the court fee already paid in the case if agreement is reached. Practice showed that these measures do not motivate parties to use mediation. Moreover, the disputing parties were not aware of the possibility of mediating their dispute. So Latvia is changing its approach. On January 26, 2012 the Mediation Law draft was announced at the Secretary of State Meeting.

¹⁹ http://www.giustizia.it/giustizia/it/mg_1_10_4.wp?previousPage=mg_2_7_5_2

²⁰ www.youtube.com/watch?v=7HwBXZbs-E4

Latvia now is in the very beginning of the mediation legislation. Latvia has no mediation history, and as a procedure Latvia started to use mediation only in the past 5 years. In the future, after the Mediation Law comes into force, state rules on the mediator certification, on mediation training procedure and requirements, on the mediation fees, on tolling the statute of limitations, and on other relevant issues will be adopted.

Arbitration: In Latvia Arbitration is regulated under the Civil Procedure Law, Part D. 2005 was a very important year for arbitration because big changes were implemented, involving challenges to arbitration awards and confidentiality.

Key Mediation Legislation: Mediation is currently governed by the Civil Procedure law (1998). Article 37 was added to address mediation in an attempt to transpose the Directive. New legislation (the Draft Mediation Law) is in progress, however. The Notariate Law (1993) also addresses mediation.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. The judge may also invite the parties to participate in mediation in all pre-trial criminal cases but only if both parties take the first step. The law provides for no sanctions or incentives.

Mediation Procedure: Mediation can be administered only by licensed mediators. The maximum duration and fee for mediators are not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court or public notary. Currently, there is no provision for tolling the statute of limitations.

Ensuring Quality: There is no required training requirement or monitoring entity. Under the Draft Mediation Law the state on behalf of the Ministry of Justice, delegates to the association "Mediation Council" the task of assessing, certificating and issuing certificates of mediators; developing a uniform training standards for mediators; conducting training programs for certification of mediators; establishing and maintaining a list of certified mediators; establishing and adopting a code of ethics for mediators. Association "Mediation Council" will start to implement its power when the Mediation law comes into force.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Civil Procedure law, Part D (1998, with major amendments in 2005).

Arbitration Procedure: No information is available about ad hoc or administrated arbitration. The procedure is according to civil procedure law. Fees are not regulated. To be enforceable, an agreement to refer disputes to arbitration must be in writing. The agreement to arbitrate can be a separate agreement or a clause in the main contract.

Relation to Civil Procedure: Arbitration is confidential. The award is obligatory. Writ of execution of the arbitration award is issued by a national district court. The award cannot be challenged.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.16 Lithuania

Trends for ADR

Mediation--Judicial mediation: Judicial mediation in Lithuania started with pilot projects in various courts. These were successful, and on 28 January 2011 the Judicial Council gave its approval to apply mediation in all courts of the Republic of Lithuania in order to guarantee recourse to mediation irrespective the region.

The launch of the Pilot Project was also followed by the adoption of the Judicial Mediation Rules which embodied the main principles of procedure of judicial mediation, to be performed solely by a judge or the assistant of a judge included in a list of judicial mediators. However, the subsequent amendments of the Judicial Mediation Rules also allowed other persons possessing the appropriate qualifications and inscribed in a list of judicial mediators to conduct mediation.

After the adoption of the Law on Conciliatory Mediation in Civil Disputes (2008), the regulation of judicial mediation has been modified and supplemented. The Law regulates non-judicial, as well as judicial mediation; therefore it is also applied when judicial mediation is performed (despite the reference to the legal acts adopted by the Judicial Council).

Mediation--Non-judicial (extrajudicial) mediation: The Law on Conciliatory Mediation in Civil Disputes was adopted on 15 July 2008 and amended on 24 May 2011 to transpose the 2008 Directive properly. It regulates judicial and non-judicial conciliatory mediation in civil disputes and embodies main principles relative to the procedure of mediation, including the main principles and objectives contained in the Directive.

Arbitration: The development of arbitration is directly related to the ratification of the 1958 New York Convention on Recognition and Enforcement of Foreign Awards by the Seimas of the Republic of Lithuania on 17 January 1995. Arbitration as an alternative dispute resolution procedure has been applied in Lithuania since the 1996 adoption of the Law on Commercial Arbitration of the Republic of Lithuania, which is combined with the UNCITRAL Model Law on International Commercial Arbitration. This law has clearly delimited the competence of state courts and arbitration institutions and embodied the main principles relative to the procedure of arbitration. It should be noted that this legislation was adopted in regard to the mentioned ratified convention and has not been changed much throughout the years.

Key Mediation Legislation: The Law on Conciliatory Mediation in Civil Disputes was adopted on 15 July 2008. This Law was subsequently amended on 24 May 2011 in order to transpose the 2008 Directive properly. Resolution No 13P-348 of the Council of Courts (later known as Judicial Council), 20 May 2005 (as amended by the Resolution No 13P-53-(7.1.2) of 29 April 2011) embodies the main principles of judicial mediation procedure (applied according to the provisions of the Law on Conciliatory Mediation in Civil Disputes). Resolution No 13P-10-(7.1.2) of the Judicial Council on the Description of the Procedure of Registration of Persons to the List of Judicial Mediators, 28 January 2011 regulates the procedure of registration of persons into the list of judicial mediators.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. The

Mediation Law recognizes the possibility of mandatory referral to mediation by the court in some international civil disputes. The law provides for no sanctions or incentives.

Mediation Procedure: For judicial mediation, only judges, assistants to judges, or other people possessing special training and accredited by the Judicial Council may be mediators. The maximum duration and fee for mediators are not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations.

Ensuring Quality: There are no training requirements, except the requirement to complete mediation courses for those who are willing to become judicial mediators, or accredited training entity. There is no monitoring entity, but the judicial mediators list and the requirements for enrolment on the list are available on the National Courts Administration website.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Law on Commercial Arbitration of the Republic of Lithuania (1996), which was enacted following 1995 ratification of the 1958 New York Convention on Recognition and Enforcement of Foreign Awards, and accompanied by procedural rules for different areas of law.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the proceeding is according to the law chosen by the parties or by the particular arbitration institution if the parties make no choice. Fees are not regulated.

Relation to Civil Procedure: Arbitration is confidential. The award can be enforced by the court, provided that it complies with the formal requirements and is adopted in accordance with legal regulations. An award can be challenged at the Court of Appeal on the grounds found in the Law on Commercial Arbitration, but not on the merits.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.17 Luxembourg

Trends for ADR

Mediation: Luxembourg first attempted to enact national legislation addressing mediation in 2002, but that attempt was not successful. The second attempt, however, recently succeeded. It involved the transposition of the Directive, which the legislator effected by the enactment of a law of 24 February 2012, which added 24 new statutory provisions, Articles 1251-1 to 1251-24, to the national civil procedure code (*Nouveau code de procédure civile*). As a result, in addition to an already existing practice in penal and family mediation, there is now a detailed statutory basis for civil and commercial mediation.

Arbitration: At the worldwide level, and due to internationalization (globalization) of the trade relations, the number of arbitration has recently grown up. Luxembourg has not yet taken

advantage of this growth in arbitration. Until now, within the territory of the Grand-Duchy of Luxembourg, the “Centre d’arbitrage de la Chambre de Commerce” had assured the administration of some arbitrations per year. A significant growth has not been observed

Key Mediation Legislation: Mediation is governed by the Civil Procedure Code, Articles 1251-1 to 1251-24 (2012), added to transpose the 2008 Directive.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters.

Mediation Procedure: For judicial mediation, only mediators accredited by the Ministry of Justice may be mediators. The Law does not provide for any accreditation requirements for mediators in extrajudicial mediation. The maximum duration for a mediation is three months.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it can be enforced if at least one party requests judicial approval from the district court and the approval is obtained. Mediation can toll the statute of limitations.

Ensuring Quality: There are no training requirements or accredited training entity. The Ministry of Justice monitors mediators.

Ensuring information: No provision related to mediation promotion in national legislation. However, the existing mediation centres like the *Centre de Médiation Civile et Commerciale* and the national mediation association, the ALMA (*Association luxembourgeoise de la Médiation et des Médiateurs agréés*), have assumed the obligation to make information available to the general public.

Key Arbitration Legislation: Arbitration is governed by Articles 1224 to 1251 of the CPC, which apply without distinguishing between the commercial or civil, the domestic or international nature of a case except for matters listed in Article 1225 of the CPC where arbitration is prohibited (e.g., cases relating to a person’s capacity or divorce). In addition, Luxembourg is a party to the European Convention on International Commercial Arbitration of 21 April 1961 and the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”). Luxembourg has not ratified the European Convention providing a Uniform Law on Arbitration of 20 January 1966, but has introduced in substance the provisions of Articles 25 to 28 of the Uniform Law.

Arbitration Procedure: Arbitration can be both administrated or ad hoc. Unless otherwise agreed by the parties, three arbitrators will be appointed as described at Article 1227 of the CPC; the procedural rules applicable to arbitration will be the normal rules applicable to court proceedings; and the arbitrators will have to render their arbitral award within a three-month period.

Relation to Civil Procedure: In case the parties choose an ad hoc arbitration, the Articles 1224 to 1251 of the New Code of Civil Procedure (Book III – Title 1 – Arbitration), as amended by the Law of 24 February 2012 (Mémorial A n° 37 of 5 May 2012) foresee some provisions related to the proceeding and its form. In case the parties choose an institutional arbitration with the Centre d’Arbitrage de la Chambre de Commerce, the parties will have to respect all the provisions mentioned in its own regulation.

Ensuring Quality: There are no training requirements or accredited training entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.18 Malta

Trends for ADR

Mediation: The main development of the last ten years has been the enactment of the Mediation Act in 2004, both to allow for more transparency in the mediation process and to transpose into national legislation the provisions of the 2008 Directive.

Arbitration: arbitration has become increasingly popular as an alternative to litigation over the past ten years,

Key Mediation Legislation: Mediation is governed by the Mediation Act (2004), as amended in 2010 to transpose the 2008 Directive.

Recourse to Mediation: Mediation is always voluntary. The courts may refer cases to the Malta Mediation Center. The law provides for no incentives, but sanctions may be imposed for parties who do not participate in good faith in mediation, even if it is voluntary.

Mediation Procedure: Mediators are regulated by the Malta Mediation Center. There is no information available about whether the maximum duration of a mediation is regulated, but the fee is regulated.

Relation to Civil Procedure: Agreements resulting from mediation are enforceable providing all parties agree. Mediation can toll the statute of limitations.

Ensuring Quality: There is no required training or accredited training entity for mediators. The Malta Mediation Center monitors mediators.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is ruled by Arbitration Act 1996.

Arbitration Procedure: Arbitration can be ad hoc or administered. Fees are not regulated.

Relation to Civil Procedure: Awards are generally final and binding with limited appeal rights in the courts

Ensuring Quality: Malta Arbitration Centre established by the Maltese Arbitration Act 1996 has to provide for the conduct of international arbitration in Malta.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.19 Poland

Trends for ADR

The past decade has seen the development of a modern legal framework for B2B ADR in Poland. Ten years ago, the arbitration law was outdated (enacted in the 1960s, with limited subsequent revisions), and there was no regulation of mediation whatsoever. The new mediation and arbitration

laws, both introduced in 2005, are generally consistent with international standards in this field. However, both appear to need certain updates. In particular:

Mediation: The mediation regulations have been criticized as setting low requirements for mediators and having no adequate quality assurance mechanisms.

Arbitration: The arbitration law does not reflect the 2006 Revision to the UNCITRAL Model Law on International Commercial Arbitration.

Key Mediation Legislation: 2005 legislation modifying the Code of Civil Procedure, and other 2005 statutes governing fees in court-referred mediation (Ordinance of 30 November 2005; Act of 28 July 2005), and a 1964 statute addressing the impact of mediation upon statutes of limitation (Act of 23 April 1964 – Civil Code).

Recourse to Mediation: Mediation is always voluntary, but a judge may order the parties to participate in mediation in all pending and new cases in civil matters with the parties' agreement. As an incentive, a portion of the court fee (3/4) may be refunded if the parties sign an agreement. Court may refrain from applying "loser pays the costs" principle if the winning party refused to take part in mediation, even though it had agreed before.

Mediation Procedure: Only providers recommended to the regional courts by non-governmental organizations and universities may be mediators. The maximum duration of a mediation is 30 days. For court-ordered mediation, the fee is one percent of the value of the case, up to a maximum of 1,000 PLN (€ 250). In non-monetary value civil cases, the fee is 60 PLN (€ 15) for the first mediation meeting and 25 PLN for the following meetings. Fees for private mediation are not regulated.

Relation to Civil Procedure: A mediator cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment if approved by a court. Mediation can toll the statute of limitations.

Ensuring Quality: There are no training requirements for mediators in civil matters. There is no accredited training entity or entity to monitor mediators.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Code of Civil Procedure, Part V (as amended effective 2005). Poland is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is according to both law and equity. The fee is not regulated.

Relation to Civil Procedure: Arbitrations are not confidential. Awards may be challenged solely on limited grounds, consistent with the UNCITRAL Model Law (Articles 34 and 36).

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.20 Portugal

Trends for ADR

Overall: Throughout the past 10 years, merely two ADR means have evolved in Portugal: arbitration and mediation.

Mediation: Even before it enacted the legislation transposing the Directive into its national legal framework, Portugal already had started to develop public mediation. The Civil Code, in particular, already contained several provisions designed to encourage settlement between the parties. Indeed, Law n. No 78/2001 of 13 July 13th, also called the law of the Julgados de Paz (Justices of the Peace), which entered into force in 2002, provided the legal framework for a public mediation system attached to a small claims procedure. Civil Code, Article 1248. also contained provisions concerning a settlement contract, defined as one in which the parties avoid or settle a dispute through reciprocal concessions.

Despite the existence of these measures, and following the entry into force of the 2008 Directive, Portugal realized that new legislation was necessary to fill the gaps in its legal framework for the field of mediation, and so enacted legislation that would, in essence, transpose the Directive. The Portuguese Legislature approved Inventory Law n. No 29/2009, which modified the Civil Procedure Code (CPC) by adding three articles related to the regulation of mediation. Transposing the Directive in only three provisions may seem to be a minimal effort, and some critics have disapproved of the placement of the provisions within a procedural code rather than in the Civil Code location of other mediation provisions.

Arbitration: Arbitration was regulated between 1986 and 2011 by the Lei de Arbitragem Voluntária, Law 31/86, of August 29, which was recently replaced by the New Law on Voluntary Arbitration, which came into force on March 15th of 2012 and will apply to disputes arising after that date. The new law now provides a more complete legislative framework for arbitration and is based largely on the UNCITRAL Model Law on International Commercial Arbitration. Unfortunately, due to the very recent entry into force of this new law, there is no experience as to its use and practical limitations.

Key Mediation Legislation: Mediation is governed by existing legal provisions plus changes to three articles in the Civil Procedure Code designed to transpose the 2008 Directive.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. The law provides for no sanctions or incentives.

Mediation Procedure: Mediators in small claims court must be part of an official list. The maximum duration in the public mediation system is up to 60 days. Depending on the mediation system (public or private) used, the fee may vary. Fees for public mediation services are set by law, and the setting of a very low fee of € 70,00 per party for mediation was determined in order to facilitate access to this means of alternative dispute resolution (adjusted to € 50,00 if the parties reach an agreement). The fee for private mediation is not regulated.

Relation to Civil Procedure: No information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a contract or court judgment if approved by a court. Mediation can toll the statute of limitations for the duration of the mediation in public mediation systems.

Ensuring Quality: There is not information about an accredited training entity. Direcção-Geral de Política da Justiça (DGPJ) is the public entity competent to monitor public ADR providers. Private ADR providers are currently under no monitoring public or private authority. For required training, basic training is 40 hours. Advanced training is 140 hours of training in a specialized field of mediation.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitrations, both domestic and international, are governed by Law 63/2011 of December 14 (Arbitragem Voluntária—Voluntary Arbitration), which replaced, effective in 2012, the 1986 law governing both types of arbitration. The recent law is based largely on the UNCITRAL Model Law on International Commercial Arbitration. Portugal is also a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 Convention on International Commercial Arbitration, and the 1965 ICSID Convention.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is generally according to Portuguese law but may be in equity, if the parties expressly indicate that the arbitral tribunal shall act as an *amiable compositeur*. The fee is often determined according to the amount in dispute, but that approach may vary for ad hoc arbitrations. To be enforceable, an agreement to refer disputes to arbitration must be in writing.

Relation to Civil Proceedings: Arbitration is confidential. The award can be enforced by the court, provided that it complies with formal requirements. The award can be challenged within 60 days only under very limited circumstances listed in the Law on Voluntary Arbitration which are rarely called upon.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.21 Romania

Trends for ADR

Overall: The ADR trend in legislation is positive. Ten years ago there were no legal provisions regarding ADR. The current state of legislation regarding ADR procedures is in constant evolution. The Civil Procedure Code is expecting to be changed before the end of the year 2012, with great expectations to include new ADR provisions.

Mediation: In the last decade, Law number 192 from 2006 on mediation and on the organization of the mediation profession was the first to introduce ADR into national legislation. The law has since been modified three times, in 2009, 2010 and 2011. In addition, in 2010, the Civil Procedure Code was modified, bringing a new trend in the use of mediation. Article 131, paragraph 2 of The Civil Procedure Code established that a judge could invite parties to use mediation. In the same year, mediation procedure become mandatory in B2B disputes, along with conciliation (recourse to mediation or conciliation is mandatory in B2B disputes involving money issues). There is also pending a law project regarding mandatory B2B dispute mediation.

Arbitration: No information available beyond overall information, above.

Key Mediation Legislation: Mediation is governed by the Law on mediation and organizing the mediator profession (Law 192/2006, amended in 2009, 2010, and 2011). The Civil Procedure Code Book VI, Chapter XIII, Art. 720(1), 720(7) contains legal provisions regarding judges' ability to invite parties to initiate the mediation procedure in B2B disputes. Romanian law also includes provisions for Conciliation. Changes in the Civil Procedure Code, including new ADR provisions, are expected by the end of the year 2012. It is anticipated, inter alia, that mediation procedure will become mandatory for B2B disputes involving money issues, along with conciliation.

Recourse to Mediation: Mediation is generally voluntary. Mediation is voluntary in B2B disputes not involving money issues, but the court can suggest the use of mediation. Recourse to mediation or conciliation is mandatory in B2B disputes involving money issues. As of October 2012, October 1st 2012 attending a mediation information session will become mandatory in some cases, like family cases, consumer cases, and cases under 50.000 lei (around € 11.000). As an incentive, the court may refund judicial stamp charges in full. The court may impose sanctions for refusal to participate in the information session.

Mediation Procedure: Mediation must be accredited by the Romanian Mediation Council. The maximum duration in criminal mediation is three months. The fee for mediation is not regulated. A mediator has the right to refuse to take a certain case, but has the obligation to recommend another mediator.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. The mediator cannot be compelled to give evidence in judicial proceedings, unless the parties agree otherwise. If the parties reach an agreement, it has the same effect as a contract or court judgment if approved by a court or notary public. Mediation can toll the statute of limitations, but the length of the suspension may vary according to the type of dispute.

Ensuring Quality: The Romanian Mediation Council is the accredited training entity, and it monitors mediators and mediation providers. For required training, basic training is 80 hours within 14 days. Advanced training is 20 hours.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Civil Procedure Code, Book IV, About arbitration.

Arbitration Procedure: Arbitration can be ad hoc or institutional. Ad hoc arbitration is governed by the provisions of the Civil Procedure Code. Usually, the arbitration award is based on the law that applies to the contract between the parties. The fee is a registration tax of € 150 and an arbitration fee based on the value of the claim, determined by the Court of Arbitration Secretarial Office. In domestic arbitration, fees also include the arbitrators' fees.

Relation to Civil Procedure: Arbitration is confidential. Arbitration awards are final and mandatory for the parties. At the parties' request, the arbitration can be enforced by law. The Civil Procedure Code enumerates the grounds on which an arbitral award may be challenged.

Ensuring Quality: There is no required training and no general monitoring entity. The coordination and monitoring of the activity performed by the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry is ensured by the Court of Arbitration College.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.22 Slovakia

Trends for ADR

Mediation: Slovakia initially enacted legislation concerning mediation well before the release of the Directive. In its 2004 adoption of the Mediation Act no 420/2004 Coll on mediation ('the Mediation Act'), Slovakia joined other European countries that already had acted to implement legislation addressing this unique and promising method of ADR. During the approximately seven years the Mediation Act has been in force, the use of mediation in Slovakia has noticeably extended dispute resolution beyond adjudication and changed the perspective of the general public on dispute resolution. Mediation has become an integral part of the Slovak legal order and is now established by a number of laws and forms.

Before 2004, there were no legal provisions in Slovakia addressing mediation. Instead, the courts applied conciliation techniques at the beginning of a proceeding, pursuant to Articles 67 to 69 of the Code of Civil Procedure (CCP). A successful conciliation was followed by a court settlement (also called a 'praetorian settlement'), which had the effect of a final court decision. Since its 2004 adoption, the Mediation Act has been subject to amendments, the most significant of which occurred in 2010 for the purpose of implementing the Directive. Some of the amendments were viewed by mediators with hesitation and even with displeasure. In particular, the obligatory deposit of a mediation agreement in the registry list was seen as absolutely irrelevant in the areas of peer, family, and community mediation. Concern was also expressed about the lack of a body to unify mediators in Slovakia, such as a chamber of mediators. Other amendments extended the coverage of the Mediation Act to cross-border cases, regulated the obligation of confidentiality, changed the provisions relating to the beginning of mediation, and introduced the obligation for continued education of mediators.

Under the Mediation Act, according to the Ministry of Justice, 550 mediators have been certified, and 10 educational institutions and 25 mediation centres accredited (as of 12 December 2011).

Arbitration: Not enough information available.

Key Mediation Legislation: Mediation is governed by the Mediation Act no 420/2004 Coll. on mediation, most recently amended in 2010 to transpose the 2008 Directive.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to mediation in all pending and new cases in civil and commercial matters. Also, according to the Code of Civil procedure, section 99(1), courts should always explore the possibility of settlement. As incentives, if mediation is used, there is the potential for the reimbursement of certain costs. If the court recommends mediation and a litigant, without good reason, refuses to attend the first meeting with a mediator, the court may refuse to completely or partially reimburse the litigant for litigation costs, even if such reimbursement might have been otherwise available.

Mediation Procedure: Mediators must be registered in the register of mediators. The maximum duration and fee for mediators are not regulated.

Relation to Civil Procedure: Mediation is confidential. Article 5 of the Mediation Act requires the mediator, the parties involved in the mediation, and other individuals attending the mediation, to make a commitment that they will not reveal information obtained during the mediation process. If the parties reach an agreement, it has the same effect as a court judgment if approved by a court,

arbitral body, or notary public. Mediation can toll the statute of limitations if the written agreement to mediate the dispute in question is properly filed in the Notarial Central Register of Deeds.

Ensuring Quality: There is no information available about an accredited training entity. The Ministry of Justice monitors mediators. For required training, basic training is 100 hours (except for natural persons holding a law degree). Advanced training is at least two seminars in a five-year period.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Following the establishment of the Slovak Republic on 1 January 1993, arbitral proceedings were regulated by the 1963 Czechoslovakian Arbitration Act, which prohibited domestic arbitration for entities that were not state owned. The entry into force of Act No. 218/1996 Coll. on Arbitration (1996 Slovakian Arbitration Act) re-introduced the possibility for parties to resolve domestic disputes by way of arbitration. However, contrary to the legislators' expectations, the 1996 Slovakian Arbitration Act did not cause a significant increase in the number of domestic arbitral proceedings. The 1996 Slovakian Arbitration Act was replaced by Act No. 244/2002 Coll. on Arbitration, which entered into force on 1 July 2002 (Slovakian Arbitration Act). The Slovakian Arbitration Act has subsequently been amended twice.

Arbitration Procedure: Arbitration can be ad hoc or administrated. The Slovakian Arbitration Act neither regulates the fees for the arbitral procedure nor the entitlement of the arbitrators to fees. The arbitration fees of each arbitral institution are regulated by its internal rules, which are typically binding upon the parties to institutional arbitral proceedings.

Relation to Civil Procedure: Arbitrators are bound by a duty of confidentiality, which survives the termination of the arbitral proceedings. An arbitrator may only be released from his or her confidentiality obligation with the consent of the parties or under certain statutory exceptions. The parties are not bound by such duty of confidentiality. An arbitration award may be challenged in court if it is contrary to law.

Ensuring Quality: The Ministry of Justice monitors arbitrators.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.23 Slovenia

Trends for ADR

Overall: Recent years have seen significant changes in both arbitration and mediation legislation. No regulatory framework for mediation existed until 2008. Arbitration was regulated within a chapter of civil procedural code before the 2008 enactment of the Law on Arbitration. Both fields are today appropriately regulated with specific laws. In addition, the 2009 Law on Alternative Resolution of Judicial Disputes has significantly contributed to increased supply and demand for mediation.

Key Mediation Legislation: Mediation is governed by the Law on mediation in civil and commercial matters (OG No 56/2008), implementing both the 2008 Directive and the UNCITRAL Model law on International Commercial Conciliation. Other laws govern court provision of mediation and other ADR services: the Law on alternative resolution of judicial disputes [OG 97/2009]; the Decree on mediators in courts programs [OG 22/2010]; and the Decree on remuneration and expenses reimbursement to mediators in court programs [OG22/2010].

Recourse to Mediation: Mediation is, overall, voluntary, but a judge may invite (or order, after an information session) the parties to participate in mediation in all pending and new cases in civil and commercial matters. A court may, following a mediation information session, refer a dispute to mediation but the disputants may opt out. As an incentive, the first 2.5 hours of mediation are free in civil (and family) litigation. Sanctions may be imposed on parties who do not participate in mediation in good faith.

Mediation Procedure: Mediators must be accredited in court-related schemes. The maximum duration for a mediation is three months. For court-connected and court-annexed mediation, the fee is hourly-based and increased in case of settlement for a fixed amount depending on whether it is a family, civil, or commercial dispute. Fees for private mediation are not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations.

Ensuring Quality: The Ministry of Justice, the ADR Council, and the courts share the responsibilities for monitoring mediators and accrediting training entities and mediators; which authority takes on which task depends in large part on whether court-connected or court-annexed mediation is involved. For required training, basic training is 40 hours. Advanced training is 16 hours every year.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Law on Arbitration (OG 45/2008), implementing the UNCITRAL Model law on International Commercial Arbitration.

Arbitration Procedure: Arbitration can be ad hoc or administrated, and the procedure is most often according to law. Fees are not regulated. To be enforceable, an agreement to refer disputes to arbitration must be in writing.

Relation to Civil Procedure: Arbitration is confidential only if so agreed by the parties. The award can be enforced by the court, provided that it complies with formal requirements. The award can be challenged only in few cases, and never on the merits.

Ensuring Quality: There is no required training or monitoring entity.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.24 Spain

Trends for ADR

Overall: Both mediation and arbitration have seen changes in the last two years.

Mediation: Most recently, mediation legislation was introduced to Spain by the 2012 Royal-Law Decree.

Arbitration: The Law in force regarding Arbitration, enacted in 2003, was amended in 2011.

Key Mediation Legislation: Mediation is governed by Royal-Law Decree 5/2012, 5th of March, on mediation in civil and commercial issues, implementing the Directive.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. The law provides for no sanctions or incentives.

Mediation Procedure: Mediators must be part of public or private entities and corporations of public law accredited by the Ministry of Justice. The fee for mediations is not regulated, but the costs must be divided equally between the parties, unless agreed otherwise. If the amount in dispute is € 600 or less, the parties must use electronic means.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in a court or arbitration procedure. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations from the beginning of the mediation process until the signature of the agreement or until the end of the mediation.

Ensuring Quality: A mediator must have specific training, which can be acquired after one or several specific training given by an accredited institution. The Ministry of Justice regulates mediators.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by Law 60/2003, 23rd December, Arbitration (2003, last amended 2011).

Arbitration Procedure: Arbitrary procedure is according to law and equity. Fees are not regulated.

Relation to Civil Procedure: Arbitrators, the parties, and arbitral institutions are required to keep confidential the information that they know through the arbitration proceedings. The court of first instance of the place where the decision was made has the power to execute the arbitration award. An action for an annulment of the award is brought to the Civil Court and the Criminal Court of Justice of the Autonomous Community where it was made.

Ensuring Quality: There is no required training. The Civil Court and Criminal Court of Justice of the Autonomous Community where the arbitration takes place are the monitoring entities.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.25 Sweden

Trends for ADR

Mediation: The call for more structured private mediation and ADR rules in legislation in recent times may be seen as beginning with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) starting to also offer mediation services through the establishment of the SCC Mediation Institute and adoption of mediation rules for it in 1999.

Between 2005 and the implementation of the 2008 Directive in August 2011, Sweden had reports done and considered various options for increasing the use of mediation and other dispute

resolution mechanisms, but no final decisions were made. Although the Directive was due for implementation on 21 May 2011, the Act on Mediation in Certain Civil and Commercial Disputes did not enter into force until 1 August 2011. The delay in implementation was due to a delay in initiating a review of the appropriate legislative changes and the time required thereafter for the Parliament to enact the proposed changes. However, the Act on Mediation in Certain Civil and Commercial Disputes applies to mediation agreements entered into as of 21 May 2011.

The new Act on Mediation in Certain Civil and Commercial Disputes from 2011, and related statutory changes, introduced moderate but long-due amendments to the current mediation and settlement regime. The changes are especially significant for private mediation in Sweden, which until now has been completely unregulated. It is also a significant attitude change that mediation, in principle, is made equally important in the court-annexed mediation schemes as settlement negotiations (conciliation) conducted by the trial judges.

At this point, as Sweden embarks on a new legislative era, use of mediation remains limited and indications are that its practice is not likely to increase dramatically in the short run. But laws and institutions that make an increase likely in the long run are now in place.

Arbitration: Arbitration has for a long time, at least since the 1970s, been the main method for dispute resolution in B2B relationships in Sweden.

Key Mediation Legislation: Mediation is governed by the Act on Mediation in Certain Civil and Commercial Disputes (SFS 2011:860), enacted in response to the 2008 Directive. Also, under the Code of Judicial Procedure (SFS 1942:740), the District Courts and Courts of Appeal have a duty to establish whether there are possibilities for an out-of-court settlement.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. Judges have an obligation to examine the possibilities for settlement between the parties. As an incentive, the losing party must reimburse the winning party for its costs if settlement fails. The law provides for no sanctions.

Mediation Procedure: Mediators may be judges, experts, or any lawyer/lay person with specific professional knowledge relevant to the dispute. The maximum duration of mediation is not generally regulated, but a mediation administered by the Stockholm Chamber of Commerce (SCC) is limited to two months in duration. For special mediation, the parties are jointly and severally liable for paying the mediator and any other costs. For private mediation, a maximum fee is based on the value of the dispute.

Relation to Civil Procedure: For special mediation, unless the parties agree otherwise, no information presented in a mediation can be used in court. For private mediation, unless the parties agree otherwise, no information presented in a mediation can be used in a court or arbitration procedure, and mediators cannot testify in a possible future trial or arbitration. If the parties reach an agreement, it has the same effect as a court judgment when approved by a court. Mediation can toll the statute of limitations for a period of one month after the termination of the mediation for mediations other than court-annexed mediations.

Ensuring Quality: There is no training for mediators. There is no monitoring entity.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is governed by the Arbitration Act (SFS 1999:116).

Arbitration Procedure: Arbitration can be institutional or ad hoc, and the procedure is according to law. Fees are not regulated. Arbitration has been the main method used for resolution of B2B disputes since the 1970's.

Relation to Civil Proceedings: There is no mandatory provision that arbitration is confidential, but confidentiality is provided for under institutional rules and the Rules of Conduct of the Swedish Bar Association, unless information must be disclosed to challenge an award. The award can be enforced by the court, provided that it complies with formal requirements. Awards can be challenged only in the cases established in the Arbitration Act and never on the merits.

Ensuring Quality: There is no required training or monitoring entity. However, in practice, the SCC Mediation Institute provides training.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.26 The Netherlands

Trends for ADR

Mediation: In order to investigate whether structural mediation referral provisions within the legal infrastructure were justified and if so, how these could be embedded in the most effective and efficient way, two national mediation projects started in 1999: the judiciary project and the financed support project. In the judiciary project, referrals of the courts to mediation took place in the area of civil law and administrative law. The financed support project concerned the referral of clients of the legal counter offices to mediation. The evaluation of these projects in 2003 led to the publication of the Research and Documentation Centre-report entitled *Room for Mediation*. The conclusion was that there was room for mediation within the legal infrastructure.

As a result of the conclusions of the report, the Ministry of Justice introduced a number of policy measures in April 2005 which were intended to help parties to weigh the pros and cons when seeking to resolve conflicts and to choose mediation when appropriate. Since then the Dutch Ministry of Justice has aimed to promote familiarity with mediation and to promote its use by introducing a number of policy measures. *The scope of the implementation of the European Mediation directive (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) will be limited to cross-border cases. Therefore a separate law will be developed, which only applies to cross-border cases.*

The Amsterdam Court started a pilot two months ago on the prevention and resolution of bankruptcies using mediation. Expectations are that the implementation of a mediation procedure will limit the costs of creditor's meetings and other insolvency proceedings. The outcomes of this investigation may raise some unprecedented legal consequences: for example, a request for a mediation procedure could lengthen a bankruptcy proceeding. Furthermore, the hourly fee and other costs of the mediator and mediations will most likely become a preferential claim in the final distribution of the bankruptcies' benefits.

Arbitration: The Dutch Arbitration Act was considerably influenced by both the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law of 1985. The Bill on the revision of Arbitration Law of March 13th 2012 (preparatory phase) foresees a further modernisation and

harmonisation with the UNCITRAL Model Law for Arbitration, as well as some other modernisations, like accommodation of existing legislation for the use of online arbitration.

Key Mediation Legislation: Bill No. 32.555 (2010), concerning modification of Code of Civil Procedure regarding the implementation of the European Directive on Mediation, has recently been rejected by the Senate. A Member of Parliament, Ard van der Steur (VVD), has taken the initiative to draft a bill which regulates more than the rejected Bill no. 32.555. In addition, the Bill on the implementation of the Directive 33320 July 4th 2012, which is limited to cross-border mediations, is in the preparatory study phase.

Recourse to Mediation: Mediation is always voluntary, but a judge may invite the parties to participate in mediation in all pending and new cases in all cases. However, an obligation to cooperate has been construed in labour cases by several courts. There are no sanctions or incentives.

Mediation Procedure: Mediators must be on the list of Legal Aid Board (which means that they are registered at the Netherlands Mediation Institute (NMI) and have fulfilled extra criteria established by the Ministry of Justice). There is no information about the maximum duration for mediations. The fee is not regulated.

Relation to Civil Procedure: Unless the parties agree otherwise, no information presented in a mediation can be used in court. Mediators cannot testify in a possible future trial. If the parties reach an agreement, it has the same effect as a court judgment or notarial deed when approved by a court, or a settlement agreement by means of an arbitral award. Mediation can toll the statute of limitations until the end of mediation.

Ensuring Quality: There is no official monitoring authority that provides mandatory quality standards for either private or public mediators. But the private organization of the NMI provides and independent register for mediators in the Netherlands, and the NMI register has gained certain judiciary recognition in the Netherlands. For required training, basic training is a minimum of 18 days of at least three hours per day.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Legislative Decree nr.191-191a of July the 2nd 1986, Stb. 1986, 372 (provides uniform regulation for national and international arbitrations). The Bill on the revision of Arbitration Law March 13th 2012, providing for further modernization and harmonization with the UNCITRAL Model Law for Arbitration and accommodation of existing legislation for online arbitration is currently in the preparatory phase.

Arbitration Procedure: The procedure is according to the law chosen by the parties or internationally accepted principles as well, such as the Lex Mercatoria, the UNIDROIT Principles of International Contract Law or the Principles of European Contract Law. Fees are not regulated.

Relation to Civil Procedure: There are no mandatory rules about confidentiality, but the parties may agree upon it. Arbitral awards may not be appealed to state courts (an appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have so agreed).

Ensuring Quality: There is no monitoring authority for the activities of arbitration courts, and no mandatory accreditation or certification of arbitrators on a legal basis.

Ensuring Information: No provision related to arbitration promotion in national legislation.

2.5.27 United Kingdom

Trends for ADR

Mediation—Mediation has not been formalised into any legislation apart from compliance with adoption of the 2008 Directive. For compliance, the Ministry of Justice considered that law and practice in England and Wales already complied in large part with the Directive, but that additional legislation was needed to bring particular aspects into force, including the enforceability of agreements reached through mediation and certain confidentiality aspects. Changes therefore were made to Part 78 of the Civil Procedure Rules (“CPR”) which introduced provisions relating to these two aspects and came into effect for cross-border mediations commenced on or after 6 April 2011. A statutory instrument (the “Regulations”) which came into effect on 20 May 2011 implemented the outstanding provisions of the Directive relating to confidentiality of mediation proceedings and the suspension of the limitation period while a relevant mediation is ongoing.

Arbitration: The Arbitration Act 1996 remains the main instrument concerning the process and the enforceability of the arbitral award. There have been no significant legislative amendments over the past 10 years.

Key Mediation Legislation: Mediation is governed by the Civil Procedure Rules 1998.

Recourse to Mediation: Mediation is always voluntary in the B2B context, but a judge may invite the parties to participate in mediation in all pending and new cases in civil and commercial matters. Parties contemplating court litigation are under an obligation to consider whether their dispute could be settled by ADR and the courts have various powers to encourage parties to mediate. There is a possibility of mandatory Small Claims cases in the near future. Mediation information and assessment sessions have been mandatory for family matters since April 2012. The law provides for no incentives, but parties who do not consider or participate in mediation may be sanctioned.

Mediation Procedure: Mediators, in practice, are generally accredited by the Civil Mediation Council. Small claims court mediators are civil service employees and are not connected to mediation providers. There is no maximum duration for mediations. There is no single, agreed model or mechanism for establishing the fee rate for a mediation process in the UK. For small claims cases, up to two hours of telephone service is provided free. For fast track mediation, there is a Ministry of Justice fee schedule. For disputes valued at over 50000 GBP, private rates are determined by agreement of the parties. The mediator has no further role in mediation if agreement is not reached.

Relation to Civil Procedure: Confidentiality in mediation is governed by contract subject to application of English common law. If the parties reach an agreement, it has same legal effect as a contract but not a legal judgment. Mediation cannot, alone, toll the statute of limitations, but a court can order the stay of proceedings for an agreed period.

Ensuring Quality: At present, there is no regulating body for mediation and there are no statutory qualifications necessary to act as a mediator. However, in practice, most mediators have some form of accreditation, following assessed training by training providers approved and accredited by the Civil Mediation Council (CMC). For required training, basic training consists of 40 hours plus assessment plus direct case experience. Advanced training requires annual training.

Ensuring information: No provision related to mediation promotion in national legislation.

Key Arbitration Legislation: Arbitration is covered by the Arbitration Act 1996.

Arbitration Procedure: Arbitration can be institutional or ad hoc, and the procedure is according to law. Fees are not regulated.

Relation to Civil Procedure: No information is available about confidentiality. An arbitration award can be enforced if the arbitration was conducted in accordance with the Arbitration Act. An award may be challenged only in specific circumstances and never on the merits.

Ensuring Quality: Training of arbitrators depends on the institute providing the training, and there is no monitoring of such institutes. It is generally accepted that all professional and highly regarded arbitrators and mediators will have undertaken professional training over and above the professional training they would have done to qualify as lawyers, barristers, engineers, or in other professions.

Ensuring Information: No provision related to arbitration promotion in national legislation.

3 Existing ADR processes and providers

3.1 B2B ADR providers and processes

Research method for identifying ADR Providers (question 1)

The landscape of B2B ADR providers is extremely fragmented in Europe. Hence we have taken specific research steps to come to realistic and comparable overviews of ADR providers – as presented in the 27 country profiles.

The aim of these overviews is to present an overall pattern and structure of B2B ADR provision in each of the Member States, without being exhaustive or aiming to have a catalogue. This list should be illustrative of the types of ADR providers and gives an understanding of the landscape and variety of B2B ADR providers.

The method for identifying ADR providers has been as follows:

- a. Collect data from official statistics, previous ADR studies (notably the GHK/Civic Consulting/Van Dijk 2009 study) and additional web search for each of the main categories: court-annexed, public/state financed, Chamber of Commerce, Professional associations and private providers. Add this information including the sources to the table.
- b. Identify whether there are other/missing categories of providers by using official statistics, websearch and/or interviews (in this order); add this information including their sources to the table;
- c. Assess whether these providers are typical or specific; the assessment takes place through additional webresearch and/or interviews. Provide orders of magnitude and illustration of providers per category on that basis.
- d. For larger numbers (e.g. more than 10 providers), the total number of such providers will be listed.
- e. With regard to Private/Individual providers, an assessment has been made of the registers provided by “umbrella organisations” for either mediation or arbitration. Where possible, only those ADR providers addressing commercial ADR services have been listed. Umbrella organisations are those which act primarily as broker and not as ADR provider themselves.
- f. On the basis of the above analysis across the EU, we have deduced that across the EU, 1/3 of mediators include commercial mediation services (whilst 90% of arbitrators are considered to provide commercial arbitration).
- g. As individual ADR providers can be part of several listings, we have been careful in listing several umbrella organisations. Therefore, we have listed one umbrella organisation in smaller countries and up to 3 umbrella organisations in larger Member States.

3.1.1 EU B2B ADR providers and processes by category

This section aims to provide a clear understanding of the existence of the B2B “ADR supply” in Europe in terms of ADR processes and ADR providers available to SMEs and large companies, in particular:

- Whether an ADR infrastructure is already in place in each Member State;
- The level of development in each Member State;
- The level of ADR providers across Europe.

Table 3.1

Number of B2B ADR providers in the EU divided by category and procedures offered

Main Categories of ADR providers	ADR providers by category	ADR providers by procedures offered		
		Amicable solution e.g. Mediation	Proposing a solution e.g. Conciliation	Imposing a solution e.g. Arbitration
Court-annexed	668	378	211	310
Public/State financed	386	348	359	20
Chamber of Commerce	369	270	28	292
Professional Associations	281	177	18	105
Business or Sector Association	195	144	12	58
Private	7,834	6,370	44	1,672
TOTALS	9,733	7,687	672	2,457

Source: Elaboration based on data collected at the local level

In order to have reliable data on the supply side of the B2B ADR sector, the focus has been on the collection of information on ADR organisations. No reliable and consistent EU-wide data exist on individual or 'solo' mediators and arbitrators as it is not considered a profession. Therefore, a separate research effort has been undertaken to make an inventory on the basis of lists of ADR organisations recognized by the law or by the market (see Box). However, not all ADR providers listed in a public register are fully operational. Furthermore, in Member States where ADR is rapidly growing due to a legislative reform the number of ADR providers can change quickly.

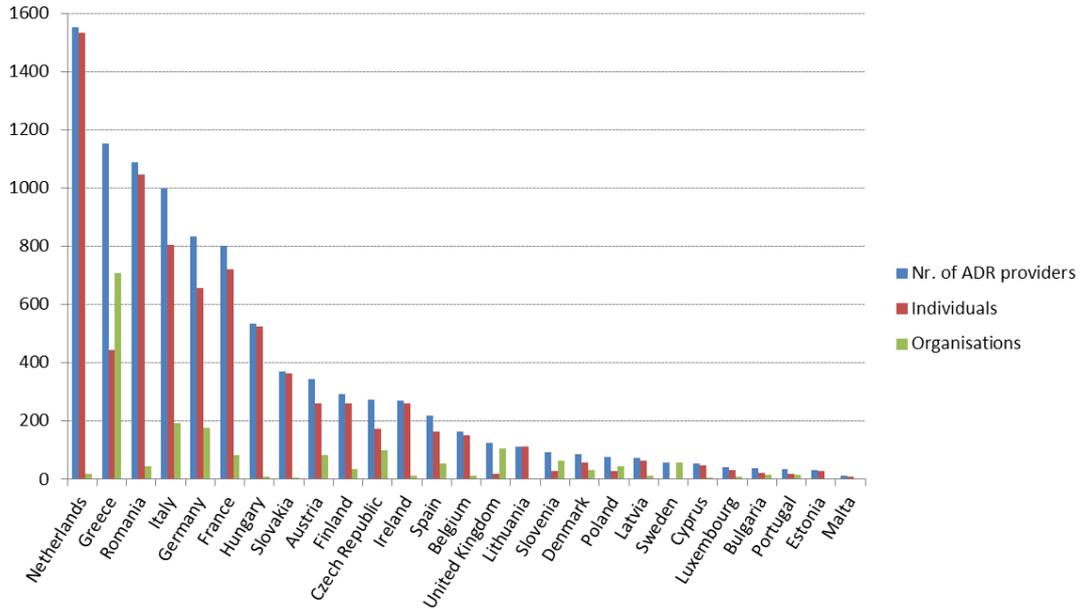
The total number of ADR providers operating in the EU that offer their services to B2B disputes are about 10,000, of which the majority are offering a procedure of "amicable solution" (i.e. mediation) followed by "imposing a solution" (i.e. arbitration). The ADR providers that offer a service that leads to "proposing a solution" form a minority. Private ADR providers are the most numerous with about 80% of the total, whilst only 4% are public ("Court-annexed" or "State financed").

Available data show a great variance in the existence of ADR providers across Europe. Some countries such as Romania, Austria, Hungary and Italy have a strong presence of ADR providers. Latvia has the next high numbers, whilst few others position between 100 and 50. However, those numbers do not necessarily reflect the real status of the active and full time ADR providers: organisations and individuals - mostly listed in a national public registers²¹. The mix of individual and organisations amongst provider changes across EU Member States, with private providers being a large majority in some large Member States (i.e. Netherlands, Romania, Italy, France and Hungary), and organisations (mostly public) being the majority of providers in others (i.e. Greece). The remaining Member States show a limited number if compared to the ones mentioned.

²¹ To ensure a more robust and reliable analysis we have also added ADR providers outside of public registers, but well established and representative for the country.

Figure 3.1

Number of ADR providers per Member State

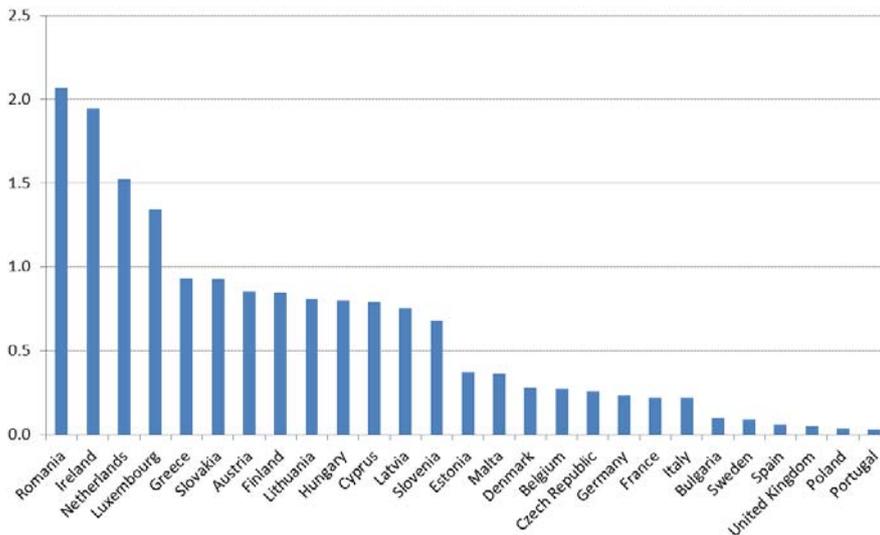


Source: Elaboration based on data collected at the local level

The pattern changes when it comes to distribution of providers by businesses, with Romania and Ireland, followed by the Netherland and Luxemburg, showing the largest number of providers if weighted by the number of businesses and Portugal, Poland, UK, Spain, Sweden and Bulgaria showing a low ratio. In-between are few larger Member States with a low ratio due to their high number of business (e.g. Italy, France and Germany) and other smaller EU Members (with the exception of Hungary) showing a higher ratio. .

Figure 3.2

Number of ADR providers each 1,000 businesses



Source: Elaboration based on Eurostat most recent data and data collected at the local level

3.1.2 Existence of monitoring authorities and their role

Monitoring authorities relate mostly to mediation. The overview below refers therefore exclusively to mediation. No monitoring authority exists for neutral evaluation of arbitration in any Member State.

Table 3.2. Main roles of monitoring authorities and their role (mediation only)

Member States	ADR Monitoring Authority		ADR Authority Main Role	Control of ADR Authority under		
	Yes	No		Minister of Justice	Judiciary	Other
Austria	Yes		<ul style="list-style-type: none"> To maintain a list of mediators 	X		
Belgium	Yes		<ul style="list-style-type: none"> Mediation: To accredit mediators on the basis of the law of 21 February 2005. To publish online a register of accredited mediators. To list mediation training providers which deliver mediation classes recognized for meeting the accreditation criteria. There exist no such monitoring authority in Belgium with regards to conciliation and arbitration. 			Federal Commission for Mediation
Bulgaria	Yes		<ul style="list-style-type: none"> To accredit and monitor mediation and training providers 	X		
Cyprus		No				
Czech Republic		No				
Denmark	Yes (only court-annexed mediation)		<ul style="list-style-type: none"> Denmark has no official legislation dealing with mediation outside the courts. Mediators annexed to the courts are registered by the local court. 		X	
Estonia	Yes		<ul style="list-style-type: none"> To conduct periodical inspections of professional activities of notaries and lawyers listed as mediators 	X (of notaries performing as mediators)		Bar association of lawyers performing as mediators
Finland	Yes		<ul style="list-style-type: none"> To supervise that members of the Finnish Bar Association acting as mediator fulfill their obligations in relation with disciplinary matters. 			Disciplinary Board of the Finnish Bar Association

Member States	ADR Monitoring Authority		ADR Authority Main Role	Control of ADR Authority under		
	Yes	No		Minister of Justice	Judiciary	Other
France		No				
Germany		No				
Greece		No	<ul style="list-style-type: none"> • There is only a monitoring public authority for training of ADR providers. 	X (According to Presidential Decree 123/2011, the MoJ and the Mediators Accreditation Commission)		
Hungary	Yes		<ul style="list-style-type: none"> • To supervise mediators and procedures • To register mediation service providers 	X		
Ireland	Yes		<ul style="list-style-type: none"> • To accredit mediators and check if they have the appropriate training, knowledge, and competence to effectively mediate 			Mediators' Institute of Ireland
Italy	Yes		<ul style="list-style-type: none"> • To accredit and monitor mediation and training providers 	X		
Latvia	Yes		<ul style="list-style-type: none"> • To examine mediators and deliver certification • To develop a uniform training standard • To conduct training programs for certification of mediators • To establish and maintain a list of certified mediators • To monitor the mediation service quality and deal with complaints; • To establish and adopt a code of ethics for mediators. 			Committees of Association "Mediation Council"
Lithuania	Yes for	No for	<ul style="list-style-type: none"> • No monitoring authority of mediation providers. Some kind of supervisory function only in respect of settlement agreement concluded in the course of 			

Member States	ADR Monitoring Authority		ADR Authority Main Role	Control of ADR Authority under		
	Yes	No		Minister of Justice	Judiciary	Other
	arbitration	mediation	<p>mediation by the court.</p> <ul style="list-style-type: none"> Lithuanian Arbitration Association has instituted a specific panel of experts arbitrators which monitors decisions adopted by arbitral courts administered by Vilnius Arbitration. 			
Luxembourg	Yes			X for judicial mediations		
Malta	Yes		<ul style="list-style-type: none"> To set up criteria for the appointment of mediators To approve and keep a register of nominated mediators To remove mediators from the list in certain circumstances according to law To provide a code of ethics to be followed by mediators during proceedings 			Malta Mediation Centre
Netherlands		No				
Poland	Yes		The Council issued several documents that act as a benchmark for the ADR national movement	"Civic ADR Council" at the Ministry of Justice		
Portugal	Yes (only public ADR providers)		Received its competence through a recent government reorganisation and has not yet implemented any measures to carry out such monitoring.	X Direcção-Geral de Política da Justiça		

Member States	ADR Monitoring Authority		ADR Authority Main Role	Control of ADR Authority under		
	Yes	No		Minister of Justice	Judiciary	Other
Romania	Yes		<ul style="list-style-type: none"> To elaborate on the training standards and professional training curricula/programs and supervise their observance To prepare and update the list of training providers who have obtained their required authorization To keep records of the Panel of authorized mediators and their offices To issue the documents certifying the professional qualification of the mediators; To adopt the Professional Ethics and Deontology Code of authorized mediators 			Romanian Mediation Council
Slovakia						
Slovenia		Yes (only public providers)	<ul style="list-style-type: none"> MoJ determines the conditions for issuing approval to mediation providers for accreditation of mediators in court-connected schemes and the way of supervising those mediators. ADR Council issues approvals to providers for accrediting court-connected mediators in respective mediation schemes. Presidents of courts accredit mediators in court-annexed mediation schemes and are responsible for monitoring the program through mediation program administrators. MoJ runs central registry of accredited mediators in both, court-annexed and court-connected mediation schemes. 	X	X	ADR Council
Spain	Yes		<ul style="list-style-type: none"> The Law provides that the Minister of Justice could regulate the Mediators. 	X		
Sweden		Yes (only public ADR)	<ul style="list-style-type: none"> To monitor the quality of court mediation in the form of settlement negotiations 			Swedish National Courts

Member States	ADR Monitoring Authority		ADR Authority Main Role	Control of ADR Authority under		
	Yes	No		Minister of Justice	Judiciary	Other
						Administration
United Kingdom		No	<ul style="list-style-type: none"> Civil Mediation Council (CMC) assesses and accredits mediators 			Civil Mediation Council

Comments on table 3.2:

- **Austria:** According to the Austrian Mediation Act, only mediators registered in the Federal Minister of Justice’s list are allowed to act as mediators.
- **Denmark:** Although there is no official legislation dealing with mediation outside the courts, mediators annexed to the courts are registered by the local court.
- **Lithuania:** There is no monitoring public authority of mediation providers yet. However, some kind of supervisory function only in respect of settlement agreements concluded in the course of mediation is executed by the court. In reference to arbitration, the Lithuanian Arbitration Association has instituted a specific panel of expert arbitrators which monitors decisions adopted by arbitral courts administered by Vilnius Arbitration (solely this arbitral institution).
- **UK:** At present, there is no regulating body for mediation or statutory qualifications necessary to act as a mediator. However, in practice, most mediators have some form of accreditation, following assessed training by training providers approved and accredited by the Civil Mediation Council (CMC).

3.1.3 Status of Online Dispute Resolution

The study and interviews conducted confirmed that the definition of ODR as “an alternative dispute resolution process aided by online technology” could have a huge variety of meanings and it is more suitable for B2C disputes, not for B2B. Usually a full ODR tool (with the absence or very limited human intervention) has been used in the United States to resolve small claims or e-commerce disputes B2C and C2C. In Europe, despite its potentiality in resolving disputes online, the few ODR projects currently in place have attracted a very limited number of users. ODR still remains in the pilot project phase with little or scarce use. Most ODR processes consist simply of allowing the claimant to submit the application form online. It seems that the development of ODR is very related to the development of ADR: users could gain confidence in ODR only when a very well developed ADR market exists and ODR is administrated by a trusted entity.

In B2B disputes, ODR has two main uses:

- 1) “e-filing” where the parties involved in a dispute can file and have access to all of the documents of the dispute;
- 2) online video conferencing to conduct meetings with the parties.

As the table below shows, there is no real ODR in place for B2B in almost all Member States.

Table 3.3: Overview of ODR by Member State

Member States	Online Form	Real ODR
Austria	35%	0
Belgium	N/A	0
Bulgaria	10%	3%
Cyprus	0	0
Czech Republic	N/A	0
Denmark	0	6%

Member States	Online Form	Real ODR
Estonia	0	0
Finland	20%	0
France	15%	0
Germany	5%	0
Greece	0	0
Hungary	10%	2%
Ireland	35%	0
Italy	30%	2%
Latvia	10%	0
Lithuania	0	0
Luxembourg	N/A	0
Malta	N/A	0
Netherlands	N/A	0
Poland	5%	0
Portugal	10%	0
Romania	1%	0
Slovakia	N/A	10%
Slovenia	20%	0
Spain	5%	5%
Sweden	0	0
United Kingdom	95%	2%

Source: Elaboration based on data collected at the local level

3.1.4 Current state and evolution of the ADR supply

The analysis of the Country Reports on B2B ADR gives a very fragmented mosaic of the existing ADR infrastructure across Europe. Significant differences exist even within the same Member State. In some countries, ADR processes are offered by single professionals outside any structured organisation. However, in each single Member State there is already and ADR infrastructure in place.

The ADR market is mature in larger Member States such as the UK, France, and Germany, and where the supply is quite established. In countries such as Italy, Romania, and Slovenia, in anticipation of a substantial increase in demand, ADR supply is growing rapidly with little control over quality. Finally, in countries such as Spain, Portugal, and Cyprus only few initiatives have been taken following the 2008 Directive on Mediation, and only a limited number of providers exist. A typical pattern is that supply exceeds the current demand for ADR.

The vast majority of ADR providers are a small division of a public body or operating on a part time basis (eg. within a law firm). Many are micro-entities that operate locally. This local-level characteristic related strongly to local-level actors 'knowing' each other more, being able to build up trust and working relationships, and as a result to be willing to work together to resolve disputes. However, the larger the geographical area, and the more 'global' the business, then it becomes much more difficult to achieve the same levels of trust and confidence. In such a situation the trust needs to be provided through a strategic intermediary, which in the case of this study is the European Commission which, through its authority, aims to put in place clear, consistent, and pan-European working relationships.

The findings of the Country Reports prove that where the ADR market has been newly developed by the law, most of the ADR providers listed in a national register are not yet active or have only few cases. Very few ADR providers in Europe have a medium size structured operation present in more than three or four cities within a Member State. Almost none have their mediators and arbitrators working full time as an ADR practitioner.

A notable difference exists in the number of ADR providers from one Member State to another. This pattern can be largely attributed to the domestic ADR legal framework. In each Member State where there is an ADR law that promotes and regulates the ADR processes, the number of ADR providers tends to be large. It is of all evidence that the number of ADR providers growth only after a mediation reform took place. There is no Member State where, without a specific ADR law, the demand has created any significant offer of ADR services. The correlation between the existence of a strong legislation on ADR and the number of ADR providers indicates that the key driving factor is of a legislative nature.

Due to different ADR domestic legislations, the quality of ADR providers and their mediators and arbitrators varies greatly. The different requirements (trainings and professional background) for becoming mediators and arbitrators reflect the quality of the processes. As for example, by analysing the training requirements in the comparison table of mediation legislation in the previous chapter, hours of trainings varies from 0 up to 200. Furthermore, independence and neutrality is not clearly defined for ADR providers. It is strongly needed an harmonization of quality of mediators and arbitrators in Europe with a clear minimum level of trainings.

With regard to mediation, in almost half of the Member States (12), monitoring authorities exist that have the duty to ensure the quality of meditation through a process of accreditation and monitoring. In the ones present, their tasks vary greatly. Usually, they resort under of the Minister of Justice or the Judiciary.

3.2 Procedural characteristics

Despite the large literature on the variety of ADR procedures and the fragmentation of ADR providers, the study confirms that the existing and most used ADR processes can be grouped into two main categories based on their output: mediation, and arbitration. Other forms, such as neutral

evaluation, are lacking of coherent definitions across the EU and therefore it is difficult to identify and compare trends in usages.

While the core of the main features of the three main ADR processes and the effects of the outcome are almost the same across the EU, difference of procedural characteristics are imposed by domestic laws as reviewed in Chapter 2.

This section continues with the tables covering fees for mediation, neutral evaluation, and arbitration. The tables show yet again the significant unevenness of practice across the EU. However, the issue with fees is less one of absolute amounts, than one of transparency and value. If the ADR process is operating efficiently and effectively in, and across, Member States (which the material earlier has shown not to be the case) then the potential beneficiaries could be willing to pay clearly stated costs if they had the trust in the process and the confidence that the outcome would be beneficial to their businesses.

3.3 Mediation fees and fees bases

Mediation fees varies greatly across Europe based whether they are regulated by the law and on the criteria of adopted. On the first distinction we need to consider:

- *Not regulated.* In this case, the market is “free” in absence of a law that determine the mediation fee or its criteria. A point of reference are lawyers’ fees.
- *Regulated.* Usually, where mediation is strictly regulated, the law provides also fees or criteria for its calculation.

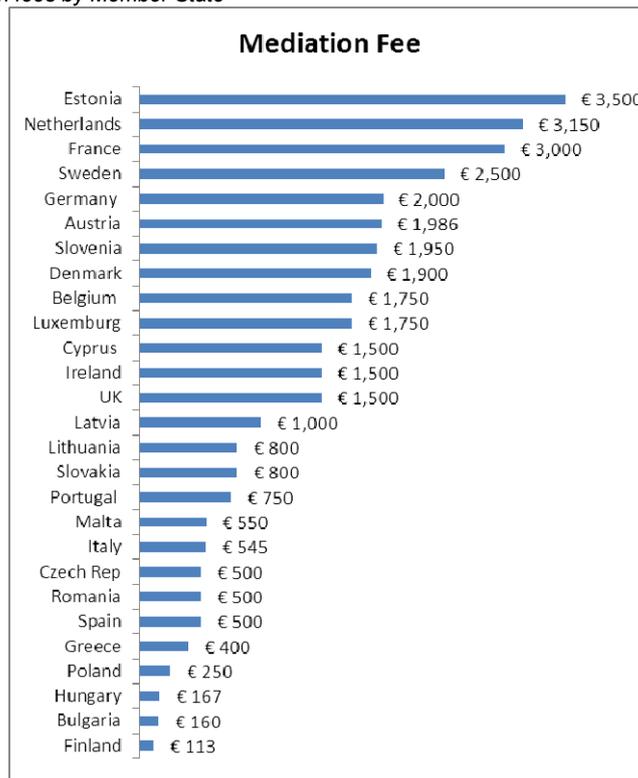
Either when the fees are regulated or not, the criteria to determine the mediation fess used can be one or more of the following:

- *By the hour (or session).* Where the total fees takes in account the duration of the mediation.
- *By the value in dispute.* Where the fees is a percentage or is proportional to the value in dispute regardless the duration of the mediation.
- *Success fee.* On top of the regular fee for managing the mediation, a success fee can be added in case the parties find an agreement.
- *By the experience of the mediator.* As many professionals fees, in some Member States the mediation fees is related to the experience of the mediators.

Further, within the same Member States, for the same typology of mediation the criteria used can vary according to the nature of the ADR provider (public or private) and the experience of the mediator. In order to compare the level of mediation fees across Europe for a B2B dispute, we have taken in consideration a standard B2B case of the value of 200% of Member State’s income per capita and asked to ADR experts to assess the average fee in the leading mediation providers for each party of a successful mediation in their country.

Figure. 3.3

Overview of mediation fees by Member State



Source: Elaboration based on data collected at the local level

The status of fees and criteria used in mediation across the EU is illustrated hereafter.

Table 3.4

Overview of mediation fees and the fee basis per Member States

Member States	Regulated or not by the law	Criteria of calculation	Range
Austria	Not regulated. Determined by the mediator.	Hourly basis.	€ 170 - € 280 for one hour.
Belgium	Not regulated. Determined by the mediator.	The most used model of determination is based on an hourly rate. For disputes of higher value, the value of the claim is also taken into account.	€ 125 – € 150 for one hour.
Bulgaria	Not regulated. Determined by mediation providers.	Private providers usually apply a hourly rate. For disputes of higher value, the value of claim is also taken into account.	No fee schedule. In court-annexed schemes, mediation is free.
Cyprus	Regulated (however, the amounts have not been fixed to date).	Based on the value of the claim.	€ 150 - € 400 for one hour.
Czech Republic	Not regulated.	Newly adopted Act on mediation presumed that fees will be settled by market itself, in free market competition, while particular mediation centers and individual	€ 100 – € 150 per hour

Member States	Regulated or not by the law	Criteria of calculation	Range
		mediators are competing for their clients.	
Denmark	Only court-annexed mediation is regulated.	Only court-annexed mediation fees are available. If mediation starts in the court, the mediation fee is covered by the paid court fee.	€ 950 for 4,4 hours.
Estonia	Not regulated.	Agreed between the parties and the mediator. Depends on the hourly rate of the mediator's occupation.	There is no state fee for mediation, however, the declaration of the mediation agreement to a writ of execution by the court is subject to a fee of € 63,91
Finland	Not regulated.	Agreed between the parties and the mediator.	€ 150 - € 400 for one hour
France	Not regulated. Determined by mediation providers.	Fixed rates depending on the value of the dispute.	<i>Domestic:</i> € 1.000 – € 6.000 (fixed rate for 5 hours maximum) <i>International:</i> € 5.000 – € 7.000 (fixed rate for 5 hours maximum)
Germany	Not regulated.	On an hourly basis upon prior agreement between parties and mediator. The range of fees is not documented and there are no statutory rules. Complexity of the case and reputation of the mediator influence the price.	€ 150 – € 350 per hour or € 1.200 – € 2.800 per day
Greece	Regulated according to MoJ decision Nr. 1460/27.1.2012.	Hourly basis fee.	€ 100 per hour (€ 500 - € 1.000 estimated for a mediation procedure)
Hungary	Not regulated.	Agreed between the parties and the mediator.	€ 16 – € 33 per party (first meeting) € 16 – € 66 per party (further meetings)
Ireland	Not regulated.	Based on the value of the claim.	€ 1.000 - € 7.000
Italy	Regulated by the law that sets the maximum fees.	Based on the value of the claim (regardless of the duration of the mediation).	Based on the value of the dispute. Maximum fees range from € 65 to € 9.200. There are no minimum fees. If the mediation is mandatory the max fees are discounted of 50%. A success fee of 20% is allowed.
Latvia	Not regulated.	Agreed between the parties and the mediator by hour's rate (The	€ 15 - € 50 per hour

Member States	Regulated or not by the law	Criteria of calculation	Range
		Mediation Law is not in force yet).	
Lithuania	Regulated by Vilnius Commercial Court of Arbitration.	Based on the value of the claim.	2% of the dispute amount (net of VAT for one mediator) 3% of the dispute amount (net of VAT for two mediators) 3,5 % of the dispute amount (net of VAT for three mediators)
Luxembourg	Not regulated.	Hourly basis fee.	€ 600 up to € 15.000 For amounts over € 15.000, the cost depends on whether the contract contains a mediation clause.
Malta	Regulated.	Hourly basis fee.	€ 50 - € 120 per hour
Netherlands	Not regulated.	Hourly basis fee.	€ 102 - € 225 per hour
Poland	Regulated court-annexed mediation. Not regulated private mediation.	<i>Private</i> : by the value of the claim, hourly basis fee, or nr. of mediation sessions <i>Court-annexed</i> : by the amount of dispute in all cases where the value may be defined	PLN 30 - PLN 1.000
Portugal	Not regulated.	Hourly basis fee.	€ 10 - € 200 per hour. According to the experience and background of the mediator, the rules of the service providers, and the value and nature of the dispute.
Romania	Regulated.	Negotiated with the parties and depends on the nature and subject of the dispute.	€ 25 – € 250 per hour
Slovakia	Not regulated.	Hourly basis fee.	€ 80 – € 200 per hour
Slovenia	Regulated court-annexed mediation. No regulated private mediation.	Hourly basis fee (but subject to increase depending on the number of the parties, complexity of a case, and value of the claim over € 50.000)	Hourly-based system example (adopted by Slovenian Association of Mediators): € 50 per hour in family disputes € 150 per hour in commercial disputes € 100 per hour in civil disputes

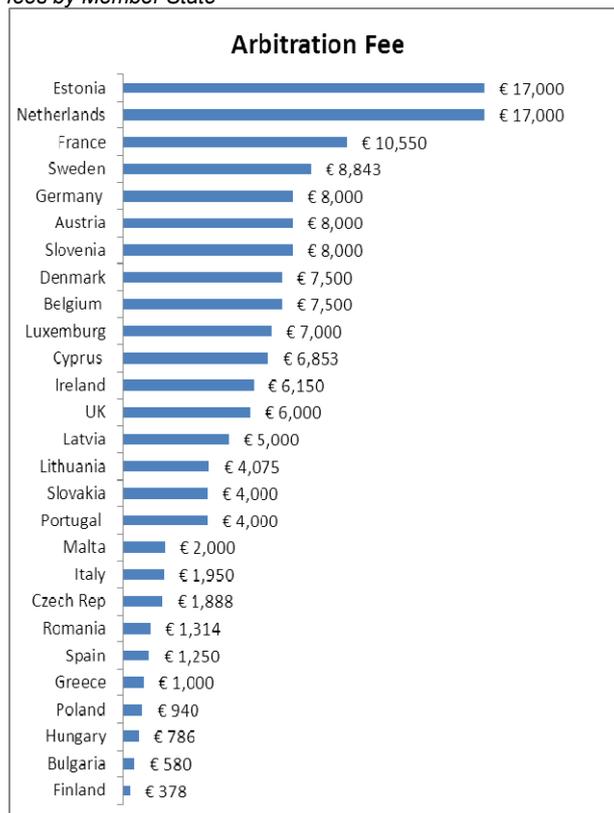
Member States	Regulated or not by the law	Criteria of calculation	Range
Spain	Regulated.	Hourly basis fee.	€ 50 – € 300 per hour
Sweden	Regulated.	Based on the value of the claim.	€ 1.200 - € 1.000.000
United Kingdom	Not regulated.	Based on the value of the claim and experience of the mediator.	£1,517 - £4,279 per day

Source: Elaboration based on data collected at the local level

3.4 Arbitration fees and fees bases

As tradition in Europe, arbitration fees are usually determined by the value of the dispute (fix amount or a percentage), the number of the arbitrators and whether is administrated or “ad hoc”. They are not regulated by domestic law. . In order to compare the level of mediation fees across Europe for a B2B dispute, we have taken in consideration a standard B2B case of the value of 200% of Member State’s income per capita and asked to ADR experts to assess the average fee in the leading arbitration providers with one arbitrator.

Figure 3.4 Overview of arbitration fees by Member State



Source: Elaboration based on data collected at the local level

Table 3.6

Fees for Arbitration and their basis

Member States	Regulated or not by the law	Criteria of calculation	Range
Austria	<i>Ad hoc</i> : determined by agreement with the parties. <i>Institutional</i> : determined by the institution.	<i>Ad hoc</i> : determined by agreement with the parties. <i>Institutional</i> : determined by the institution.	<i>Institutional</i> : € 6.000 to € 197.000 + 0.01 % of excess over € 100.000.000
Belgium	Not regulated.	Based on the value of the claim.	€ 625 – € 140.000
Bulgaria	Arbitration court.	Fee schedule.	<i>Domestic</i> : € 200 to € 21,255 + 1 % for the sum over € 1.000.000 <i>International</i> : € 150 to € 17,980 + 1 % for the sum over € 1.000.000
Cyprus	Cyprus Scientific and Technological Chamber.	<i>Other arbitrations</i> : seniority of the arbitrator, amount in dispute, complexity of issues	<i>Cyprus Scientific and Technological Chamber</i> : € 85 per hour <i>Other</i> : € 80 to € 500 per hour
Czech Republic	Not regulated.	Value of dispute.	€ 400 – € 300.000
Denmark	Not regulated.	Based on the value of the claim.	DKK 30.000 – DKK 50.000
Estonia	Varies according to each arbitration institution.	Based on the value of the claim.	From € 51 to € 80.209,12
Finland	Varies according to each arbitration institution.	Based on the value of the claim.	€ 2.000 – € 94.000 + 0,24% of any amount exceeding € 10.000.000
France	Not regulated.	Based on the value of the claim.	€ 1.800 minimum (one arbitrator) – over € 300.000 (three arbitrators)
Germany	Varies according to each arbitration institution.	Value of the dispute, complexity of the case, reputation of the arbitrator.	€ 2.340 – € 4.485 (for one arbitrator)
Greece	Regulated by the Code of Civil Procedure.	Based on the value of the claim.	Scheme: Amount of dispute X percentage <ul style="list-style-type: none"> Up to € 1.500 = 6% From € 150.000,01 and above = 1%.

Member States	Regulated or not by the law	Criteria of calculation	Range
Hungary	Varies according to each arbitration institution.	Based on the value of the claim.	HUF 60.000 + 2,4% - HUF 18.360.000 + 0,007%
Ireland	Not regulated. Varies according to each ADR provider.	Hourly basis fee.	€250 – € 400 per hour
Italy	Not regulated.	Based on the value of the claim.	€ 600 up to € 550.000
Latvia	Varies according to each arbitration institution.	Based on the value of the claim.	LVL 250 – LVL 6.000
Lithuania	Varies according to each arbitration institution.	Based on the value of the claim.	LT 500 – LT 70.000
Luxembourg	Not regulated.	Based on the value of the claim.	€ 1.200 – € 300.000
Malta	Varies according to each arbitration institution.	Based on the value of the claim.	<i>Domestic:</i> €69.88 - € 116.47 <i>International:</i> € 386 – € 4.639
Netherlands	Varies according to each arbitration institution.	Based on the value of the claim or on an hourly fee.	€ 450 – € 15.000 (depending on the value of the claim)
Poland	Varies according to each arbitration institution.	Based on the value of the claim.	PLN 3.000 – PLN 100.000.000
Portugal	Not regulated.	Based on the value of the claim.	€ 1.250 – € 84.750
Romania	Regulated.	Based on the value of the claim.	€ 1.246 to € 144.190 plus 0.65% of the amount exceeding € 5.000.000
Slovakia	Varies according to each arbitration institution.	Based on the value of the claim.	€ 400 – € 300.000
Slovenia	Not regulated.	Based on the value of the claim.	€ 500 – € 21.300
Spain	Varies according to each arbitration institution.	Based on the value of the claim.	€ 1.800 – € 30.000
Sweden	Not regulated.	Based on the value of the claim.	€ 4.000 to € 60.000 + to be determined by the Board
United Kingdom	Not regulated.	Based on the value of the claim.	€ 6.000 – € 30.000

Source: Elaboration based on data on data collected at the local level

3.5 Schemes dealing with domestic and cross-border disputes

In cross-border B2B ADR, we need to clearly differentiate mediation from arbitration. Cross-border ADR involves two parties from different Member States that choose to use a domestic or international ADR procedure. In arbitration, international procedures are very developed and distinct from domestic ones. Parties can decide by contract to have their dispute arbitrated under domestic or international rules. In this context, there are few well-recognised international arbitration institutes that deal with B2B disputes.

In most Member States, mediation is regulated by domestic laws and there is not an international mediation convention (like the New York one on arbitration) or institute. This implies that cross-border mediation is really a domestic mediation conducted in a foreign language. As an example, in Italy where mediation is mandatory in some civil disputes, a non-Italian party before suing an Italian party in Italy has to attempt mediation under an Italian accredited mediation provider. If they attempt mediation in the UK, for example, and it fails, they would be required to attempt mediation again in Italy before having the right to sue in an Italian court.

3.5.1 Percentage of ADR providers with multilingual capabilities

The very different patterns in the multi-lingual capability of ADR providers across the EU, is illustrated in the following table. The fact that a ADR websites in few countries have general information in English or in any other language different from their national one, is a strong obstacle for a foreign party that needs to initiate an ADR procedure in foreign country.

Table 3.7: Percentage of ADR providers with multilingual capabilities

Member States	Foreign language website and form
Austria	10%
Belgium	75%
Bulgaria	7%
Cyprus	80%
Czech Republic	0
Denmark	80%
Estonia	0
Finland	20%
France	3%
Germany	0
Greece	1%
Hungary	2%

Member States	Foreign language website and form
Ireland	5%
Italy	5%
Latvia	50%
Lithuania	15%
Luxembourg	10%
Malta	9%
Netherlands	0
Poland	0
Portugal	5%
Romania	5%
Slovakia	10%
Slovenia	2%
Spain	0
Sweden	0
United Kingdom	10%

Source: Elaboration based on data collected at the local level

4 Use of ADR for B2B dispute resolution

4.1 Overall trends in the use of ADR for B2B dispute resolution

Research method for trends in use of B2B ADR (q. 13/14)

The availability of secondary sources on use of B2B ADR is scarce and fragmented in Europe. Hence we have taken specific research steps to come to realistic and comparable trends for ADR use by businesses – as presented in the 27 country profiles.

- a. The method for assembling a comparable and reliable dataset of ADR usages has been as follows: inventory of litigation, arbitration and mediation cases by using official statistics.
- b. With regard to litigation, we have listed the total number of processed commercial or civil/commercial cases; in absence of this we have used the number of incoming cases;
- c. Attribution of these court cases to B2B is as follows – on the basis of estimates from experts and exchanges with the EC on this subject:
 - Approximately 5%-10% of Civil and Commercial Court Cases deal with B2B;
 - Approximately 15%-20% of Commercial Court Cases deal with B2B;
- d. In certain countries (e.g. Finland), there are different numbers of court cases (e.g. most of them are written procedures). In those situations, we have opted for including the total number of oral hearings.
- e. For further analysis, the latest available year is included.
- f. Where appropriate and other sources fail, we have assessed that approximately 30%-40% of mediation cases refer to B2B, while 80%-90% of arbitration cases are estimated to be B2B.
- g. Validate the numbers of cases against other sources, notably by using the Eurobarometer and CEPEJ (in case of court statistics).
- h. Review the numbers where plausibility is questionable (while recognising that other sources may have data concerns as well).
- i. Confront the numbers of ADR cases against the number of ADR providers, thus allowing to form a view as to the intensity of use of the existing ADR offer, as input to the main report.
- j. Where appropriate, we have estimated that the average ADR provider handles 3 cases per year (in reality: a limited number of ADR providers will handle many more cases, while a large number of providers will handle hardly any case).

Overall B2B ADR use remains very limited in comparison to litigation through court

Available sources – as well as interviews held with stakeholders and practitioners across the EU²² – provide some limited evidence to support the hypothesis that ADR would be replacing court litigation. In fact, although recent trends show a slow decline in the use of court and a constant increase in ADR, and particularly mediation, one should be careful in drawing too sudden conclusions. After all, the absolute number of court cases is still very high if compared to the total number of ADR cases.

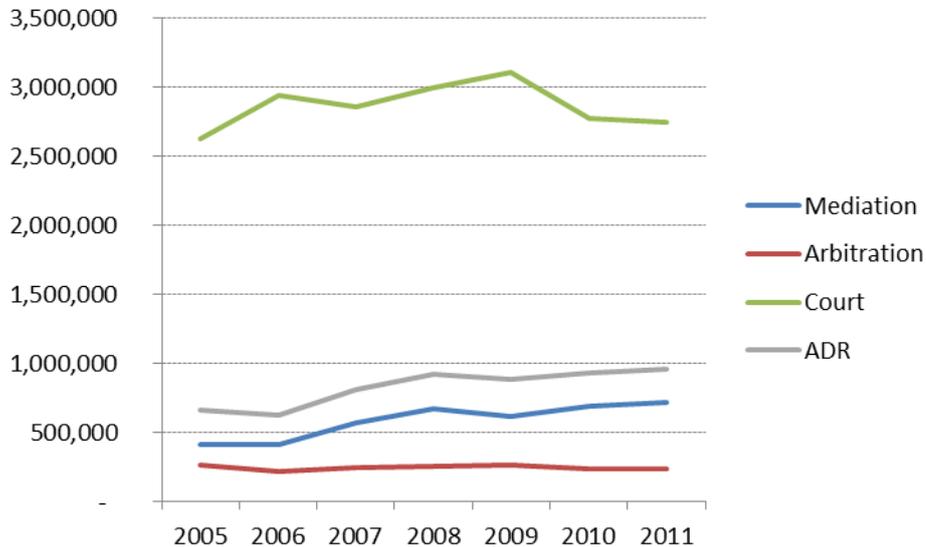
Overall, numbers of B2B court litigation have been increasing on average since 2005, with a sharp increase and a decline between 2007 and 2010 and a stabilisation in the recent year. On the contrary, there has been mild but constant growth of ADR mainly due to an increase in the use of mediation and a rapid acceleration in the past year due to mandatory mediation in Italy, a large country in absolute numbers of B2B disputes. Arbitration usage instead seems to have remained constant through time, with some minor decline recently.

²² As set out in Chapter 1, this report has relied on a variety of official sources including Eurobarometer surveys, national databases, publicly available ADR scheme sources and estimates of local stakeholders.

Therefore, the pattern of arbitration demonstrates some resemblance to that of court litigation – although overall growth levels are certainly higher. Arbitration in fact started to slow down in 2009 to accelerate the decrease in the most recent years. The growth pattern of mediation instead appears to be more robust and consistent, with growth rates of 20-30% in the years 2006 and 2008, followed by a period of decline and a moderate growth (10-20%) in the subsequent years. Available data therefore suggest a consistent interest on mediation amongst EU businesses.

Figure 4.1

Average EU-wide yearly change of B2B disputes handled through court litigation, mediation and arbitration



Source: Elaboration based on local sources, Eurobarometer (2012) and stakeholders' estimates

Index for the calculation of B2B usages based on multiple available sources

The Index for the calculation of B2B usages is based on available sources, namely:

- Eurobarometer Survey (2012) on B2B usage of court, mediation and arbitration
- CEPEJ data (2011) on court usages adjusted to B2B
- Country Profile data collected through available local sources and interviews

A. Eurobarometers data are calculated as follows

1. Number of domestic cases:

a. Number of court cases per business with court experience -> e.g. Austria: 4.8

b. Divided by 3 (years) -> 1.6

c. Divided by 2 (because two businesses are involved) -> 0.8

d. Times the % of businesses with dispute and court experience for domestic cases -> compare number of answers per country in Q5a_1TT (Austria: 54) with the sample (Austria: 400, see B2) -> for Austria: $54/400 = 0.135 = 13.5\%$

e. Final result for Austria for domestic cases: 0.108

f. Times total number of businesses = 43,604 domestic B2B court cases for Austria.

2. Number of cross-border cases:

a. Number of court cases per business with court experience -> e.g. Austria: 2.2

b. Divided by 3 (years) -> 0.733

c. Divided by 2 (because two businesses are involved) -> 0.366

d. Times the %age of businesses with dispute and court experience for cross-border cases -> compare number of answers per country in Q5b_1TT (Austria: 27) with the sample (Austria: 400, see B2) -> for Austria: $27/400 = 0.0675 = 6.75\%$

e. Final result for Austria for cross-border cases: 0.02475

f. Times total number of businesses = 9,992 cross-border B2B court cases for Austria

3. Total = 1 + 2 = 53,596 B2B court cases in Austria;

B. CEPEJ data are calculated as follows:
15% of cases considered B2B (based on general assumptions of this study);

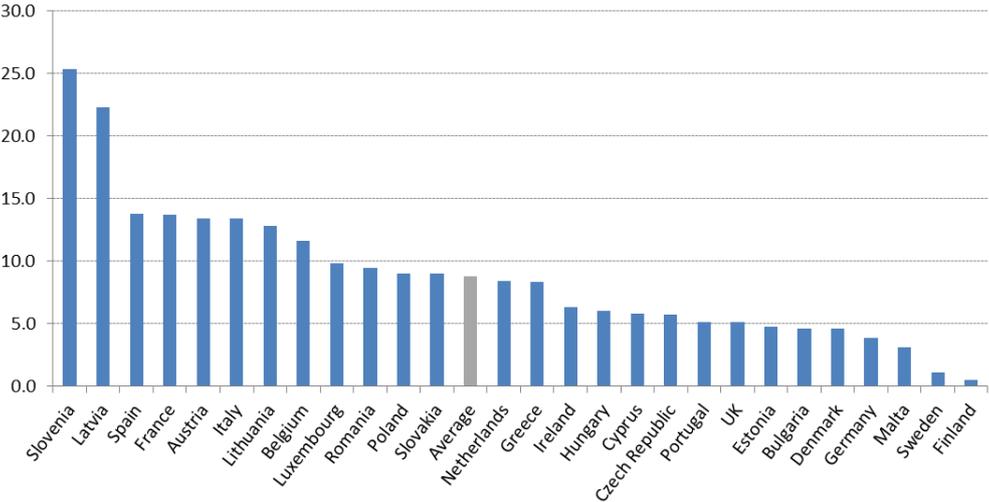
C. Country Profiles data are calculated on the basis of:
% of B2B of total Court, Mediation and Arbitration cases provided in each Country Profile.

Strong differences in court litigation patterns between EU Member States

Court litigation patterns vary across EU Member States, if one compares the number of court litigations per 100 businesses. Slovenia and Latvia lead the higher number of court litigations per businesses, followed by large southern European Countries such as Spain, France and Italy. Below EU average are Northern European Countries - i.e. Finland, Sweden, Denmark and the UK, but also central European countries such as Germany and smaller EU countries - i.e. Portugal, Cyprus and Ireland. The remaining countries have mostly a similar ratio of court litigation disputes per business.

Figure 4.2

Number of B2B court litigations per year in selected EU Members per 1,000 businesses



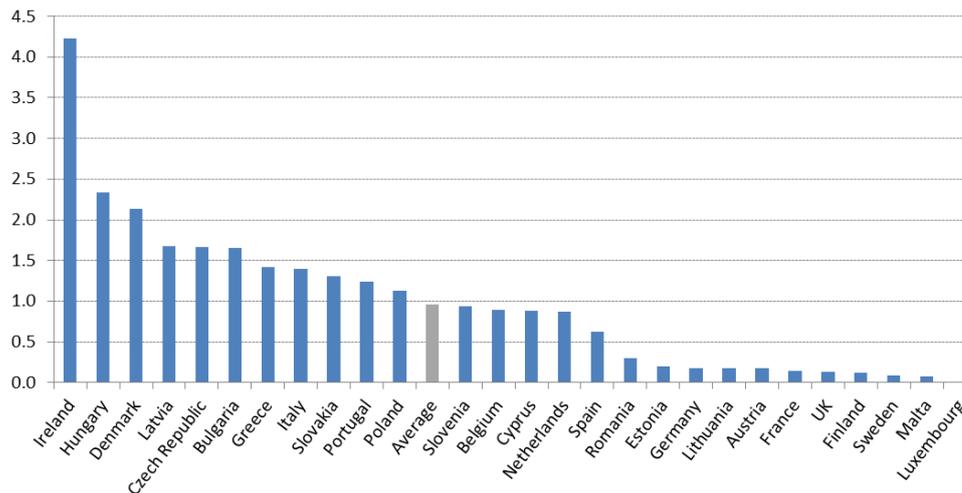
Source: Elaboration based on Eurostat (2009), local sources, Eurobarometer (2012) and stakeholders' estimates

Use of arbitration is even more polarised across EU Member States

Although the use of B2B ADR remains very limited when compared to litigation through court across the EU, it appears to be more frequently used by businesses in most countries which have a relatively limited number of court litigation per business. Ireland, Hungary and Denmark, scoring below average in court litigations per businesses, are leading in relative terms when it comes to arbitration and other countries similarly low in court litigation are scoring quite high when it comes to arbitrations per businesses. Only Latvia, Italy and Poland score above EU average for both court litigation and arbitration. On the lower side of the spectrum again stand Sweden, Finland, UK and Germany, together this time with France, Austria and Romania. Most of the remaining Member States score around the EU average value.

Figure 4.3

Percentage of ADR (mediation and arbitration) in comparison to court litigation in selected EU Members



Source: Elaboration based on Eurostat (2009), local sources, Eurobarometer (2012) and stakeholders' estimates

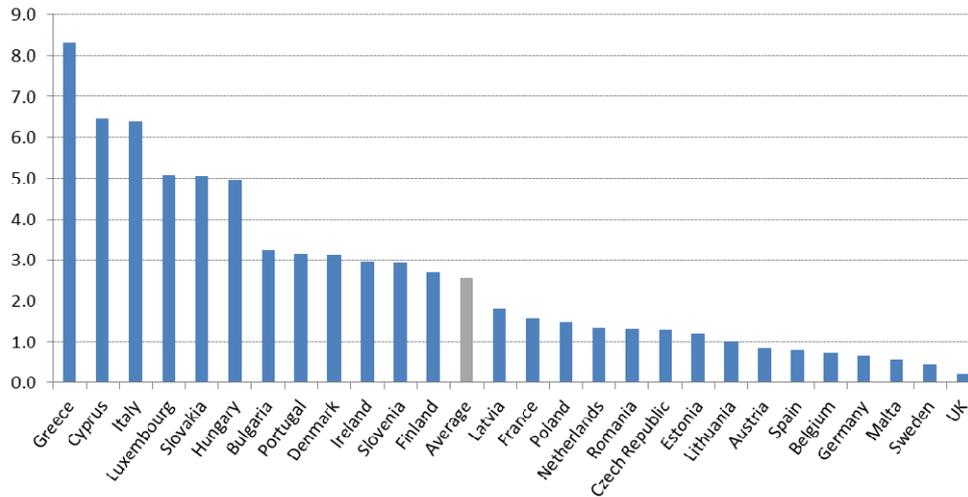
B2B mediation relatively popular in the Netherlands, Slovenia, the UK and Italy

Patterns of mediation are more complex, partially due to some terminological complication in the two countries with highest score in the Eurobarometer survey. Although Greece and Cyprus score on the highest ration of mediations by businesses in the table below, our field analysis show lack of clear terminological distinction amongst mediation - amicable solution - and solutions proposed by Courts (see Country profiles). Both countries, and particularly Greece, in fact show high number of courts and publicly-funded organisations which promotes amicable solutions amongst litigants. Although such organisations mostly deal with B2C disputes, it is possibly the case that SMEs and retails involved in B2B disputes can use such procedures to avoid litigations.

Right after, Italy is leading in highest number of mediation by business, due to a recently introduced pro-mediation regulation for B2B disputes (see Country Profile). Luxembourg, Slovakia and Hungary also score a relatively high ratio of mediations per business. Few other EU Member States, very diverse in terms of size and legal systems, score quite above the EU average - i.e. Bulgaria, Portugal, Denmark Ireland, Slovenia and Finland. The remaining EU Member States show in general a relatively low ration of mediation per business if compared to the EU average, again with quite diverse size and legal systems, at the lower side of the spectrum – i.e. Austria, Spain, Belgium, Germany, Malta, Sweden and UK.

Figure 4.4

Number of B2B mediations in selected EU Members each 1,000 businesses



Source: Elaboration based on Eurostat (2009), local sources, Eurobarometer (2012) and stakeholders' estimates

4.2 Patterns of use and trends

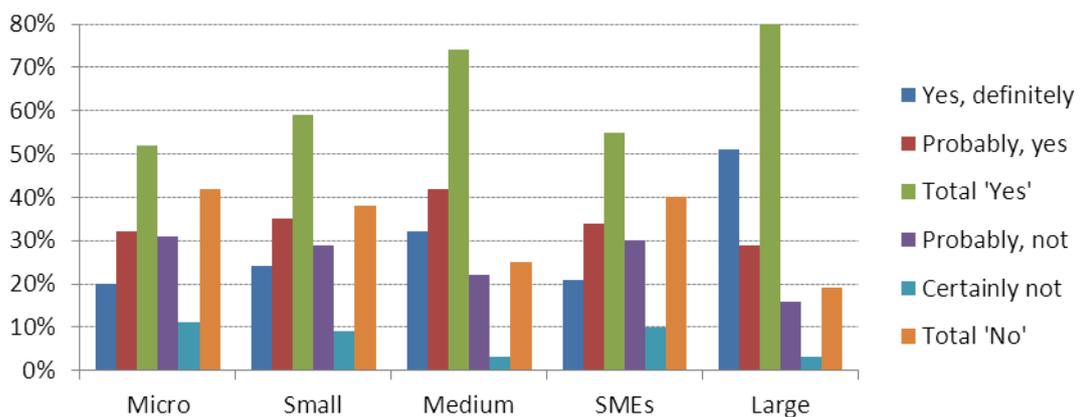
4.2.1 By size of business

Court litigation is much more favoured by larger companies than by SMEs

Court litigation is a favourite option for larger companies in case no in-house conciliation is possible. They can in fact afford lengthy procedures and costs if they feel the issue is one where they have the right to apply – and if they think they can benefit from, or cope with, exposure to public media. It is important to note that SMEs and small enterprises particularly tend to see court litigation as the main dispute resolution process, as they fear arbitration can be biased by unbalanced power relations, and they tend to lack of awareness on how to use mediation or other ADR processes.

Figure 4.5

Willingness to use court litigation as dispute resolution process (by SMEs and Large Enterprises)



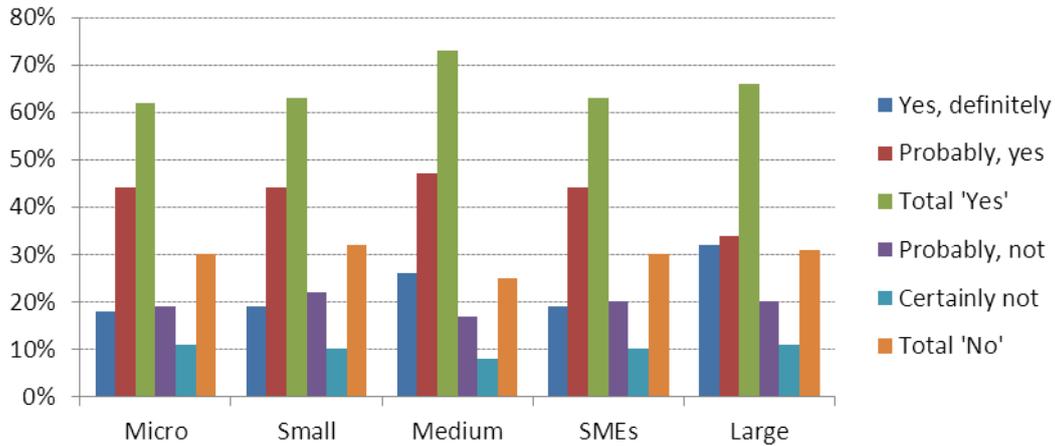
Source: Eurobarometer (2012)

SMEs show a strong interest to use mediation

Interviews with stakeholders reinforce the finding of current surveys, suggesting that SMEs are particularly interested in mediation. This interest is not necessarily derived from experience, but tends to be driven by low levels of satisfaction with court litigation. Particularly, mediation emerges as the most interesting ADR type for micro enterprises, which obviously cannot afford costly and lengthy litigation procedures, but are sometimes concerned by the actual costs and fairness of

decisions of experts in arbitrations. As emerged from interviews, large companies tend to manage disputes in-house through direct conciliation if possible, so to ensure they have full control of the process. What these SME responses show is that there is latent demand for a mediation process which will deliver dispute resolution more efficiently and effectively for SMEs, but that (as noted earlier in this chapter) SME awareness of ADR is limited.

Figure 4.6 Willingness to use mediation in dispute resolution process (by SMEs and Large Enterprises)



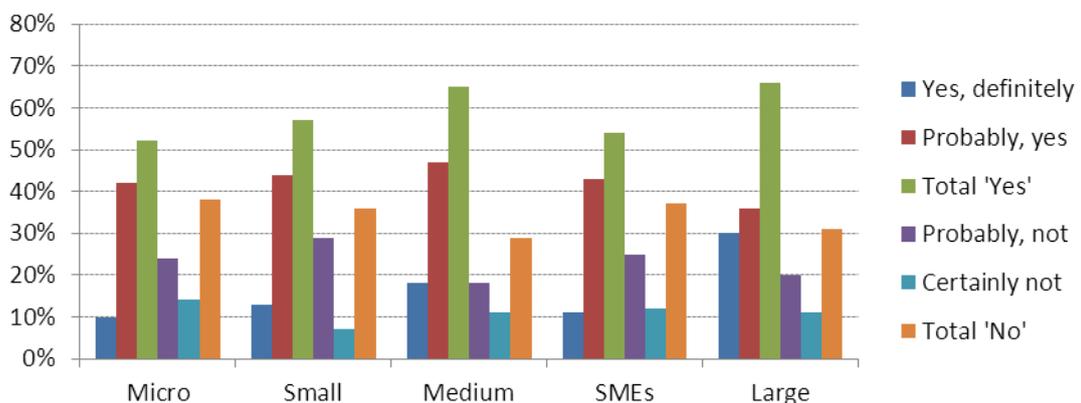
Source: Eurobarometer (2012)

Arbitration tends to be the favourite option for larger businesses

Arbitration tends to be a favourite option for larger businesses, which can afford higher costs of arbitrations (see Chapter 6 for costs details) and tend to appreciate the relatively fast and fair results which are typically binding and easily enforceable. On the contrary arbitration is the less interesting dispute resolution option for small and particularly micro enterprises, which rather opt for court dispute in case previous mediations fail or are not considered as a viable option.

Medium-sized companies appear to be almost equally interested in arbitration as mediation. This size group appears to be most open to the various ADR processes available.

Figure 4.7 Willingness to use arbitration in dispute resolution process (by SMEs and Large Enterprises)



Source: Eurobarometer (2012)

Medium-sized firms: most open to various ADR processes

Medium-sized companies appear to be best placed to utilise ADR. In the absence of large in-house legal departments, they are less inclined to opt for court litigation. But they demonstrate very strong

interest both in mediation and in arbitration. This size group therefore appears to be most open to the various ADR processes available.

Micro-enterprises are particularly vulnerable

The case study work has pointed to the fact that micro-enterprises are particularly vulnerable, especially so in Member States currently mostly affected by the economic crisis (i.e. Spain, Italy). Micro enterprises tend to work without clear contracts and dispute resolution clauses, which makes them largely exposed to risks of disputes for example in the delay of payments with larger contractors. This problem has been reported by both the European Association of SMEs and by our own field work. Neither arbitration nor court litigation are feasible options for such micro-enterprises, and only mediation could be an opportunity for them if better understood and promoted, and subject to the approval of the opposing partner.

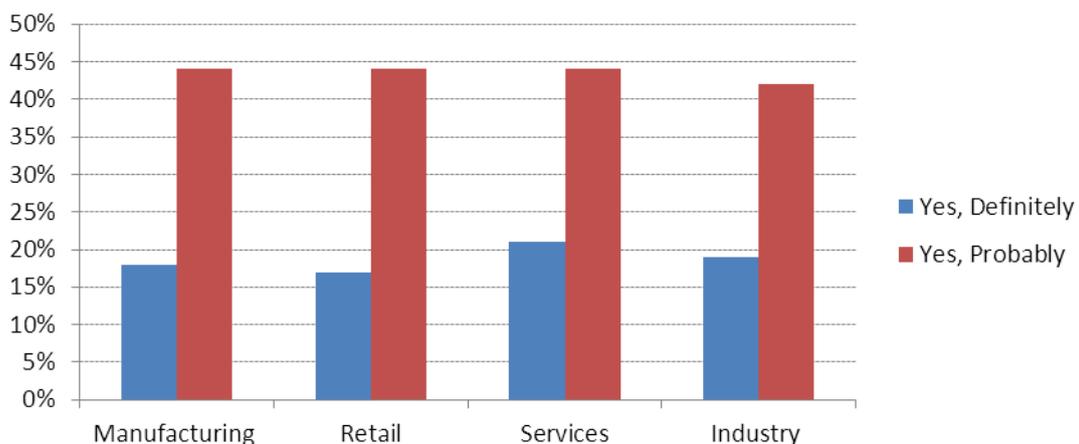
4.2.2 By business sector

No real difference in the propensity in use ADR across macro-categories of business sectors

The relation between ADR use and the economic sector is a long-debated subject²³, which is also reflected in collected evidence. On the one hand the main argument is that disputes and dispute resolution processes are not sector-specific and depending on a variety of elements (e.g. institutional setting, litigation trends, access to external or in-house lawyers). At first sight, the survey data suggest there to be only limited differentiation in preferences for ADR processes.

Figure 4.8

Propensity in the use of ADR to settle B2B litigations (by aggregated of NACE sectors)



Source: Eurobarometer (2012)

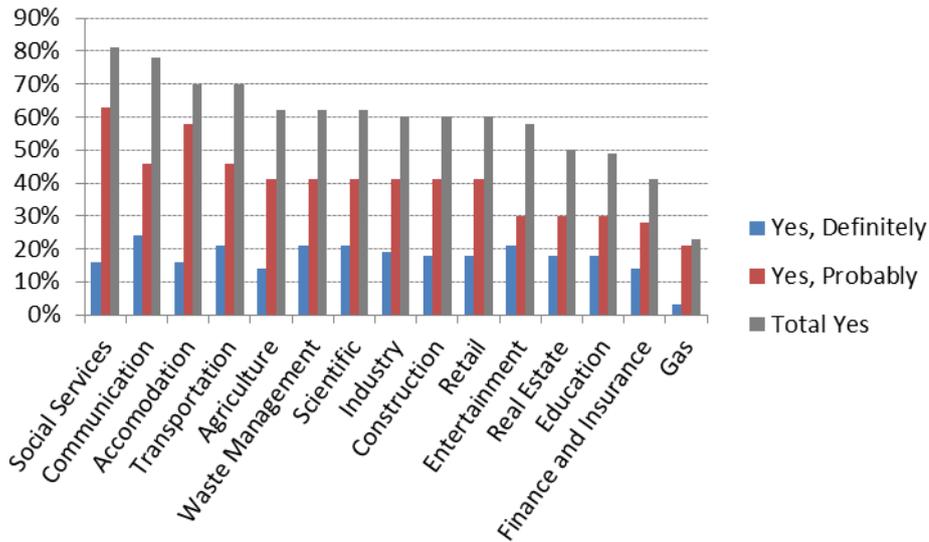
But differences amongst specific sectors

Interest in the use of ADR appears to be strongest in mining, social services, accommodation as well as agriculture. Stakeholders interviewed on this matter as part of the case study work also point to strong differentiation in the preference of particular ADR processes across economic sectors. Although differences in firm size play a role here as well, we have also found sector-specific conditions, answers and solutions. Important is also the exposure of sectors to international trade and investment and therefore to cross-border disputes. Sector-specific business associations tend to support their members (mostly smaller ones) by providing specific information and services which promote a greater use of ADR in that sector.

²³ See for example D.B. Lipsky and R.L. Seeber (1998) "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations", p. 14.

Figure 4.9

Propensity in the use of ADR to settle B2B litigation (by specific NACE sectors)



Source: Eurobarometer (2012)

Note: Numbers of respondents vary across sectors and not all samples are sufficient to be representative

Box.4.1

Features in the use of ADR in the construction sector in Italy

According to the statistics²⁴ there were 22 arbitration procedures in the construction sector dealt by the Chamber of Milan in 2011. It is not possible to determine how many disputes in the sector under examination have a cross-border dimension. The statistics of the Chamber of Arbitration of Milan report that 22% of the total cases are disputes arising with a non-Italian party. Again, it is difficult to determine if the foreign party is European or extra European.

There is a divergent perception on the use of arbitration in the construction sector. From the point of view of the Chambers of arbitration there has been a slow but constant increase of arbitration, while entrepreneurs interviewed are not keen in using arbitration due to the cost and the questioned neutrality of arbiters (this perception will be further developed in the relevant chapter).

Arbitration in the construction sector is relevant for quantitative and qualitative reasons. From the first point of view, the Euro Builders Confederation has roughly estimated that the average rate of disputes arising in the Italian construction sector is around 50% of contractual relations. From the second point of view the legal literature²⁵ underlines that arbitration is suitable for the construction sector for the following reasons:

- High level of technicality;
- It provides dedicated spaces and times;
- Technical advisors are pointed in prompt timing;
- More suitable for cross-border disputes (i.e. language issue);
- Higher level of discretion of the procedure;
- Higher level of neutrality of the hearing body.

These characteristics make arbitration particular suitable also to solve cross-border disputes. As the high expertise of the arbiters make it more advantageous also to foreign parties. Mediation, on the contrary, appears to be scarcely known and rarely used in the sectors if compared to arbitration.

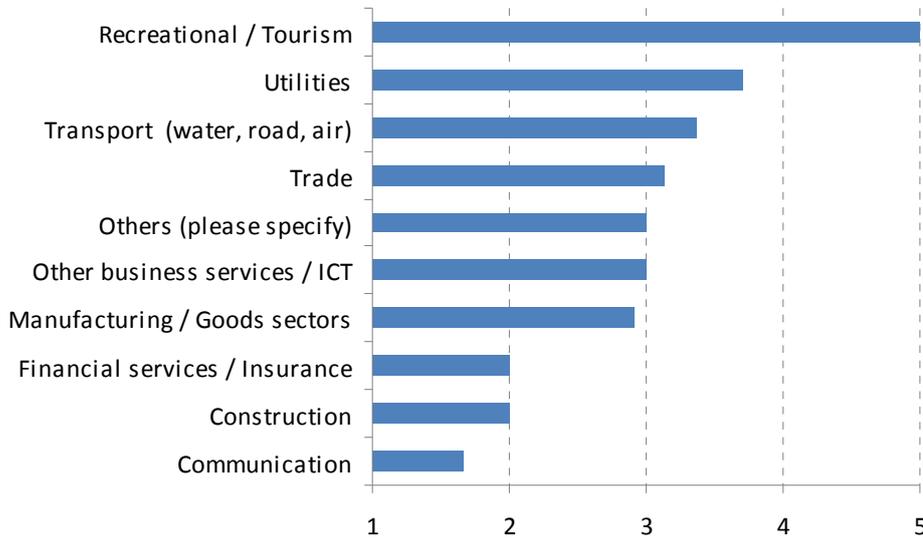
Source: Italy Case Study, pp. 11/12

²⁴ Data available on the official statistics at http://www.camera-arbitrale.it/Documenti/arbitration_stat_2006-2011_it.pdf.

²⁵ This statement is reported from the interview with B.Coppo, attached to Case Study – Annex 2.

Eurobarometer's findings are also supported by detailed responses of business to the UEAPME survey. Although sector breakdowns differ from the NACE groups distinguished by the Eurobarometer, they both point to accommodation, tourism and transport as sectors which make use of ADR, more so than for example finance and construction. Other sectors where ADR is used relatively often are utilities and trade.

Figure 4.10 Sectors in which ADR is more likely to be used (1 less likely, 5 more likely)



Source: Survey of ADR stakeholders across EU Member States;

Note: Numbers of respondents are limited and only provide indicative answers

Box4.2 Features in the use of ADR in the automotive manufacturing sector in Poland

Interviews with business representatives in Poland revealed also that businesses tend to undertake measures to prevent delays in payments and avoid potential consequences rather than struggle with payment recovery later on. One possible measure allowing businesses to avoid problems with obtaining payments from their contractors is pre-payment. One interviewee representing small enterprises, for instance, estimates that his company loses 30-40% orders per year due to the pre-payments policy. In the case of delay in payments businesses tend to consider a case self-evident and expect efficient dispute schemes to recover payment from a contractor. One of the interviewees representing the business sector mentioned on-line proceedings (Chapter 4.6) by writ of payment as a convenient procedure for cases regarding delays in payments.

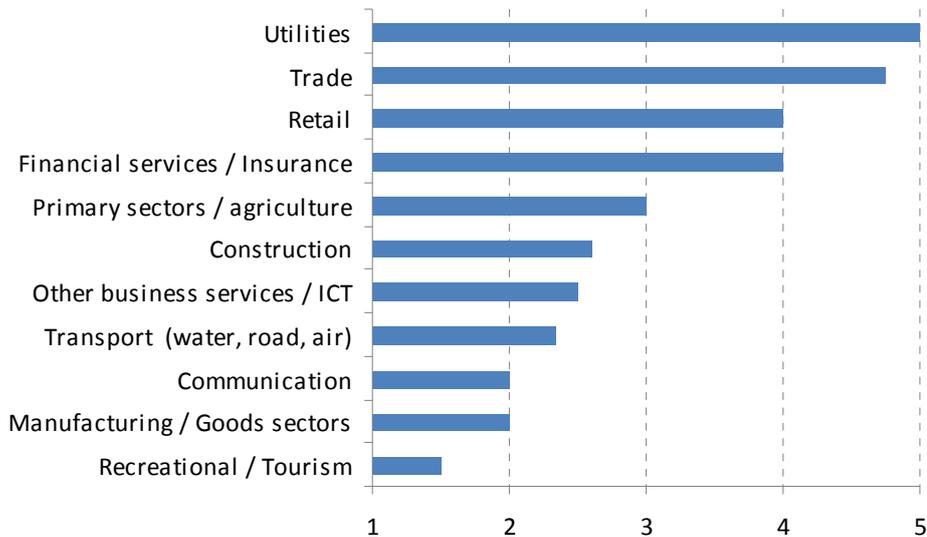
The other types of conflicts are disputes with competitors, usually smaller companies, concerning intellectual property. For disputes concerning intellectual property ADR, particularly mediation, are not perceived as effective resolution tools. This is due to the fact that the counterparty intentionally acts to the detriment of the other company which prevents negotiations and agreement. Court litigation is considered a more relevant solution in such type of conflicts. Reportedly, another significant problems related to intellectual property protection in Poland is insufficient law enforcement in this area as well as a low recognition of a problem among Polish law enforcement services.

Poland Case Study, p. 88/89

If the question is posed in which sectors ADR is more likely to be used by SMEs, then utilities, trade, retail and financial services are mentioned. The financial services finding appears surprising, but can be possibly explained by the fact that SMEs in this sector are particularly exposed to

disputes with large companies which have corporate cultures prone to internal arbitration, and which are backed up by extensive in-house legal departments.

Figure 4.11 Sectors in which ADR is more likely to be used by SMEs (1 less likely, 5 more likely)



Source: Survey of SMEs associations selected across selected EU Member States

Box 4.3 Feature in the use of ADR in the tourism and transport sectors in Bulgaria

In Bulgaria both tourism and transport sectors are represented mainly by small enterprises with 10-15 employees. All of the companies reported having been affected by the financial crisis in the last years. The main economic consequences are postponed investment plans, difficulties in the access to finance, high indebtedness, and low survival rate of companies on the long run. According to the report “Analysis of the factors for SME development in Bulgaria” (2011) the companies in the tourism sector record the lowest survival rate, followed only by the companies from the real estate sector.

The SMEs are not acquainted with the possibility to include ADR clauses in their contracts and will do this only if it is requested by the opposing partner. Most commonly the Bulgarian small business will search for an extra judicial settlement after the conflict has arisen and will make separate agreement with the counter party. Companies therefore tend to solve a B2B dispute through friendly agreements or by court litigation (and obviously don't shy away from the consequently long procedures for court litigation in Bulgaria).

Representative of the Arbitration Court of Bulgarian Chamber of Commerce and Industry (BCCI) and representative from the International Arbitration court to Legal Interaction Alliance confirm that arbitration is rarely used as dispute resolution for tourism operators. The lack of knowledge and use of ADR in Bulgaria in the tourism sector was also confirmed by the Association of Mediators.

Source: Bulgaria Case Study, p. 58

4.3 Cross-border disputes

Cross-border disputes are generally evenly distributed across different size of businesses

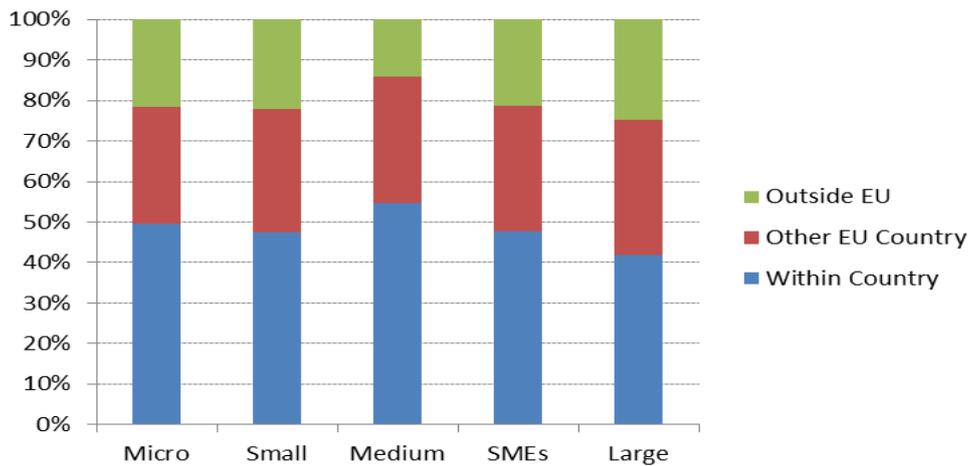
Case studies held across different sectors and EU countries suggest that cross-border disputes are often limited in more place-based sectors (i.e. construction), although cross-border contracts and consequently disputes are reportedly increasing due to decrease of volume of contracts with traditional clients such as national public government, and the need for new market outside national

borders. Such disputes are more significant for businesses operating in trade-oriented sectors, with ADR for example becoming increasingly popular within trade fairs (one example is the Milan Trade Fair, as reported by the local Chamber of Commerce), particularly those involving a large number of SMEs lacking expertise in the management of dispute resolution processes.

Nonetheless, recent surveys show that the relevance of cross-border B2B disputes differs very mildly in relation to the size of businesses, medium enterprise having a slightly higher number of disputes within country if compared to others, and large businesses slightly more cross-border and outside-EU disputes than average. This pattern is similar for disputes outside the EU, with such disputes being slightly more frequent for large companies and slightly less common for medium businesses.

Figure 4.12

B2B disputes within and outside countries by enterprise size (average number, past 3 years)



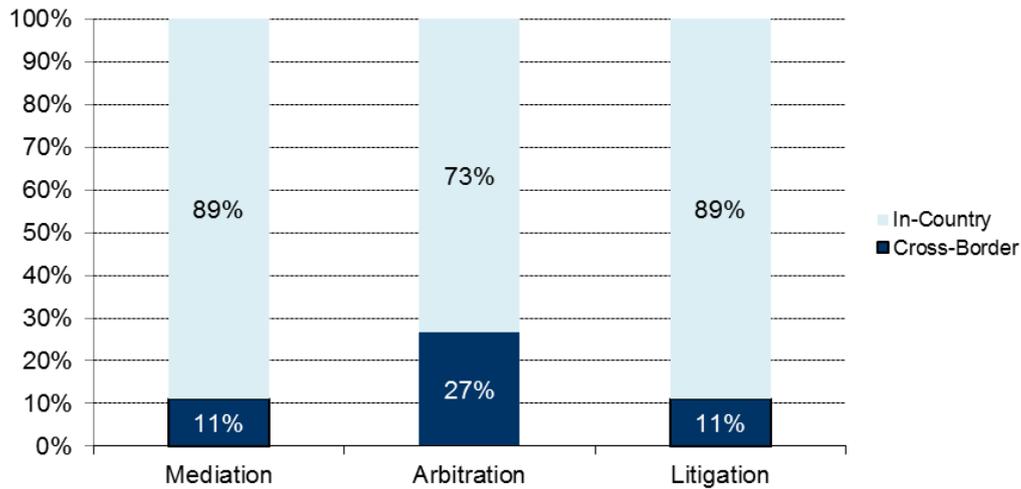
Source: Eurobarometer (2012)

ADR use in cross-border disputes is still relatively limited

As a consequence, the use of ADR for the resolution of cross-border disputes is generally limited if compared to ADR use for in-country disputes. The table below presents an aggregate view at the EU level, with the majority of disputes conducted clearly within countries, and when it comes to cross-border disputes arbitration being more popular than litigation and mediation very scarcely used.

Figure 4.13

Relevance in the use of ADR for cross-border disputes (as % of all disputes)



Source: Elaboration based on national sources and stakeholders' estimates

Findings from interviews and case studies suggest that arbitration clauses are in fact always preferred and inserted in cross-border contracts, as a way to protect businesses and to avoid issues with legal systems in countries which are unknown. All evidence therefore points to the fact that ADR, and specifically arbitration, is potentially growing in the future when it comes to cross-countries disputes as a tool to resolve disputes, and particularly managing possible risks of facing disputes in an unfamiliar context – due to cultural, linguistic or legal differences.

4.4 Features of B2B disputes in-country and cross-border

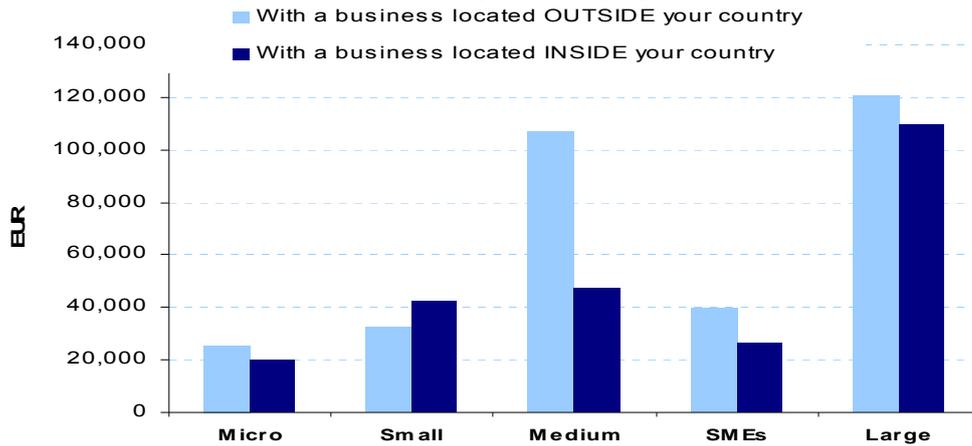
Features of disputes changes significantly depending on size, location and size of businesses involved.

Some general assessment can be provided on the average size of the dispute, as well as time taken to resolve them in their country and across countries. Further analysis on financial and time costs for business in the use of ADR and litigation is provided in the Chapter 6 of this Report.

Monetary amounts in disputes obviously vary on the basis of the size of both the organisation and the business of the involved enterprises. It is interesting to note that the amount of dispute does not change significantly whether the dispute is within a country or cross-border, with the exception of medium enterprises which might be greatly exposed to globalisation and might have larger businesses outside their own countries. In fact small and large enterprises seem to have a slightly larger amount of disputes within countries, although the overall picture seems quite fairly balanced across the two options.

Figure 4.14

Monetary amount in dispute to resolve the dispute by size of company

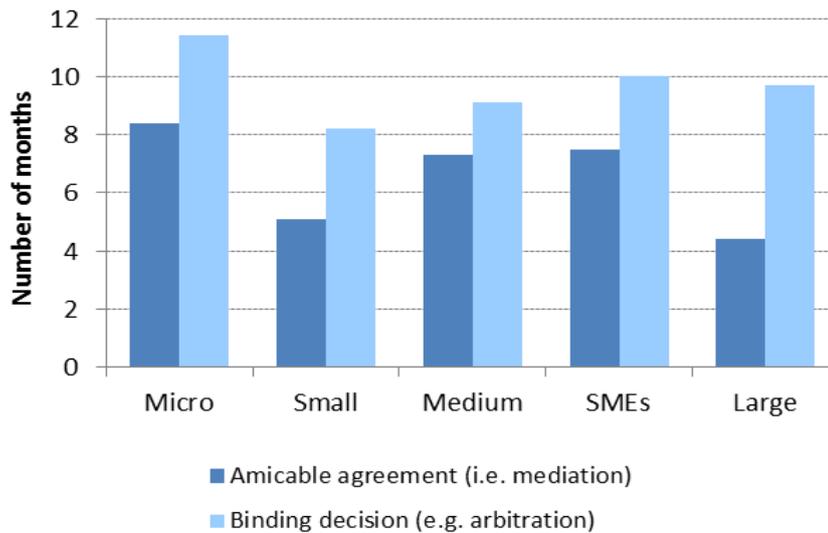


Source: Eurobarometer

A difference – confirmed by experts and stakeholders interviewed across the EU – also emerges in the duration of the disputes depending on the resolution process adopted, where disputes managed through arbitration seems to be generally lengthier than those managed through mediation, and often corresponding to the duration of court litigations (i.e. about one year).

Figure 4.15

Average time taken to resolve domestic dispute by size of the company (inside country)



Source: Eurobarometer (2012)

The situation seems to be quite diverse when it comes to business disputes outside country, depending obviously by the complexity of businesses relations and the practical and linguistic barriers amongst the Business involved. Still very different patterns emerge from the Eurobarometer survey across various businesses, depending on their size.

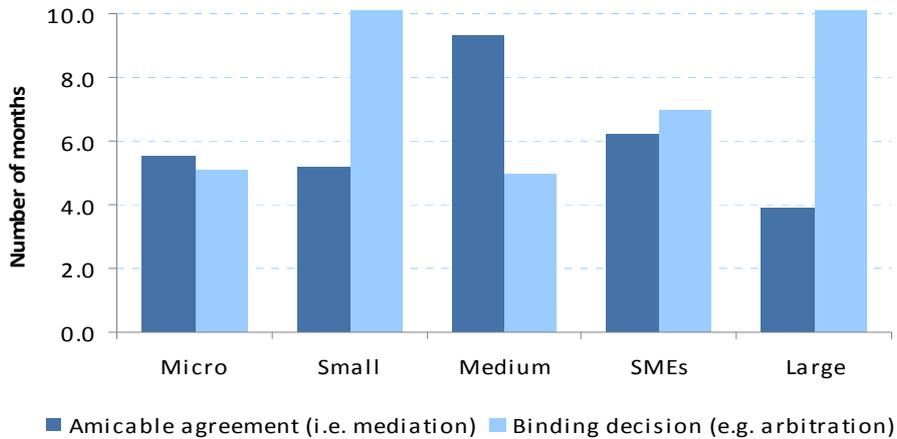
Case Study findings²⁶ suggest that SMEs tend to agree on an amicable solution much more often than large enterprise as they have more interest in rapidly settling a dispute as their businesses do not have the capacity to survive a long procedure. It is common for large companies to consider litigation as an added value and a possibility to gain income. Thus litigation can also be part of the strategic considerations of a company. The fact that time of dispute resolutions procedures appears

²⁶ Italy Case Study, p. 12

in some cases longer for SMEs than larger companies both within- and across-countries, might be an issue in terms of sustainability for small and micro enterprises.

Figure 4.16

Average time taken to resolve the cross-border dispute by size of company (outside country)



Source: Eurobarometer (2012)

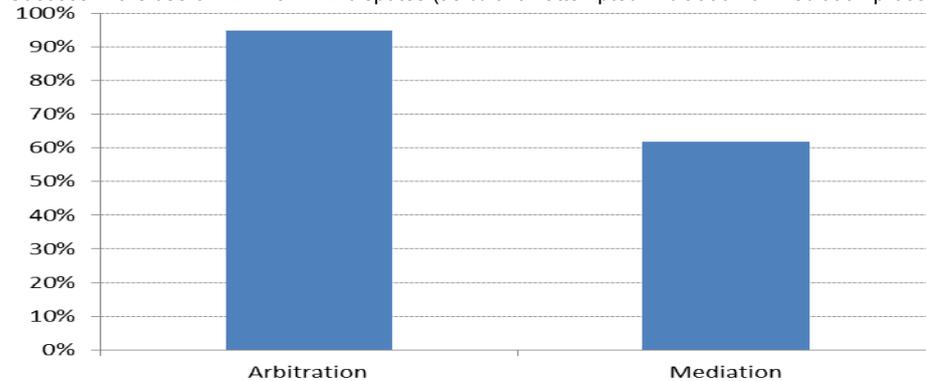
4.5 Success rate of ADR processes

Arbitration success rate is very high across the EU whilst mediation success varies

As illustrated in the figure below, Arbitration results are very rarely challenged in court, with consequent extremely high “success rate” of this ADR procedure. On the contrary, Mediation is on average slightly less successful, although still more than 1 Mediation in 2 is successful for both parties.

Figure 4.17

Success in the use of ADR for B2B disputes (as % of all attempted Arbitration or Mediation procedures)

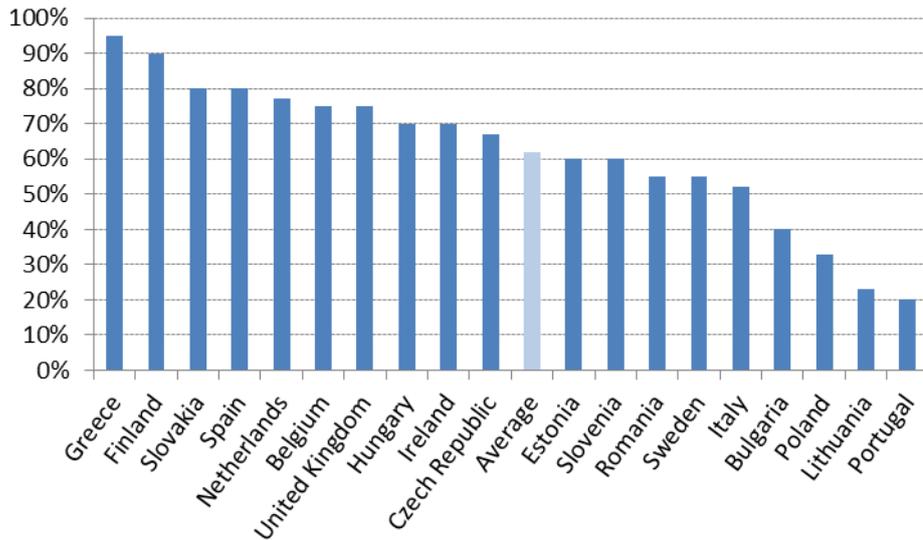


Source: Elaboration based on national sources and stakeholders' estimates

Furthermore, whilst arbitration success rate is generally evenly spread across EU Member States, mediation success rate changes significantly across Member States. Higher-than-average success is shown in those countries where Mediation is an optional procedure, as presumably Business calling for Mediation have higher incentives to get a fair deal for both. Lower-than-average rate is shown, amongst others, in most of the countries where some form of Mediation are somewhat mandatory for B2B disputes (i.e. Italy, Romania and Slovenia) and a higher number of Mediations would possibly not even have been started if it was not obligatory.

Figure 4.18

Success in the use of mediation for B2B disputes (as % of all attempted Arbitration or Mediation procedures)



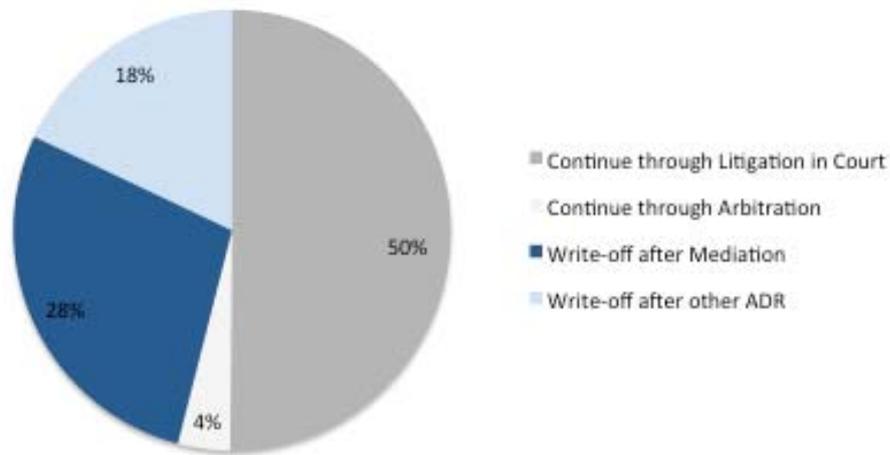
Source: Elaboration based on national sources and stakeholders' estimates

Half of the firms proceed with court litigation after ADR fails

The figure below illustrates the percentage of cases where businesses decide to continue or write off the dispute after an unsuccessful ADR attempt (typically mediation). The main pattern is to then proceed to court litigation, or alternatively write-off the dispute, with a very limited number of businesses opting for arbitration. The other ADR processes mentioned in the chart below reflects a variety of processes which might be in place in each Member State, but most often to direct conciliation between the two parties (with a conciliator).

Figure 4.19

Cases where business decide to continue or write-off the dispute after unsuccessful ADR attempt



Source: Elaboration based on stakeholders' estimates

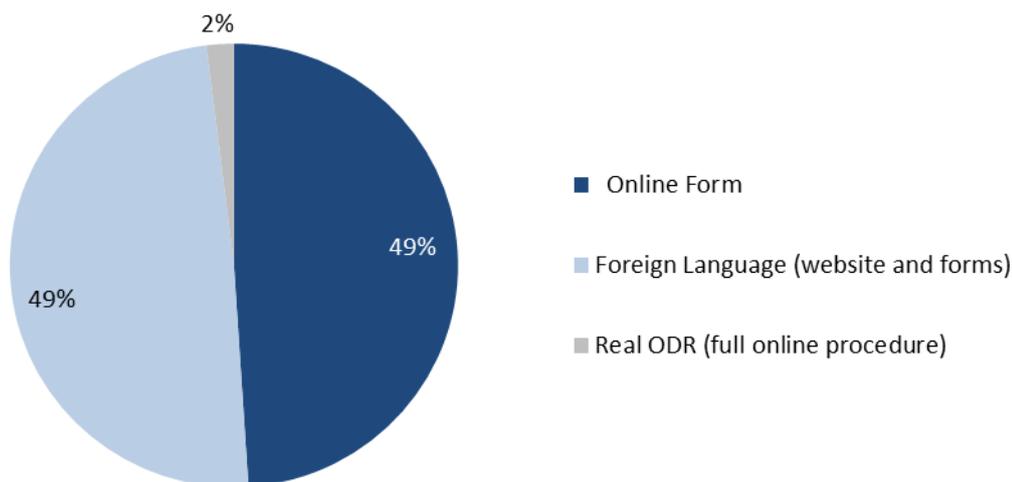
Cross-border disputes are limited in number if compared to domestic disputes, and so are the dispute resolution options in general including ADR. Nonetheless businesses operating in trade-related sectors, or sectors increasingly internationalised are experiencing a greater exposure to cross-border disputes and therefore to court litigation resolutions. In the context of cross border and international disputes greater attention is put on formal contracting and legal formalities, including dispute resolution clauses. It is difficult to say how often SMEs will opt for ADR, but anecdotal evidence from interviews and case studies suggests that they might be tempted to include such clauses if they had greater and better understanding of ADR features and possible benefits.

4.6 On-line Dispute Resolution (ODR), Ombudsmen and other ADR processes

More complex forms of ODR are offered only in very few Member States, such as the UK

As illustrated in Chapter 3.1.2 use of ODR is generally limited in B2B disputes, with a general presence of on-line forms for submitting and consulting documentation required for the dispute resolution, being it mediation, arbitration or otherwise. In few Member States, more complex forms of ODR are offered, but the lack of substantial available data makes it difficult to provide clear estimates in the actual use of such procedures.

Figure 4.20 Distribution of services ODR offered by for those providers with some type of online services



Source: Based on reviewed ADR websites across EU Member States (only about 15 out of 100 had any ODR service)

Practice in the UK, one of the EU Members where ODR and ADR in general has a quite long history, shows that ODR is used to manage micro-disputes involving small financial transaction, particularly in retail²⁷. For example ODR is embedded in on-line platforms and E-commerce services such as eBay and PayPal. Some countries (i.e. Poland) have recently introduced new forms of on-line court procedures to make such litigation quicker and simpler, which are apparently successful amongst businesses. This part will be further elaborated in the Final Report, on the basis of findings emerging from Case Studies.

Another interesting good practice is the on-line proceedings by writ of payment launched by the Ministry of Justice as an e-service within wider actions to setting up an e-administration in Poland²⁸, with co-funding by the EU. Introduced only in June 2010, in the first year of operation the e-court received 690,109 claims, of which 641,069 were settled. In 2011, the number of cases received increased rapidly to 1,825,069 (of which 1,467,843 were settled).²⁹ Following the introduction of the electronic proceedings the traditional courts in Poland received fewer cases, in particular minor ones. In turn, this helps them to devote more resources on more complex cases. The efficiency of the on-line court is considerably higher than the traditional one (570 cases recognized by judge or clerk in traditional court in 2010 against 20,700 cases recognized on average by judge or clerk in the e-court). The on-line court proved to be beneficial both from the state and contending parties

²⁷ UK Case Study

²⁸ Poland Case Study

²⁹ The Ministry of Justice, <http://ms.gov.pl/pl/informacje/news,3720,wizyta-ministra-sprawiedliwosci-w-e-sadzie.html> [Accessed on July, 17 2012].

point of view. The e-court fee amounts to 1,25% of a claim value whereas for traditional court it is usually 5%.

Ombudsmen: mostly useful for B2C

Another scheme which has some limited use is an 'Ombudsman', a typical scheme for B2C, particularly used in the resolution of disputes with public utilities and institutions. Although no systematic evidence is available across Member States, anecdotal evidence collected through case studies suggests a very limited use of Ombudsmen for the resolution of B2B disputes. This can be possibly the case for class-action initiatives which might involve micro-enterprises having disputes with the state or with public utilities, but again such practice is residual. In some countries (e.g. Belgium) Ombudsman might deal with businesses, but with regards to administrative issues within G2B (Government to Business) relation. There is no evidence therefore that Ombudsmen are used for B2B, neither for retails.

Conciliation has a very private nature and is more rare, but practiced in finance, utilities and insurance

Through interviews and case studies in selected sectors and EU Member States, direct conciliation amongst businesses emerges as a diffuse practice for utilities and in sectors such as finance and insurance, where big players have an interest to avoid lengthy court procedures and keep their disputes with clients out of the public sphere. Due to its very private nature though, this is a practice where data are scarcely available and not much additional robust details can be provided.

5 Problems encountered by businesses

5.1 Introduction

The previous chapter has addressed how much ADR is used and what patterns can be discerned across the EU. This chapter addresses the underlying problems that businesses (and in particular SMEs) encounter in resolving disputes with other businesses, and how ADR can contribute to the dispute resolution process.

In essence, this chapter builds on the context as introduced in the beginning of this report (Chapter 1.3): B2B disputes occur regularly and that they come at a cost for businesses and in particular SMEs, and therefore to the economy as a whole. In particular, we will focus on the following issues:

The **general** problem is that B2B disputes are often difficult to resolve, and that this also comes at a cost for businesses and in particular SMEs (Section 4.3).

The **specific** problem is that there are barriers and hurdles that prevent businesses – and in particular SMEs – from using ADR in B2B dispute resolution (Section 5.3). These reasons differ between mediation (Section 5.4), arbitration (Section 5.5) and ODR (Section 5.6) as well as for the cross-border dimension (Section 5.7).

5.2 The general problem: B2B disputes can be difficult to resolve

Numbers of disputes are increasing

With increasing pressures on B2B interactions, disputes between firms become more frequent. The overall burden of disputes (in terms of costs for a company) is evidently also determined by their frequency. An earlier 2006 survey³⁰ pointed to the fact that SMEs have on average 1.6 disputes during a period of 3 years. Size does matter however: an average small enterprise had 1.5 disputes in a 3 year period, while medium-sized companies had 10 disputes in the same period.

The 2012 Eurobarometer confirms the pattern that disputes are frequent and these numbers appear to be on the rise: the average number of disputes amongst companies surveyed is now 2.1. Differences between Member States are large: Italy (3.9 disputes) and Greece (5.8 disputes per company) are rich in B2B-disputes, while these numbers are smaller in most larger countries, as well as those in Northern, Central and Northwestern Europe. Of the companies which have a dispute, micro-enterprises now have in a 3 year period about 10 disputes (of which 5 are cross-border), small companies have 14 (half cross-border), medium-sized companies have 18 (8 cross-border) and larger companies have 29 (17 cross-border).

The average dispute weighs more heavily on SMEs

The Eurobarometer survey points to the fact that most disputes refer to amounts between €10,000 and €100,000, and the average amount for domestic disputes is € 28,300 and € 44,300 for cross-border disputes. Disputes vary in size, but not necessarily as strong as one would expect. The average dispute for a micro-enterprise is still € 20,000, while for large enterprises the amount disputes is about € 109,000. In between these extremes, average amounts disputes by smaller enterprises are worth € 42,000 and € 47,000 for medium-sized companies.

³⁰ EIM (2006) "SME access to Alternative Dispute Resolution systems". Final report.

This result is important, as it implies that the relative importance of a disputes varies by company size. The average dispute presses proportionately more heavily on smaller companies than on larger companies. This pattern is related to the fact that disputes involve several parties (including disputes between SMEs as well as large companies). We have only found scattered information on the size of the contracts and the shares disputed. Again, a wide variety between sectors and actors is likely to exist. For example in the Italian construction industry, the size of the dispute equals about 50% of the contract volume.

Payments – the main source of dispute

The previous EIM survey (2006) pointed to the fact that the vast majority of disputes (71%) were found to be around payments. Other types of disputes were often related, as they related to quality (10%), invoicing (3%) and late delivery (2%). At the time of that study (2006), the number of disputes appeared to be relatively high in the New Member States – possibly due to the rate of economic development and changing business dynamics. The number of disputes was found to be lower in Italy, Spain and Scandinavia. This finding is corroborated by the case study findings, e.g. in the transport and tourism sector in Bulgaria where the majority of disputes is related to payment delays.

Other US-based research³¹ confirms the dominance of commercial/contractual disputes as well, but adds intellectual property questions as a secondary reason – however this is a type of dispute which is rather specific to larger companies with R&D facilities, and is less of a concern to SMEs.

A more recent survey³² finds strong differences in late payment across the EU. B2B payments are made relatively fast (up to 30 days) in Austria, Finland, Germany, and Sweden. B2B payments are made relatively slow (>80 days) in Cyprus, Greece, Italy, Portugal and Spain.

Across Europe, the amount written-off debts amounts in 2012 to € 340 billion, an increase of 11% compared to the previous survey in 2011 (€ 300 billion). The tendency for the written-off debts is to go up from 2.4% (2010) to 2.6% (2011) and now 2.8% of total receivables.³³

The above amounts are strongly related to payment loss, which is due to several reasons, again according to the most recent European Payment Index survey carried out in 2012 :

- Debtor in financial difficulties (80%);
- Intentional late payment (66%);
- Administrative inefficiency (46%);
- Disputes regarding goods and services delivered (22%);

As the above percentages suggest, multiple reasons lie at the core of payment loss (which leads to a total of 214 percentage points). A combination of debtors in financial difficulties and intentional late payment often concur. Of the above total, we can deduce that 10% (22 out of 214 points) of payment loss in Europe (€ 34 billion.) can be attributed to disputes regarding goods and services delivered.

Suppliers and customers – an unequal relation?

The above-mentioned 2006 study found that vertical relations are by far the most important source of disputes: customers are the most important counterpart in B2B disputes involving SMEs (71% of

³¹ Lipsky D.B. and R.L. Seeber (1998) "The Appropriate Resolution of Corporate Disputes: A Report on the Growing use of ADR by US corporations. *Martin and Laurie Scheinman Institute on Conflict Resolution*. Paper 4

³² Intrum Justitia (2012) "European payment index".

³³ Intrum Justitia (2012) "European payment index".

SMEs involved in B2B disputes had disputes with customers), while 29% reported disputes with suppliers (29%). Disputes with a horizontal dimension are less frequent: 18% of disputes involve partners. Even though the above study does not point to this fact, the imbalance between customers and suppliers is striking. After all, and at least in theory, a vertical B2B dispute requires the presence of both customers and suppliers – and in the same proportion. A possible explanation for this imbalance may come from the fact that this particular survey was carried out amongst SMEs, which tend to be overrepresented on the supply side, while customers (and other downstream actors) are often larger in size – and not necessarily part of the sample.

A more likely explanation however is related to the fact that most disputes involve payments – and that suppliers are on the receiving end of these disputes. It is understandable that customers are less inclined to categorise such payment issues as disputes. Such an explanation would be supported by the previously quoted Ecorys/DTI study on value chains, which points to the fact that such relations can be unequal in nature: larger assemblers and end producers at the downstream end (e.g. Original Equipment Manufacturers) can clearly exert power over an increasingly large number of (globalised) suppliers. By the same token, an emerging conclusion from the UK retail case study points to the disputes between large retail chains and suppliers (including farmers).

A growing share of unresolved B2B disputes

The earlier EIM study pointed already to the fact that about a quarter (26%) of disputes remained unresolved. The percentage unresolved disputes was particularly high in the manufacturing and construction sectors (36%), while somewhat lower in trade and services (22% and 23% respectively). The share of unresolved disputes was particularly high in Italy (67%), but also in Poland (52%), France, Spain and the remaining South Europe (all 43%). Countries with low barriers to legal procedures (the so-called Anglo-Germanic group) had lower levels of unresolved disputes.

The most recent findings of the Eurobarometer survey (2012) point to a further increase of the share of unresolved disputes, which found that nowadays 38.43% of domestic disputes and 35.8% of cross-border disputes is not resolved.³⁴ The percentages of unresolved domestic disputes are much higher in a range of Southern European countries: the following countries: Greece (61%), Italy (53%), Cyprus (65%) and above all Portugal (75%). Rates of unresolved disputes are also high in a range of Central and Eastern European countries: the Czech Republic (53%), Estonia (47%), Hungary (46%), Slovenia (53%), and Slovakia (56%). These ratios are broadly in line with the percentages of cross-border disputes being unresolved.

Given the fact that so many (unresolved) disputes are about payments, the costs related to this high number of unresolved disputes are expected to be high, especially so for SMEs where (to use the familiar phrase) 'cash-flow is king'. This outcome adds to costs for the businesses concerned and therefore their competitiveness. However, unresolved disputes may provide advantages for the other party involved in the dispute – often the customers who will in many cases not be enforced to pay their invoices. Given the above-mentioned power relations in the supply chain, it is expected that larger downstream companies (including OEM's) benefit more from unsettled disputes than others. We will also return to this issue when addressing the secondary compliance effects.

The share of unresolved disputes tends to be higher in sectors where disputes tend to be incidental. For example in the Dutch insurance sector – where case resolution is core business – the majority of the cases (90%) are solved by the insurers themselves in a standard way (award of claim, maybe negotiation on the size of the claim). For the remaining cases, more special attention is required, but most of them are also solved by the insurance company itself. The number of

³⁴ Use is made of the corrected TT-versions of the datasheets

problematic cases not solvable by the insurance company without an external intervention is less than 0.5% of the total number. This low percentage may be attributed to the fact that one of the important pillars of business for an insurer is to determine liability and to solve financial claims. In this respect, the sector varies significantly from other sectors, where disagreements on liability and size of the damages suffered are more incidental.

Unresolved disputes interact with the business climate

Unresolved disputes – and payment losses in particular - have an adverse effect on the business climate – and more specifically the business sentiment. More than half (55%) of respondents from the European Payment Index survey experience loss of income and liquidity due to late payments. A further 47% feel less confident in getting bank support and only 10% feel the payment risks will decrease in the next year. We expect this to lead to: a) a decrease in turnover, b) lack of financial support and c) this ultimately contributes to failure and bankruptcy. SMEs are particularly vulnerable to late payment – as their cashflow and credit lines are more restricted than for larger companies. This can easily become a cyclical problem: when SMEs have turnover problems or go bankrupt, this creates costs for their own creditors.

For example in the transport and tourism sectors in Bulgaria, intra-company indebtedness has become very big³⁵. Companies have started to request advance payments which was not a common practice until 5-7 years ago. According to a survey between enterprises made by the BCCI in the beginning of 2012, there is almost no company in Bulgaria which does not face delayed payments from partners or customers. The survey shows that 94% of the business is affected by intra-company indebtedness in a process which resembles that of a snowball. When a company does not have the necessary financial resources, it draws into a chain of indebtedness all its partners. The survey of the BCCI showed that 90% of the interviewed companies have debts to each other. Other factors which create the intra-company indebtedness are the announced bankruptcy by companies.

The economic and financial crisis has also an adverse impact on the payment capacity of public authorities. For example in the Italian construction industry, a decrease of 20% of volume of investments has been recorded in comparison to last year (this is also deeply linked to the recent fiscal regime introduced in the country as a response to the critical economic condition of Italy). On top of that the crisis is reflected by the fact that public administration is not proving to be a reliable client due to continuous delays in payments and even, in the worst cases, lack of payments³⁶. This has been reported also by ISTAT in its annual report on the state of the Italian economic situation released in February 2012³⁷. In particular, in 2011 public administration was averagely paying with a delay of 180 days versus the average of 65 days in the EU³⁸. In Bulgaria, the State and municipalities are also not timely in their payments to the companies, which also creates a chain of indebtedness.

In summary, unresolved disputes have adverse consequences for the business climate: they contribute not only to unpaid bills and a direct reduction in turnover, but also to loss of markets, restricted suppliers and loss of overall trust in the business community.

³⁵ Annual report for the activities of the BCCI in 2011

³⁶ Interview with Arnaldo Redaelli, attached to Case Study – Annex 1.

³⁷ ISTAT – Italian National Institute of Statistics (2012), 'Rapporto annuale 2012', report available at <http://www.istat.it/it/archivio/61203>

³⁸ ANAEP (2012), 'Lo stop della ripresa', p. 28. Cfr. Footnote 11.

5.3 The specific problem: barriers and advantages of ADR

The **specific** problem is that there are barriers and hurdles that prevent businesses – and in particular SMEs – from using ADR in B2B dispute resolution, and that a large proportion of their disputes remains unresolved.

5.3.1 *The point of reference: litigation by court*

The legal system faces increasingly severe challenges to address dispute resolution

At the core of the large number of unresolved disputes lies the large backlogs in courts across Europe. The Eurobarometer survey points to the fact that it takes on average 1 ½ years to solve a dispute with another business in a court (15 months for cross-border disputes). But differences are large between Member States. Resolution of B2B disputes is relatively faster in Denmark, Ireland, Latvia, Lithuania, Luxembourg, Finland, Sweden and above all the UK. But resolution of B2B disputes through court takes particularly long (around 2 years or longer) in France, Italy, Cyprus, Hungary, and Portugal.

A further delay in B2B court litigation may be expected in the future, when taking into account the larger public deficit crisis. Especially in Southern Europe, where B2B litigation by court is already slow, and where the judicial system appears is currently suffering significant cuts. For example in Greece, the funds of the Ministry of Justice have shrunk from € 950 mln. in 2009 to € 550 mln. in 2012, and the new minister claims that further cuts would result in a near-collapse of the judicial process, which is already plagued by inadequate court facilities and long delays in reaching judgments³⁹.

The case study material broadly confirms the fact that dispute resolution through courts tends to be slow. For example in Bulgaria, one of the main problems in the judicial system is the efficiency of the courts. There are big differences in the workload of the courts in Sofia and the other courts in the country. According to the opinion of jurists, the workload of the magistrates in the Sofia district court is eight times higher than the workload of the magistrates in other first instance courts in the country. The big workload leads to delays in the court decisions, especially in the preparation of the arguments for the court decisions. These delays are real barriers for the effectiveness of the judicial process. They reflect also on the independence of the magistrates as due to the high workload they are in “technical malpractice”. Very often the court proceedings are very long. The statistics of the European Human Right Court shows that from all Member States, Bulgaria has the largest number of court decision which has to be implemented⁴⁰.

Clearly, a review of the court system in B2B disputes would merit a study on its own. Within the context of the remainder of this chapter, we will now position various ADR solutions in comparison to court litigation. With the large number of unresolved disputes and the overall limited B2B dispute resolution capacity in our mind, the main question will be what the specific advantages and barriers of ADR are in practice.

5.3.2 *General advantages of ADR compared to court litigation*

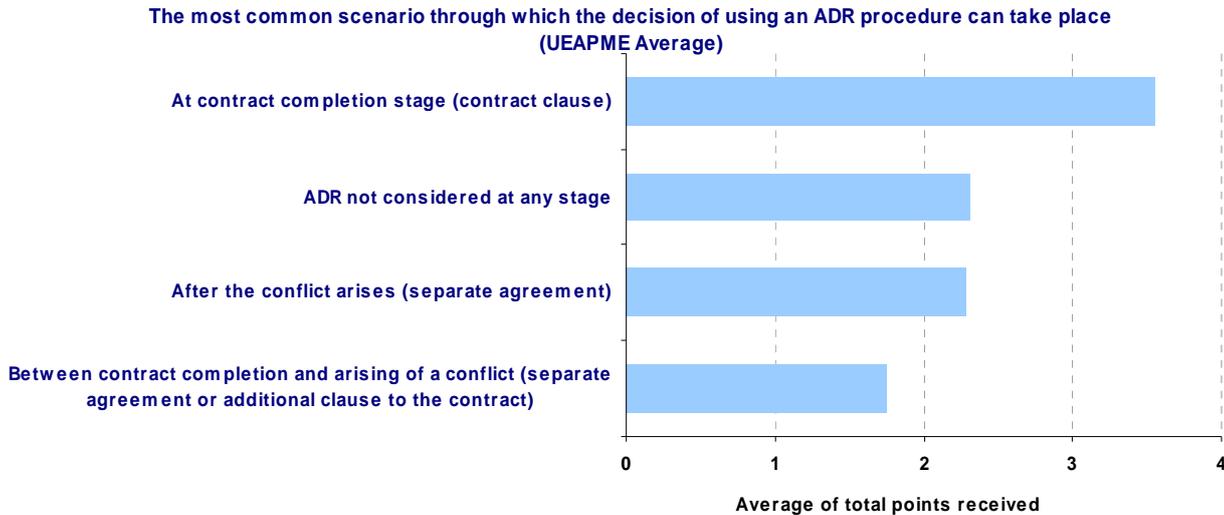
To understand the take-up of ADR in practice, it is crucial to be aware of the moment that a dispute resolution mechanism is chosen. According to UEAPME sources, it is most common for ADR to be agreed upon in the contracting stage. Once a conflict arises, there is still another moment to agree on the use of ADR, but this is less common. Even less common is a choice for ADR between the

³⁹ The Economist (2012) "The Greek Bail Out", July 21-27, p. 24

⁴⁰ EC Report for the On Progress in Bulgaria under the Cooperation and Verification Mechanism, 8-10

initial contracting and the rise of the conflict – e.g. during the amendment of or an addendum to a contract (see figure below).

Table 5.1 Moment of choice for using ADR



We will now address the reasons for using ADR and their barriers on the basis of the information collected by national experts as well as a UEAPME survey carried out amongst national member organisations⁴¹. The underlying reasons (advantages and barriers) will differ between ADR processes. Hence, the analysis of these reasons will take place in the subsequent sections (Section 5.4 and 5.5).

Contracting stage: ADR has many advantages....

National experts and the UAEPME survey (with an SME perspective) carried out in the context of this study point to a high convergence on views, at least with regard to the top reasons for business to include an ADR clause in the contract. These are:

1. Common practice in industry: certain sectors and industries have agreed ADR standard practices which are highly conducive to the take-up of ADR;
2. Preservation of the business relation is especially important from the SME-perspective, as degree of commonalities;
3. Direct cost savings;
4. Direct time savings;
5. Avoiding legal precedents;
6. Advice of the external lawyer;
7. Confidentiality of the proceedings (important for SMEs);
8. Possibility to indirectly choose the persons involved in the dispute resolution (important for SMEs);
9. More control over the dispute outcomes;
10. More control over the dispute resolution process;
11. Corporate policy (compare with common practice in the industry);
12. More consideration for underlying interests of parties.

The advice of in-house lawyers and the avoidance of cross-border litigation were mentioned, however not by the SME voice.

⁴¹ The UEAPME survey was carried out over a limited number of contact points and results should only be seen in conjunction with other sources.

But an almost equal amount of barriers...

Apparently, and in most cases, these advantages are off-set by a number of barriers. For a large part, national experts and UEAPME sources agree on the most important barriers, but there are some minor differences as well.

- The ADR process is not according to clear legal procedures
- The current template contracts do not contain an ADR clause
- A concern that the ADR process could be abused by a more powerful opposing partner
- Lack of awareness of ADR as a suitable means for solving disputes
- Lack of (internal) company experience with ADR providers (SME perspective)
- External lawyers advise for litigation (in case of mediation)
- In-house lawyers decide in favour of litigation
- Lack of confidence in neutrality of arbitrators/mediators
- Possible problems of enforcing ADR agreements

Furthermore, national experts are of the view that there is much resistance amongst corporate practices to include ADR clauses. They also notice an insufficient quantity or quality of ADR providers. These views are not shared by the SME perspective (UAEPME) who do not see this problem.

Preservation of business relations becomes a key motive once a dispute has arisen...

Motives for choosing ADR to resolve B2B disputes change if the decision to do so is taken after the dispute has arisen. If we take the SME voice (UEAPME) as a starting point, this decision appears to be taken more deliberately and consciously – and not just out of common practice. Direct cost and time savings are still important, but the preservation of the business relation is considered very valuable at this stage. Apparently, businesses value such relations more in the case a dispute has arisen. As many disputes relate to payment claims by suppliers, we understand hereby that businesses are afraid to lose vitally important clients. All other factors appear to be similar to those decisions taken at contracting stage.

The above motives appear to be rather stable over time and across the world. For example, they corroborate to a high extent on earlier (1998) findings regarding the reasons for ADR use in the US⁴².

Lack of trust: too late to settle

Again, the barriers to choose for ADR once a dispute has arisen are broadly consistent with those mentioned at contracting stage. However there is one exception: the most important barrier for using ADR has become the lack of trust and communication barriers. The escalation of a conflict prevents businesses involved to agree on anything, including the mechanism for resolving the dispute. Proponents of ADR can see in this finding an important argument to introduce ADR clauses in the contracting stage. After that, the possibilities for introducing ADR appear to have been much reduced.

⁴² Lipsky D.B. and R.L. Seeber (1998) "The Appropriate Resolution of Corporate Disputes: A Report on the Growing use of ADR by US corporations. *Martin and Laurie Scheinman Institute on Conflict Resolution*. Paper 4. <http://digitalcommons.ilr.cornell.edu/icrpubs/4>

5.4 Advantages and barriers for using mediation

This section is based primarily on the case study reports on Poland, the Netherlands and the UK, and complemented by findings from interviewees with experts, practitioners and business representatives across the EU.

5.4.1 Advantages of mediation

Businesses report the following reasons for using mediation.

1. Direct time savings;
2. Direct cost savings;
3. Indirect cost and time savings (e.g. capital unblocking);
4. Preserving business relations;
5. More control over the dispute resolution outcome;
6. Avoidance of stress related to court litigation;
7. Implementation of the decision taken.

Advantage 1: Direct time savings

The comparably short duration of a dispute resolution is a definite advantage of mediation over litigation. For example in Poland, B2B litigation can take up to 5-6 years, whereas for mediation the time span ranges from several days to several weeks. A quick resolution allows businesses to unblock capital by at least partially recovering outstanding payments from their contractors. Often, this is essential for SMEs to continue business activities or even to survive.

Time savings were acknowledged as positive side-effects of applying mediation in the Dutch insurance industry. The time spent on mediation was significantly lower than the time of a regular court case. Although the benefits per case might be significant, savings are not the main driver for the use of mediation – at least not in the Dutch insurance sector. The number of disputes arising on an annual basis is therefore too low. Hence, the time saving realised due to use of mediation instead of court cases is also very low compared to the total benefits for the business.

Advantage 2: Direct cost savings

Direct costs are important for business as part of their overall efforts to bring costs down. The fact that mediation is a relatively cheap dispute resolution is an unmistakable advantage. This advantage clearly depends on court fees which differ strongly between Member States. But this advantage can also change over time. Irish mediation experts and practitioners informed us of the fact that the economic downturn has brought about a significant drop in fee levels for legal practices overall – and thus reduced the overall direct cost attractiveness of mediation.

Advantage 3: Indirect cost and time savings (e.g. capital unblocking)

Often this is more important than direct savings are the indirect cost and time savings. In some sectors, e.g. construction, faster dispute resolution has important cash flow advantages, as it reduces long-term capital blocking (e.g. construction projects being put on hold). The unblocking of capital will be further studied as part of the secondary effects (Chapter 7).

Advantage 4: Preserving business relations

Another powerful indirect and frequently mentioned effect is the preservation of business relations. This advantage particularly applies to situations where litigation would probably not be considered in order to avoid irreparable damage to client relationships. Protecting income streams is a primary concern and in so far as mediation can lead to a negotiated settlement this is considered to be beneficial.

For example, a shared view from a majority of the interviewees from the Dutch insurance sector stated that building trust and personal relations with the counterparty are the most important drivers for the use of mediation. Due to its involvement in scandals, the insurance sector in the Netherlands suffered from a negative image with the public and the media. These scandals, notably the selling of speculative products, concerned the offering of insurances of investments into financial products. These insurances turned out to be complex and relatively expensive, had serious penalties for early termination of the contract and offered insufficient information to consumers. As a result, the insurance sector in the Netherlands is looking for ways to repair and nurture its relationship with both clients and the outside world. Mediation, as a tool to facilitate and improve personal contact, can be used to realise this improvement in external image.

Advantage 5: More control over the dispute resolution outcome

Unlike arbitration or litigation, mediation provides conflict partners with more control both over resolution process and outcome. This incentive is particularly important when contractors are willing to preserve their business relationship. The mediation outcome is usually a compromise between parties involved in a conflict that together work out a solution, therefore cooperation can be continued.

In this context, Bulgarian business managers stated that mediation provides them with an opportunity to meet face to face with decision makers of the disputed company – and not only their lawyers. Two of the interviewed SME managers who have experience with court litigations identified that reason. Sometimes in court one can meet only the external lawyer of the company or the responsible employee and both do not have the authority to take quick decisions and obligations. They mentioned that if the managers of both sides could have a face-to-face meeting for example with mediators they could find easier and faster a resolution of the conflict.

Related to this is the fact that mediation provides more consideration for underlying interests of parties. Interviewees in the Dutch insurance industry stated that mediation may provide a way to reach a solution, in particular for those situations when cases take a long time to be resolved because of opposing views by parties on the size of the damage. The necessary precondition for a successful mediation is the willingness of parties to resolve the conflict. Insurance companies are perceived to be inclined to try mediation in any case with one major exception: in case of fraud, the issue is usually taken to court.

Advantage 6: Avoidance of stress related to court litigation

The avoidance of stress related to court litigation is repeatedly mentioned. This advantage applies above all to smaller companies, and to businesses which go to court only occasionally. Mediation provides more clarity in terms of the result and the deadlines than court proceedings.

Advantage 7: Implementation of the decision taken

Bulgarian businesses stated that it is easier to implement the decision agreed by both parties rather than something imposed by the court. The interviewed companies consider that a decision made in a mediation process and agreed by both parties in the dispute will give a feeling of win-win situation and will be easily implemented by both companies. Several of the interviewed companies' complained about the fact that sometimes arbitration decisions and court decisions are not respected by the opposing sides, so they prefer to find solution which is beneficial for both parties.

5.4.2 Barriers for using mediation

In addition to the general reasons for using ADR above, the most important barriers for a business preventing it from the use of mediation are:

1. Lack of awareness of mediation as a suitable means for solving disputes;

2. Current template contracts do not contain a mediation clause;
3. Conservative attitude of lawyers;
4. Lack of mediation training;
5. Corporate culture;
6. Specific sector-wide agreements;
7. Previous experience with mediation;
8. Limited trustworthiness of the system;
9. Confirmation from court required;
10. Lack of cooperation from opposing partners.

Barrier 1: Lack of awareness of mediation as a suitable means for solving disputes

According to Polish mediation experts and practitioners, the degree of business awareness of mediation is rather low which is reflected in the limited use in Poland. The insufficient awareness has deeper societal roots in that the general unawareness of mediation in the Polish culture and society. The link between these two is particularly relevant as far as micro-enterprises are concerned. The latter represent over 90% of businesses in Poland. Generally, the level of awareness depends on the size of the business – the smaller the enterprise, the lower the degree of awareness. Smaller companies are less inclined to use legal services than the bigger ones. As a consequence, smaller companies are also less likely to use mediation.

The Polish interviews revealed that ADR is usually associated with arbitration, whereas mediation is rarely mentioned. This might result from the fact that arbitration has a long-standing tradition in Poland. The oldest court of arbitration in Poland, the Court of Arbitration at the Polish Chamber of Commerce, was established in 1950⁴³. Mediation in civil and commercial matters was introduced into the Polish legal system only in 2005, but mediation processes had been conducted earlier, i.e. from 2000 onwards by the Court of Arbitration at the Polish Chamber of Commerce⁴⁴.

An Austrian expert phrased this barrier as follows: *“A study showed that 90% of Austria’s population do not know that mediation or any other kind of ADR even exists. This majority of people will not be able to choose any alternative to a lawsuit as long as these people do not know any alternatives. Therefore I think that a mandatory first conversation with mediators should be established in which mediation is not only explained but were the parties also start working in the matter. Only if this happens people will see that many things can change in the first mediation session.”*

In Greece, one practitioner called for a mass-media campaign in favour of mediation or any form of ADR, as both lawyers and businesses lack awareness.

Until recently, mediation was largely unknown to the Dutch insurance sector - which has slightly changed since the last 5 years. Most non-life insurers are only starting to implement pilot actions with respect to mediation.

Barrier 2: Current template contracts do not contain a mediation clause

Polish interviewees admitted that a mediation clause is very rarely included in the contracts. As stated, the problem is more general and relates to the approach of Polish businesses to trading and contracts. Reportedly, there were two issues of concern identified: a lack of contracts in business practice and a low quality of contracts used by companies in Poland. In relation to the first statement, it is usually not common practice to not issue a dedicated contract for transactions.

⁴³ The Court of Arbitration at the Polish Chamber of Commerce, <http://sakig.pl/en/about-court/general-information> [Accessed on July, 12 2012].

⁴⁴ The Mediation Centre at the Court of Arbitration at the Polish Chamber of Commerce, http://sakig.pl/uploads/pdf/ABC_mediacji.pdf [Accessed on July, 12 2012].

Trading is then based on general legislation which regulates, among others, sales-purchase transactions. No specific arrangements concerning potential disputes resolution are made. Such solutions appear convenient especially for small businesses that are less likely to use legal services than big ones and hence find contract completion more challenging and time consuming. The downside of this attitude is that it doesn't provide adequate measures in case of contractual conflicts.

Secondly, the quality of contracts used by companies in Poland is considered inadequate. This is particularly true for small businesses that do not have enough capacity (knowledge, time) to prepare an effective agreement. Contracts very often do not include all relevant issues concerning transactions, especially arrangements on disputes resolution. Yet if a company determines a procedure for a dispute resolution in contract, there is a strong preference towards court litigation.

Barrier 3: Conservative attitude of lawyers

As mentioned earlier, mediation experts, practitioners and businesses share the opinion that lawyer's advice is essential in opting for dispute resolution schemes. Lawyers external to a company are believed to prefer litigations simply as it is a more familiar and profitable business for them. This barrier appears to transcend Europe's legal cultures. In Finland, the conservative attitude of the legal community was considered a prime barrier towards the use of mediation. But also in France, lawyers in general and barristers in particular are seen to form a real barrier toward the use of mediation as they do wish to be in control and do not like the fact that the process is in the hands of their clients. One expert referred in this context also to a specific 'confrontational' culture in France – which has its own specific procedures and attributes. A similar comment came from a Romanian interviewee, who stated that dialogues are less embedded in the national culture, and that the court system remains therefore the first option for dispute resolution.

Reluctance in cooperation from courts more broadly needs to be mentioned as well. In Poland, mediation experts/practitioners found reluctance of the legal community as well. Reportedly, courts tend to rarely refer parties to mediation (court-annexed mediation). Interestingly, once a case is referred to mediation, parties rarely raise objections against such court decision (despite having right to objection) in fear that their refusal might act to the detriment of their position in litigation. Therefore a role of judges in advertising the use of mediation is very important.

In-house lawyers are hesitant to engage in mediation for comparable but slightly different reasons: they can be concerned of being criticized by their peers, colleagues and business contacts. This concern focuses on situations where a mediation outcome would be unsatisfactory for the company management. Therefore, in-house lawyers run less risk by proposing court litigation or arbitration as they would not need to bear any responsibility for the outcomes. This reasoning applies especially to large companies, where in-house lawyers are particularly reluctant to use mediation where the other party is smaller in size: they know that bigger companies are usually a stronger party to the conflict as they can afford professional legal services and therefore are confident in winning court litigation.

Barrier 4: Limited mediation training

The above-mentioned barrier – resistance of lawyers to recommend mediation - can be partially explained by the limited training received by them. A range of mediation experts and practitioners as well as some business representatives pointed to the fact that there is indeed no or limited specific mediation training taking place as part of the regular curriculum of legal education.

Students in corporate law do neither receive any training in mediation in Belgium or in France. In Ireland and Latvia, limited education in mediation was seen as a clear barrier too. In Denmark, only 10% of lawyers are stated to have received education in mediation. Bulgaria, several interviewees stated that the main efforts should be focused on educating lawyers and representatives of businesses. Directly working with the teams of big companies is a good way to acquaint them with mediation.

Mediation training is not only necessary for lawyers, but also for other professional categories. In the Dutch insurance sector, in-house mediation is common practice. This requires employees to be trained on how to make use of mediation, either as mediator themselves or as involved party. In order to improve the internal knowledge on mediation, companies may choose for training of staff and/or pilot projects.

Barrier 5: Corporate culture

Organisations that want to make more use of mediation need to make a conscious change in company culture – which varies from company to company.

Overall, smaller firms tend to react differently to disputes – and therefore to their resolution – than larger firms. Dutch experts and business representatives pointed to the fact that large organisations tend to be better at rationalising the problem: more people are involved, more expertise and more resources can be mobilised. But smaller companies tend to react differently. They can be overwhelmed by emotions, especially when only a few individuals are (too) closely involved in the conflict. This can lead to difficulties in rationalising away from emotions, and to taking the best decisions. Paradoxically, this behaviour often leads to decisions that are detrimental for mediation – even though smaller companies have much to gain from mediation.

Hungarian as well as Dutch experts and practitioners pointed to what could well be another root problem: it is difficult to secure the presence of the senior managers of companies in mediation meetings. In most cases, senior managers of businesses do not wish to take responsibility for the conflicts of the businesses and for the possible solutions - it is easier for them to delegate the dispute resolution to a legal department. And the legal department often considers it to be best to delegate it to the legal system – for reason already mentioned earlier.

This argumentation also resonates in the interviews in other New Member States, both from experts as well as from businesses. For example in Lithuania, one interviewee referred to a 'post-soviet syndrome' which would consist of not wishing to be the master of one's own dispute, but to rather give it to the solution of a state representative with perceived strength, authority and power.

Employees need to realise the advantages of mediation as well. These changes in company culture take time and may call up internal resistance, for example in the Dutch insurance industry. Employees need to change their usual way of working. Also the importance of some departments, like legal affairs, may need to decrease in importance.

Barrier 6: Specific sector-wide agreements and practices

The case studies as well as some expert interviews points to the importance of sector-specific agreements and practices. In Ireland, three key sectors (government, banking and insurance) have their own dispute resolution mechanisms. Together, these three sectors represent a substantial portion of disputes/claims – probably more than 60%.

Such specific agreements and practices also apply to the Dutch insurance industry, which uses its own specific procedures and agreements, by taking recourse to in-house mediators.

In Bulgaria, clear differences were reported between the tourism and the (cargo) transport sector. B2B disputes in tourism – not so common – tend to be solved informally, while operators in the cargo sector are more inclined to go to court.

By the same token, specific sector-wide practices can also be used as a basis for promoting mediation. For example in Italy, it is common practice to solve emerging disputes *in situ* through mediation during trade fairs (e.g. the Milan Trade Fair).

Barrier 7: Previous experience with mediation

A corporate stance vis-à-vis mediation can also be formed by previous – negative – experiences. Such experiences differ of course from case to case. For example in Poland, business interviewees commented that such experience may relate either to the procedure itself, to the provider or to the settlement/judgement enforcement. In Poland, lack of confidence in domestic mediation providers might be a further obstacle. It was observed that big companies in Poland, especially those with foreign capital, tend to prefer foreign mediation providers rather than domestic ones.

Despite above anecdotal evidence, there is no general reason to believe that this barrier is very strong. To the contrary, the Eurobarometer survey states that 63% of companies using mediation would use it again – while satisfaction is particularly high amongst medium-sized companies (73% would use it again). These rates are higher than for court litigation (56%) and arbitration (54%).

Barrier 8: Lack of trustworthiness of the system

A lack of mediation training feeds into another barrier towards mediation, which has throughout our research reached the surface repeatedly: no training for mediators implies that whom-ever wants to act as one, can easily do so. As stated already in the Chapters 2 and 3 of this report, the state of play with regard to mediation varies largely between Member States. But this situation is felt to be really poor in at least some Member States. For example in Estonia, there is no functioning infrastructure for mediation at all. There is no state-created body that would monitor the activities of mediators. Therefore, Estonian experts consider the trustworthiness of the system as a whole as being questionable.

Barrier 9: Limited legal certainty

Another important barrier relating particularly to mediation relates to the limited legal certainty, at least in some Member States. Hungarian experts and practitioners stated explicitly that lack of enforcement proceedings form a barrier towards the use of mediation. A previous Secretary General for one of the Nordic Bar and Law Societies tried to push the development for mediation, but it was very difficult to convince lawyers of the outcome of ADR-procedures. It confirms a situation of mediation which was mentioned to be driven by “fiery souls” and not by legislation or through the legal system as such.

In Poland, a mediation settlement needs to be approved by the court (for court-annexed mediation - by enforcement seal; for parties-driven mediation - during *in camera* court session) in order to have the legal status equal to court settlement. The requirement to obtain court's approval for the settlement to allow its enforcement discourages businesses from using contractual mediation, as for many companies one of the main benefits from using mediation would be to avoid litigation and nuisance related to judicial proceedings. If a court procedure appears to be inevitable, there is a strong preference among businesses that mediation unnecessarily postpones the dispute resolution.

But this barrier cannot be simply addressed by pushing through legislative initiatives. In Bulgaria, the Mediation Law was already amended in April 2011 – giving a binding nature to mediation decisions. However, a multitude of companies are still not aware of this and this is one reason for companies not to search for mediation as a possible dispute resolution method. Related to enforceability are the need for improved regulation of enforceability and sanctions (e.g. in case of unreasonable refusal of a party to consider mediation, etc.).

Barrier 10: Lack of cooperation from opposing partners

Not all counter parties are willing to agree on mediation. Possible reasons are a certain hesitance to provide full openness of business at the representatives' side, as this could also expose any possible mistakes made by the representative.

5.5 Advantages and barriers for using arbitration

This section is based primarily on the case study reports on Italy and Bulgaria, and complemented by findings from interviewees with experts, practitioners and business representatives across the EU.

5.5.1 Advantages of using arbitration

In addition to the general reasons for using ADR above, the most important barriers for a business preventing it from the use of mediation are:

1. Direct time savings;
2. Direct cost savings;
3. Indirect cost and time savings (e.g. avoidance of blocking funds);
4. Corporate policy (in case of large companies);
5. Preservation of business relations;
6. Avoidance of stress related to court litigation;
7. More control over the dispute resolution outcome;
8. Expertise.

Advantage 1: Direct time savings

Arbitration is above all considered to be time saving – at least in comparison with litigation in court. In fact, the main advantage for businesses is to find a solution quickly in order to be paid by the counterpart or proceed with works. The average time of the arbitration procedure is from 13 to 18 months. A rather long time in comparison to other sectors, but still reasonable in the construction domain where often experts' witnesses are required. On the other hand, litigation procedures can last up to 2-2 and half years due to the delays required for having experts' witnesses and in case the decision is challenged in first instance (that appears to be often the case)⁴⁵.

A Bulgarian practitioner states that most international companies prefer and very often use arbitration, because they consider it a faster, reliable, and flexible way to resolve disputes. They value the fact that arbitration is based on rules (procedural) with high extent of international standardisation and may even be determined by parties.

In Bulgaria, all interviewees recommended the inclusion of an ADR clause during the time of contract preparation to save time – this includes businesses that have not used arbitration before. This view is based mainly on the (negative) experience with court proceedings and the opinion that the judicial system is not working quickly and effectively. Also the decisions of the court could be appealed on several instances which further prolongs and raises the costs of the court litigations.

⁴⁵ Interview attached to Case Study – Annex 2.

Advantage 2: Direct cost savings

The time saving is directly connected to the second reason why businesses include the arbitration clause: cost saving. However, it must be précised that these savings do not necessarily mean it is cheaper. It rather implies that the advantage for businesses is related to the fact that a rapid solution to the dispute prevents the wasting time and money on a problematic business relationship by continuing or interrupting it. In particular in the construction sector, this is an important consideration as capital intensity is high.

Advantage 3: Indirect cost and time savings (e.g. avoiding the blockage of funds)

As a consequence of direct time savings, an important advantage of arbitration for businesses is that it avoids or reduces the blockage of funds. Bulgarian interviewees were typically owners of small companies with 10 to 15 employees. For such companies, the blocking of funds could have negative effects on the financial capacity of a company. Most of the companies in the transport and tourism sector rarely have huge savings. When there is a case of blocked funds the company has to rely on the accounts of receivables from clients which are not the best option due the practice of delays of such payments.

Advantage 4: Corporate policy (in case of large companies)

Contrary to mediation, and in the case of large companies, corporate policy tends to be more in favour of arbitration, often following the advice given by corporate lawyers. Large companies in Bulgaria are used to arbitration clauses in their contracts. In Italy, some organisations such as IGI (the association of big work constructors) is using the advice of corporate experts to increase the awareness of its members towards arbitration⁴⁶. The advice of an in-house corporate expert can generate more confidence than that of an external lawyer.

In the Netherlands, clauses for the use of arbitration are gradually being introduced. Such practice is standard in insurances related to the construction sector, and may also be entered into the condition of insurances of large scale ICT projects. The reason behind the use of an arbitration clause is the possibility to refer the dispute to the binding decision of an expert in the field. Court cases are not seen as suitable alternatives due to lack of expertise of the judge.

Advantage 5: Preservation of business relations

In particular within the context of structured businesses, there is awareness that one of the benefits of using arbitration is the preservation of business relationships. Businesses are keen to solve a dispute through arbitration only with a counterpart that they consider reliable and with who is foreseeable to reach an agreement. This is why businesses often prefer to go in front of a judge if the business relation is already damaged. The inclusion of an ADR clause in the contract is a decision driven by the willing of maintaining good relations between partners.

Advantage 6: Avoidance of stress related to court litigation

Related to this is the avoidance of the stress related to court litigation. Some of the Bulgarian interviewees mentioned that court litigations are causing stress and frustration over the whole working process. Especially in smaller companies, court proceedings cause additional workload for the manager of the company. The manager has to earmark additional resources, e.g. funds, human resources and time to be dedicated to the court litigation. Also the unclear result and deadline of the court proceeding creates tensions among the employees especially if the dispute is due to delays of payments which might have reflection on the salaries and the profit of the company as whole.

⁴⁶ Interview attached to Case Study – Annex 2.

Advantage 7: More control over the dispute resolution process

Finally, an advantage of arbitration is the possibility to directly or indirectly choose the person involved in solving the disputes. Procedures are more standardised and this makes the arbitration proceedings much more controllable by parties and much more predictable and secure. This has two major advantages for the businesses involved:

- **Neutrality:** especially when parties appoint each one additional arbitrators there is a higher level of contradictory than that typical of court litigation;

Advantage 8: Expertise

Last but not least, another clear advantage for companies is the specialization of arbitrators. Arbitrators are commonly already familiar with the expert matter, and often have in-depth sectoral knowledge. This is not the case in court where the judge has to appoint an expert to provide him with advices and technical background information. Expertise is particularly important when issues submitted to arbitration are complex.

For example in the Spanish energy sector, the Law foresees that it is better to be judged by the opinion of specialists more than by a Judge with good general preparation but probably not expert in the issue object. The prestige and capacity of the arbitrators is considered essential, but also is their real specialization.

5.5.2 Barriers for using arbitration

In addition to the general reasons for using ADR above, the most important barriers for a business preventing it from the use of arbitration are found to be:

1. "Business as usual" attitudes;
2. Lack of experience;
3. Lack of appeal possibilities;
4. Broken trust;
5. Direct costs of arbitration;
6. Unwillingness of the opposing partner;
7. Independence of arbitrators.

Barrier 1: "Business as usual" attitudes

The business as usual practice is seen by many as the most important barrier for using ADR. Contracts are often drawn on the basis of standard templates, the use of which is often stipulated by corporate policies. This barrier includes therefore corporate culture, established legal practices and routine use of standard templates.

Barrier 2: Lack of experience

The experience in using arbitration is still limited, and this lack of experience prevents a large-scale roll-out of B2B arbitration. For example in Italy, putting a valid arbitration clause in a contract is rather complex – as many conditions need to be fulfilled. Corporate lawyers are not always inclined to build in these clauses. This fits with the finding of a US survey on the subject which found that more experienced corporate lawyers (with 15 years experience or more) were more inclined to include arbitration clauses in contracts than others⁴⁷.

Lack of (internal) company experience with arbitration resonates from our research in Bulgaria as well. None of the interviewed companies used arbitration methods for conflict resolution. From the interviews with representatives of arbitration courts and mediation centres, it became clear that the companies from the tourism sector (many of which being SMEs) are not using arbitration at all –

⁴⁷ RAND Institute for Civil Justice (2011) "Business-to-business Arbitration in the US – Perception of Corporate Counsel, p.22.

while avoiding litigation at all cost as well. Their main disputes are with consumers or tourists. The companies from the transport sector dealing with passengers transport are also not using ADR methods and very rarely go to court. Mainly the companies dealing with shipping and freight forwarding have broad experience with B2B disputes, but they prefer to go to court litigations.

An interviewee from confirmed that especially small businesses and lawyers advising them are often not aware of the true benefits of arbitration in commercial dispute resolution. Hence, they miss out from the benefits such as neutral forum, flexible procedures, speed, costs, and confidentiality.

Barrier 3: Lack of appeal possibilities

A frequently mentioned barrier is the lack of appeal possibilities. This issue was raised in the Italian construction case, and supported by several US surveys taken at different points in time. The above survey (2011) pointed to the fact that 63% of companies surveyed felt that the lack of appeal discouraged arbitration contracts to be included in contracts. An earlier survey by the same authors⁴⁸ suggested already that 55% of respondents considered this lack of appeal to be an important barrier towards the use of arbitration. An important additional barrier that discourages arbitration is the lack of a right to appeal. Two US surveys found that at least 55% of respondents mentioned this to be a deterrent for using arbitration.

A Bulgarian practitioner argued that arbitrators are reliable professionals in general, but omissions are always possible, and there is no second instance control over the arbitration award.

The lack of appeal poses a risk especially as doubts on the expertise/independence of arbitrators exist. This is one barrier towards arbitration in specialised disputes, notably in the area of intellectual property.

Barrier 4: Broken trust

As was already stated above, arbitration is difficult to implement at a moment a dispute has arisen. Several sources point to the fact that this basis is exactly missing in case of a dispute: parties tend to disagree on virtually everything, including the channels along which the dispute is to be resolved. A complete breakdown of trust does not happen overnight. A good previous or existing relationship could therefore have an influence on the willingness of businesses to agree on arbitration. After all, partners should be less inclined to use litigation if their relationship is good. The same US study⁴⁹ found that 47% of companies stated that a good previous or existing relationship with another company encouraged the inclusion of an arbitration clause in the contract (40% mentioned no effect, while only 8% felt that such a good relation discouraged arbitration clauses). The statement was supported by experienced litigators (with more than 15 years experience), who felt that poor relationships discouraged the use of arbitration.

Barrier 5: Direct costs of arbitration

Costs of arbitration can be high. In Lithuania, the big initial cost incurred by the parties was mentioned by interviewees.

In Bulgaria, several interviewed companies declared therefore that they were not entirely convinced about the advantages of arbitration. Some of them mentioned that the arbitration tariffs are quite high and there is no very big cost saving from the arbitration procedure in comparison with the court procedure. They also added that if the arbitration decision is not accepted by the opposing partner,

⁴⁸ Lipsky and Seeber, 1998.

⁴⁹ Ibid.

it could still start court litigation. This will lead to double expenditures for the company – first time for the arbitration, second time for the court proceeding.

Barrier 6: Unwillingness of the opposing partner

Unwillingness of the opposing partner is also seen as barrier to agree on arbitration once the dispute has arisen.

Barrier 7: Independence of the arbitrator

The expertise of arbitrators on specific sectors and issues may be a clear advantage, but a possible down-side of this expertise may be that arbitrators could sometimes be too close to the interests of the sectors itself, and/or its leading players.

For example in the Spanish energy sector, the independence and integrity of the prestige of the referee was expressed as a concern, and holding back a wider use of the arbitration. Background to this is the fear that arbitrators might be influenced by the most important and powerful of the companies which are in dispute. There is a general fear that what finally decides the arbitration is the greater ability to influence. There is no reason to believe that this concern applies to arbitration more widely, but if it would then it could help to understand why larger companies are more satisfied with arbitration than smaller companies.

5.6 Advantages and barriers for using ODR

As already presented in Chapter 4.6, On-line Dispute Resolution (ORD) practices have different features and different degrees of sophistication across the EU. About one provider out of two is estimated to offer relevant documentation provided on dedicated websites. Another half seem to offer “basic” ODR services, such as on-line forms through which request information and/or submit claims. Only a residual 2% of ADR providers across the EU Member States offers “advanced” ODR services which in the majority of cases are still embryonic with respect to full ICT potentials.

Advantages in reducing costs relatively simple disputes with small amounts involved

In areas where disputes are entirely managed on-line, such as the case for retail services platforms such as eBay and PayPal, ODR is considered to offer the potential to reduce the cost of litigation, both direct costs and the time invested in preparing submissions, gathering evidence, sourcing witnesses and dealing with paperwork associated with litigation. ODR has been highlighted as being time and cost-efficient – although it is unclear how far disputes resolved through PayPal would otherwise be addressed and how any time and cost penalties associated with unresolved disputes would accrue to different parties. Some interviewees highlighted that mediation can be carried out in a way which maintains confidentiality of both parties and this is beneficial in respect of reputation management. This factor along with protecting income was the primary factor mentioned during the interview with a major retail organisation.

Still, more traditional mediation service providers that we interviewed described ODR in terms of the delivery of conventional mediation with the use of online technologies (such as on-line document exchange or video conferencing). They could see the potential for ODR services to varying degrees. ODR is sometimes suggested to be most suitable for resolving low value consumer disputes, possibly those involving micro enterprises and retail transactions, due to their uncomplicated characteristics and the desire of both parties to keep ADR costs to a minimum. Another mediator was more enthusiastic about the prospects for ODR and felt that the potential for ODR needed to be more fully explored and highlighted the range of technological and cost (capital investment) costs to gearing up for greater use of ODR.

Interestingly, in some Member States, such as for the recent initiative by the Ministry of Justice in Poland⁵⁰, on-line proceedings related to court conciliation have been launched. Such e-court procedure proved to be beneficial both for State and disputing businesses, with fee amounts declining from 5% to 1.25% of claim value⁵¹. Also indirect related-costs are lower, as for example complaints on court judgment are free of charge. The efficiency of the on-line court is therefore considerably higher than the traditional one (570 cases recognized by judge or clerk in traditional court in 2010 against 20,700 cases recognized on average by judge or clerk in the e-court). Some evidence from interviews show that once court litigation has begun the accumulation of court costs can act as a barrier to mediation at a later stage, since by that point one party will need to cover the fees and this can work against settlement, parties can consider ODR in the light of eventual likely costs. As they save costs for both businesses and the State, on-line disputes resolutions procedure are therefore an interesting alternative to traditional off-line dispute resolution procedures when the main obstacle to reach an agreement is lack of financial support to continue the procedure.

Barriers in usage mainly due to limited understanding and availability of ODR procedures

The main barriers to the greater use of mediation are generally of two kinds. Firstly, even more than “traditional ADR”, there is a general lack of understanding about ODR features, availability and cost both for business and ADR service providers. Secondly, in the case of complex dynamics, high budget and lack of trusts amongst parties involved in the dispute, ODR might be perceived as too impersonal and risky, whilst a “traditional face-to-face approach” would be more suitable. Still, ODR in some cases could be an added value as conflicts are mitigated by limited interactions, but the limited expertise emerged so far does not allow any robust generalisation.

Limited experience of ODR preventing any generalisation of findings

Related to the above lack of awareness is the specific issue of the lack of experience of ODR - which leads to legal specialists within businesses routinely referring cases to lawyers rather than considering alternatives. It has also been highlighted that this may be a characteristic of larger firms and for smaller firms potential claimants may avoid bringing claims through any mechanism due to a lack of experience in receiving external support. Even in the UK⁵², a country with a long history in the use of ADR in general and this specific practice in particular, providers that we have interviewed in the UK argue that there is a lack of awareness of the potential benefits that ODR in particular could offer in terms of efficiencies and costs, although on-line tools such as document transfer are routinely part of a more traditional mediation processes.

Therefore, due to limited experience in the actual use of ODR no robust generalisation can be done. Nonetheless, further support in exchange of knowledge and practical experience amongst providers is believed to possibly trigger a greater availability and usage of ODR procedure.

Analysis of the extent to which ADR clauses are included in contracts has been hampered by the limited cooperation by businesses in our research. The available evidence suggests that such clauses are not commonplace and influencing this is a key ambition of efforts by the Ministry of Justice to encourage businesses to sign up to a commitment to ADR. There are two points to highlight in relation to this ambition. Firstly, very many of the cases handled by mediators which involve commercial disputes between small businesses involve only implied contracts and there is a challenge to formalise business relationships before ADR clauses can be considered. Secondly, businesses carrying out e-commerce and signing up to use PayPal do agree to use their online resolution centre.

⁵⁰ Poland Case Study

⁵¹ Poland Case Study, p. 91.

⁵² UK Case Study, p. 119.

5.7 The cross-border dimension

The overview of existing ADR schemes and characteristics (Section 3.3) already pointed to the fact that arbitration of cross-border ADR is more harmonised than cross-border mediation. Hence, arbitration appears to be clearly favoured over mediation, which has faces particular barriers.

More advantages for arbitration

ADR international arbitration rules are quite established and there is a degree of harmonisation across the EU, which encourages its cross-border advantages. Furthermore, the fact that arbitration is often favoured by larger companies helps it to be used in international settings.

Most of the above-mentioned advantages for arbitration apply therefore also to cross-border arbitration. Direct time savings. The fact that arbitration is rarely chosen for its direct cost savings helps it to be used in international settings.

The main reasons for an increased chance for the use of ADR for international transactions emerging from Case Studies held in countries such as Poland and Italy, where globalisation of firm is becoming a relevance component of internal economy, being basically a result of needs to avoid risks by more globalised companies and adjustment to such requests by local partners.

Main dynamics emerging from our case Studies are the followings:

- A fairly common practice for ADR in cross-border disputes is that partners choose an ADR provider (usually arbitration court) from a country other than the countries in which they cooperate, or even through International Providers, to ensure neutrality of a dispute resolution process and equality of both partners.
- As a general element business culture of foreign contractors allows more trust and flexibility in terms of potential dispute resolution as well as settlement/judgement enforcement, and as a consequence local companies in countries where such culture is not so widespread are keener to use ADR procedures for cross-border disputes;
- More specifically, often business practice and corporate policies of multinational organisations or truly international businesses requires ADR clauses within contracts and consequently promote a greater use of ADR for local business within countries or culture not so acquainted to such practices.

But more barriers for mediation

Since most of mediation should be administered in the country where the litigation would have taken place, cross-border ADR really means a domestic process conducted in a foreign language with domestic rules. The level of preparation to conduct mediation in two languages is usually related to the level of internationalization of the Member State. This leads to further limited legal certainty. The fact that mediation lacks trustworthiness is a particularly important barrier for cross-border ADR.

Related to this is the difficulty of enforcement is expected to be particularly important in an international setting, where the monitoring of the implementation of the decision is much more difficult than in a domestic setting. Hence the advantage 7 of domestic mediation "Implementation of the decision taken" does not hold up easily for cross-border mediation.

A more pragmatic, but important barrier for cross-border mediation (as part of the barrier on corporate culture) lies in the management time involved. After all, cross-border mediation requires managers to travel internationally, specifically to attend one or more mediation sessions. This fact

will encourage managers even more to delegate the dispute resolution to a legal department. And again, the legal department often considers it to be best to delegate it to the legal system – for reason already mentioned above.

6 Direct Costs/Savings

6.1 Direct Costs and Savings for Businesses

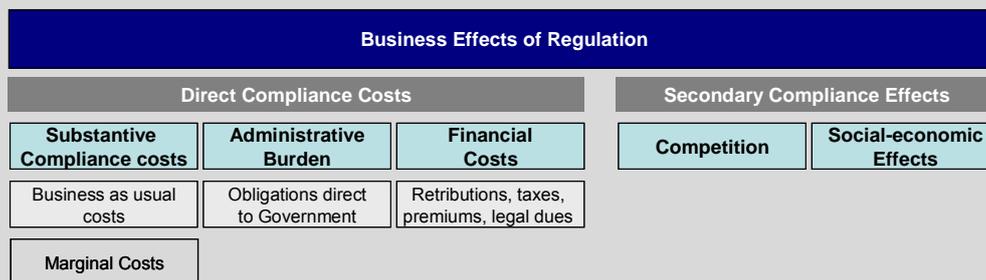
6.1.1 Analytical Framework

To assess the costs and savings of ADR schemes *vis-à-vis* court litigation, in each jurisdiction of EU Member States and in cross-border cases, we need to consider and compare the main “dispute resolution processes” that businesses can choose. In fact, costs - and savings - of ADR schemes cannot be calculated without considering any steps that litigants need to take before or subsequent to the ADR scheme itself. Further, effectiveness and efficiency of the dispute resolution process are usually the result of three different factors: money cost, time cost and successful result.

Box 6.1

SCM's compliance costs analysis used for this analysis

This chapter presents findings of costs and savings for businesses due to a greater use of ADR procedure, by relying on the Standard Cost Model (SCM)⁵³ approach and particularly Direct Compliance Costs. In practice we have considered the main compliance costs of Court litigations and ADR procedures, including fees and time-costs, and compared the total direct compliance cost of each. Consequently we have estimated possible savings for business in opting for one or another procedure, and calculated a total cost-saving for businesses through time on the basis of assumptions of a greater progressive use of ADR procedures instead of Court litigation. A full description of the way we have built on SCM for this specific assessment is provided in Annex II, whilst a further analysis of broader Secondary Compliance Effects for business is provided later on in the study (Chapter 7).



Source: Standard Cost Model (SCM) Network⁵⁴

Once the dispute arises, there are different factors and actors that influence parties to choose one or another process such as: contract clauses, legislation in place, incentives and disincentives, nature of the disputes, cost and time expectations, lawyers advises. As example, in most Member States despite the presence of ADR schemes we will find out whether the distribution of the choices among these processes is heavy unbalanced toward the court with little percentage devoted to the other three processes. Not always litigants take the most effective and rational decision and once taken, it is very difficult to change to another option. In practice, parties have few dispute resolution processes to choose from, generally grouped into three main options.

- o Option 1 - “One-Step” Dispute Resolution Processes;
 - This approach is characterized by a single process in which either the authority (judge or arbitrator) issues a binding decision based to the law- (i.e. **Court Litigation** or **Arbitration**), or

⁵³ EU Commission Staff Working Document SEC(2005)1329, Annex to COM(2005)518.

⁵⁴ One SCM expert - member of the secretariat of the SCM-network - has been part of the advisory board for the project, therefore ensuring a sound application of this methodology for this specific study's requirement and features. See Section 4.3.

the parties reach successful **amicable solutions (i.e. Mediation)**. For simplicity of analysis we do not consider any challenge and enforcement of Arbitration and Court decisions.

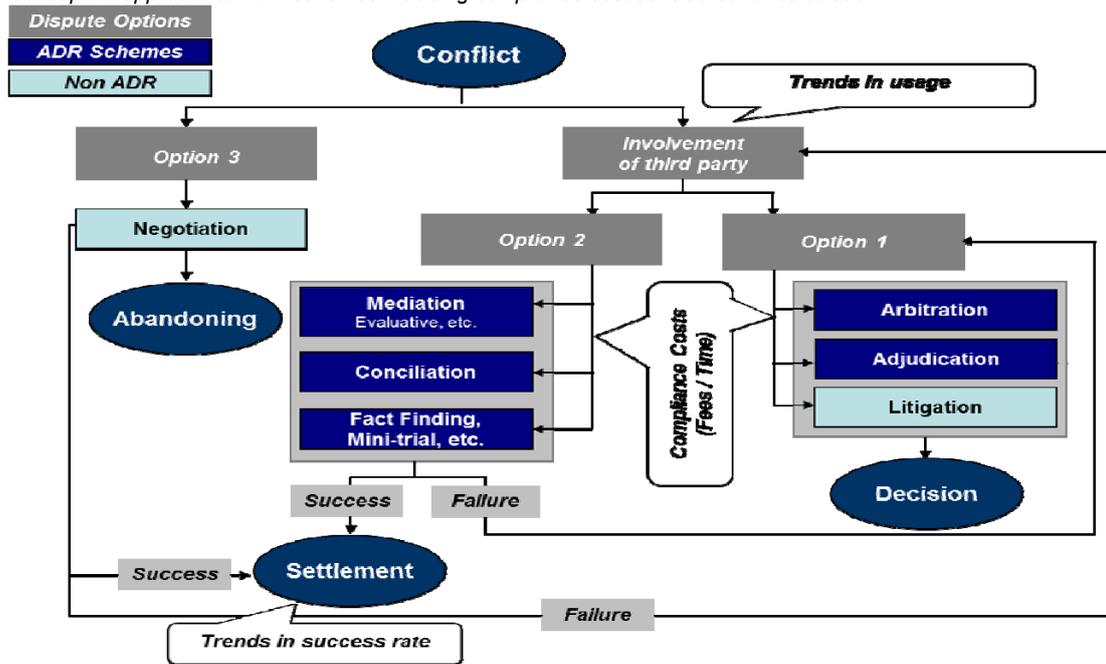
- o Option 2 - “Two-Steps” Dispute Resolution Processes;
The two-step processes are characterized by using mediation and, only when it fails, a binding process such as litigation in court or arbitration. In order to assess the time and cost of these processes it is essential to estimate the average success rate of mediation which is usually related to the quality of the mediators or mediation providers (e.g. trainings required, accreditation, controls). In all the percentage of success cases, cost and time are limited to the first step of the process. In all cases where mediation fails, parties have to incur the cost and time of court or arbitration on top of the mediation cost and time.
 1. **Consensual dispute (i.e. Mediation) then Court litigation.** This two-step process can be imposed by the law, with the “mandatory mediation”, or by a multi-step contract clause (Chapter 3);
 2. **Consensual dispute (i.e. Mediation) then Arbitration.** This process can be used only due to a contract clause.

- o Option 3 – Abandoning the dispute after unsuccessful bilateral negotiations
An additional option exists, as mentioned whilst introducing our conceptual model. This is the possibility that one litigant simply decide to **not proceed further in case of failure** in the consensual dispute. Although this is generally a minor option for large businesses, some studies⁵⁵ and our investigations suggest this being a quite common practice amongst SMEs, as proceeding further in involvement of third parties might simply be costly. For simplicity of calculation, this option will not be considered in the estimation of costs. It will however be estimated in the subsequent chapter, under the heading of unresolved disputes.

The figure below illustrates how the proposed approach relies on the conceptual approach to ADR to calculate total costs of ADR schemes throughout the “dispute resolution process”. The analysis takes account of the fact that mediation processes fail to resolve the dispute in a proportion of cases. Parties may then proceed through other mechanisms – i.e. arbitration and/or litigation – involving further costs to the parties involved and potentially the State.

⁵⁵ EIM, *op.cit.*, p.32.

Figure 6.1 Conceptual approach to ADR schemes including compliance cost considered for calculation



Source: Elaboration of Ecorys on WIPO (2010) and World Bank (2011)

The approach in calculating the direct costs for businesses is based upon the adaptation of the Standard Cost Model (SCM) and Direct Compliance Costs calculation, as presented in Annex 10 of The Impact Assessment Guidelines (2009). As such the main features of the calculations - for Options 1 and 2 above - are the followings:

- Reflecting the current extent of usage of different resolution procedures (i.e. Mediation, Arbitration and Litigation);
- Estimating the current Compliance Costs for businesses in each procedure (i.e. fees and time-costs);
- Estimating the total costs to businesses of dispute resolution within a baseline scenario (i.e. current usage) and optional future scenarios (i.e. growing proportional usage in ADR, Arbitration and Mediation);
- Estimating the total potential cost savings to businesses of scenarios involving increased use of the ADR mechanisms over court litigations but a stable number of total resolved disputes through time;
- Considering how far these savings would be affected by a modest increase through time in the total number of resolved disputes.

The sources of used data have been the World Bank (2011) study, the Eurobarometer (2012) survey and additional data collected through interview with local stakeholders (Annex II), as briefly presented hereafter.

Litigation

The costs for an individual complainant business of using litigation as a route to resolving disputes may comprise:

- Court fees;
- Attorney costs;
- Costs of the time of company personnel.

For the sake of simplicity it has been agreed that no other internal costs for businesses (e.g. for a private expertise) will be included.

These costs have been estimated based on a triangulation of World Bank 'exemplar' case figures and results from the Eurobarometer (2012) survey (i.e. data on the money spent on the dispute and the time taken for the dispute to be resolved), to provide alternative estimates of the business costs of resolving B2B disputes through litigation. Additional time-costs have been added on the basis of local stakeholders' estimations.

The following points need to be noted in particular:

- In general the World Bank data only include costs which the plaintiff has to advance. After consultation with the authors of the World Bank study, it has been assumed that court costs are paid only by the plaintiff while all other business costs can effectively be "doubled" to include the costs incurred by both the plaintiff and the defendant in a single dispute;
- Local stakeholders estimates to test the World Bank figure and provide the number of person days used by the business to resolve the dispute which, multiplied by an estimate of productivity cost for mid-top manager involved in the litigation procedure⁵⁶, provided additional compliance costs in terms of time cost for individuals involved in the procedure;
- Eurobarometers data on litigation costs were compared to such data to come with a reliable final amount.

Arbitration

The structure of the information to be collected here is similar to that for litigation:

- Costs of the arbitration process itself;
- Attorney fees, for both parties;
- Costs of the time of company personnel.

For the sake of simplicity it has been agreed that no other internal costs for businesses (e.g. for a private expertise) will be included.

These costs have been estimated based on a triangulation of results from the Eurobarometer (2012) survey (i.e. data on the money spent on the dispute and the time taken for the dispute to be resolved) and local stakeholders estimates, to provide alternative estimates of the business costs of resolving B2B disputes through arbitration.

The following points need to be noted in particular:

- Local stakeholder estimates on attorney/procedure fees and number of person days used by the business to resolve the dispute which, multiplied by an estimate of productivity cost for mid-top manager involved in the litigation procedure⁵⁷, provided additional compliance costs in terms of time-cost for individuals involved in the procedure;
- Eurobarometer data on arbitration costs were compared to other data to come with a reliable final amount.

Mediation

The structure of the information to be collected here is similar to that for litigation:

- Costs of the mediation process itself;
- Attorney fees, for both parties;

⁵⁶ This was estimated for each country based on 2011 GDP per capita. From Eurostat data, it is estimated that the average non-manual worker earns 1.2 times the GDP per capita. We also assume that the average employee works 240 days per year and non-wage labour costs amount to 25% of gross wages. Therefore, value per person day = $(\text{GDP per capita} \times 1.2 \times 1.25) / 240$

⁵⁷ This was estimated for each country based on 2011 GDP per capita. From Eurostat data, it is estimated that the average non-manual worker earns 1.2 times the GDP per capita. We also assume that the average employee works 240 days per year and non-wage labour costs amount to 25% of gross wages. Therefore, value per person day = $(\text{GDP per capita} \times 1.2 \times 1.25) / 240$

- Costs of the time of company personnel;
- Success rate of mediation.

For the sake of simplicity it has been agreed that no other internal costs for businesses (e.g. for a private expertise) will be included.

These costs have been estimated based on a triangulation of results from the Eurobarometer (2012) survey (i.e. data on the money spent on the dispute and the time taken for the dispute to be resolved) and local stakeholders estimates, to provide alternative estimates of the business costs of resolving B2B disputes through mediation.

The following points need to be noted in particular:

- Local stakeholders estimates on Attorney/procedure fees and number of person days used by the business to resolve the dispute which, multiplied by an estimate of productivity cost for mid-top manager involved in the litigation procedure⁵⁸, provided additional compliance costs in terms of time-cost for individuals involved in the procedure;
- Eurobarometer data on mediation costs were compared to other data to come with a reliable final amount;
- In addition, local stakeholders' estimates on success rate on mediation procedures have also been used.

There is an issue to consider for mediation, which is whether and how the use of mediation affects the costs of subsequent litigation. Where mediation fails and the dispute is brought to court, the litigation process is not a continuation of the mediation but a new and separate process. For example, evidence collected in mediation is not normally eligible for consideration in court. Our assumption is that court proceedings relating to the standard case are of the same duration and cost, irrespective of whether or not it had been preceded by mediation. However, it should be noted that a negative legacy from the experience of ADR might increase the cost of subsequent litigation, while if mediation succeeds in narrowing the scope of the outstanding issues to be resolved, without resolving the entire dispute, this may reduce the cost of subsequent litigation.

6.1.2 Results

The first element of our analysis is an estimation of the average cost to business of a B2B dispute resolved through litigation, mediation and arbitration respectively, and hence an average saving associated with ADR methods. To account for uncertainty in the data, we also provide 95% confidence intervals around these averages, thus constructing a range for the 'true' average costs⁵⁹. Detailed calculation and amounts are provided in Annex II.

The following table shows the average costs of a dispute for a single business, based on available data sources, as previously described (i.e. World Bank / Local Stakeholders and Eurobarometer). For each cost element, the medium value shows the weighted mean while the low and high values show the 95% confidence interval around this mean. To be conservative high fee-costs from Eurobarometer and higher-than average time-costs from stakeholder's estimates for ADR have been considered.

⁵⁸ This was estimated for each country based on 2011 GDP per capita. From Eurostat data, it is estimated that the average non-manual worker earns 1.2 times the GDP per capita. We also assume that the average employee works 240 days per year and non-wage labour costs amount to 25% of gross wages. Therefore, value per person day = (GDP per capita x 1.2 x 1.25) / 240

⁵⁹ Confidence intervals were calculated by assuming that the sample data provided by country experts is normally distributed for all variables in the model. The medium estimate is the weighted mean while the high and low estimates are the 95% confidence intervals (1.96 standard deviations) above and below the mean respectively.

As noted above, mediation does not always resolve the dispute, so the cost estimates presented include the true costs to a business of engaging with mediation as a proportion of such disputes will proceed to litigation (or, in a small number of cases, arbitration). These are therefore calculated as a final total amount, for the additional costs of mediation failing (Chapter 4) and scaling to court.

Table 6.1 Average cost of dispute resolution in EU27

Procedures	Fee Cost		Time Cots		Aggregate Costs	
	Attorney, Procedure, etc.	Person days (A)	Day Costs (B)	Total Costs (A * B)	Compliance Costs (Fee + Time)	Mediation Failure (2 Steps)
Mediation	€ 3,140	3.5	€ 300	€ 1,050	€ 4,190	€ 9,269
Arbitration	€ 7,043	5.5	€ 300	€ 1,650	€ 8,693	€ 8,693
Litigation	€ 11,716	5.5	€ 300	€ 1,650	€ 13,366	€ 13,366

Source: Ecorys analysis based on World Bank (2011), Eurobarometer (2012) and local stakeholders estimates

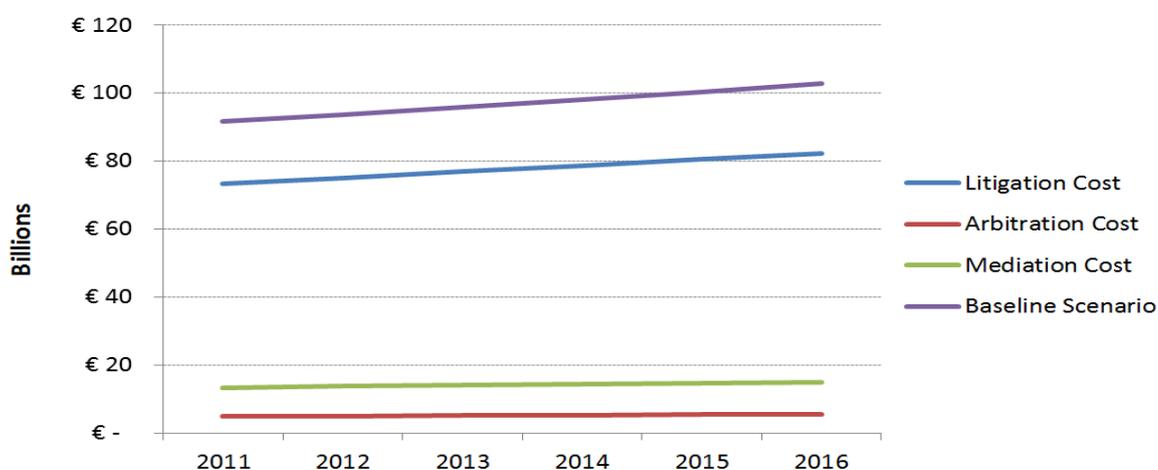
There is no limit to the number or type of scenarios that can be generated from our model. However, for the purposes of this study, we present three scenarios, compared to a baseline scenario in which it is assumed that the proportion of all disputes resolved by ADR does not change over a period of five years from 2011 (year when latest data were available) to 2016.

The baseline scenario will assume a natural 0.5% yearly increase in the total amount of disputes. This baseline is compared against alternative scenarios:

- Scenario 1, where 0.5% of disputes resolved by litigation in the previous year are **resolved by ADR** in the present year (with the proportion between mediation and arbitration remaining constant);
- Scenario 2, where 0.5% of disputes resolved by litigation in the previous year are **resolved by arbitration** in the subsequent year (with no change in the number of mediations);
- Scenario 3, where 0.5% of disputes resolved by litigation in the previous year are **resolved by mediations** in the subsequent year (with no change in the number of arbitrations).

The figure below shows **costs for business in the baseline scenario growing from about 90 to over 100 billion euros in the period 2011 to 2016**, given a natural growth of 0.5% in overall disputes resolved through Court litigation, arbitration and mediation. Baseline scenario is the sum of estimated cost for litigation, arbitration and mediation.

Figure 6.2 Direct costs to business by assuming natural 0.5% growth as a baseline scenario

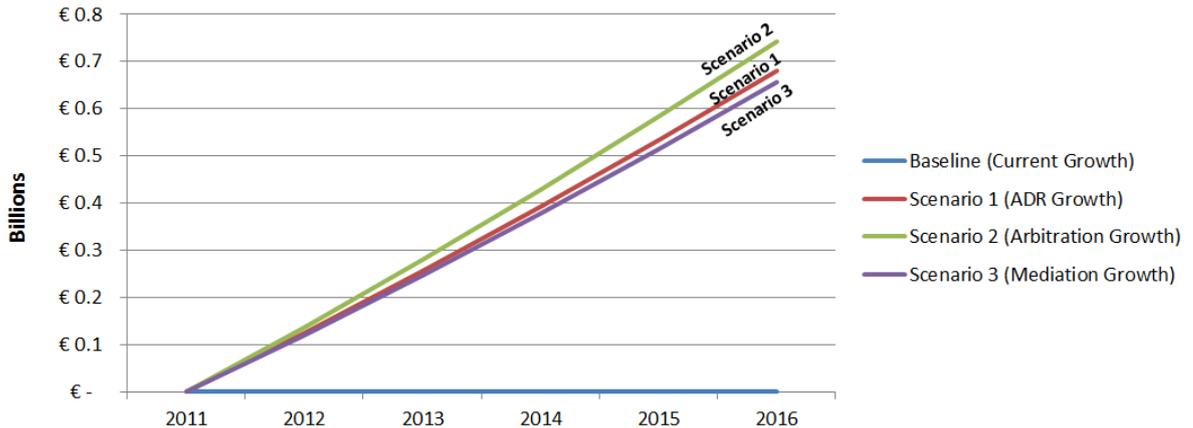


Source: Ecorys elaboration on secondary sources and local stakeholders' estimates

Interestingly in all alternative scenarios where the 0.5% growth shifts towards ADR, arbitration or mediation, some benefits from business emerge in terms of cost-savings, with some minor differences amongst specific procedure, although with arbitration being slightly cheaper through time. Clearly, as illustrated in previous chapters, reasons and problems for using one dispute resolution instead of another are not limited to its cost-effectiveness. If a dispute resolution process is operating efficiently and effectively in, and across, Member States (which the material earlier has shown not to be the case) then the potential beneficiaries could be willing to pay clearly stated costs if they had the trust in the process and the confidence that the outcome would be beneficial to businesses

Figure 6.4

Direct savings to business by assuming different scenarios with greater use of ADR instead of court



Source: Ecorys elaboration on secondary sources and local stakeholders' estimates

As suggested by the figure above, a mild 0.5% yearly increase in the use of ADR is likely to generate **between 0.6 and 0.8 billion of euros of savings for businesses in 2016**, due to consequent decrease in court litigation. On a yearly basis, our estimates suggest an average grow of € 200/300 million savings for a growing percentage of disputes resolved through ADR procedure rather than through court litigation. Business savings can become higher if the current success rate of mediation moves up from the current rate (about two out of three cases), possibly through better knowledge of the procedure and more appropriate usage (Chapter 5).

6.2 Direct Costs and Savings for the State

6.2.1 Analytical Framework

By relying on the Standard Cost model (SCM)⁶⁰ in addressing possible Compliance Costs due to Administrative burdens when it comes to the State⁶¹, there are potentially three ways in which the State may incur additional costs as a result of use of ADR:

1. Cost savings due to reduced use of Courts;
2. Additional costs for establishing ADR Providers;
3. Additional costs due to policy obligations.

The following sections describe our findings for each of the above elements of State Costs.

Box 6.2

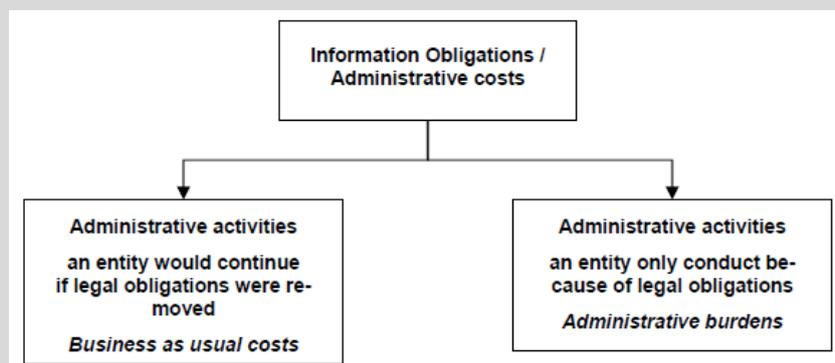
SCM's compliance costs analysis used for this analysis

The Standard Cost model (SCM)⁶² requires that, in addition to direct costs, implication of possible administrative requirements should be taken into consideration when assessing administrative costs. This implies comparing

⁶⁰ A description of the adoption of SCM in relation to this study is provided in Annex II.

⁶¹ We take as a reference for possible policy obligations the EU Directive Proposal on B2C ADR http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

"[...] two different cost components: the business-as-usual costs and the administrative burdens. While the business-as-usual costs correspond to the costs resulting from collecting and processing information which would be done even in the absence of the legislation, the administrative burdens stem from the part of the process which is done solely because of a legal obligation" (p.46) ⁶³.



Source: EU Impact Assessment Guidelines, Annex 10 (2009)

6.2.2 Cost savings for the State due to reduced use of Courts

The state incurs any costs that are over and above those covered by court fees. A recent report by the European Commission for the Efficiency of Justice (CEPEJ)⁴ provides estimates of total income from court fees as a percentage of total expenditure on courts for most countries in Europe⁵. This is shown in the table below, which also illustrates how share of court fee covered by annual income varies (e.g. Austria having a surplus, whilst Italy covering a very limited part of the costs) or are not available (e.g. France, Spain Luxembourg), therefore making it difficult to clearly use such data effectively for our purpose.

Table 6.2

Annual income received by the state from court fees as a percentage of total state budget allocated to courts⁶

Country	Annual Budget (millions)	Court Fees on Annual Budget (share)	Amount of Court Fees (millions)
Austria	€ 668	111%	€ 741
Belgium	€ 850	4%	€ 31
Bulgaria	€ 128	26%	€ 34
Cyprus	€ 26	29%	€ 8
Czech Republic	€ 390	6%	€ 24
Denmark	€ 229	44%	€ 101
Estonia	€ 34	17%	€ 6
Finland	€ 256	13%	€ 34
France	€ 3,378	0%	€ 0
Germany	n/a	24%	n/a
Greece	€ 367	24%	€ 85
Hungary	€ 286	24%	€ 68
Ireland	€ 171	22%	€ 38
Italy	€ 3,125	9%	€ 272
Latvia	€ 47	16%	€ 8

⁶² One SCM expert - member of the secretariat of the SCM-network - has been part of the advisory board for the project, therefore ensuring a sound application of this methodology for this specific study's requirement and features. See Section 4.3.

⁶³ EU Commission Staff Working Document SEC(2005)1329, Annex to COM(2005)518.

⁴ CEPEJ (2010) *European Judicial Systems Edition 2010 (data 2008): Efficiency and quality of justice*

⁵ Ibidem, Table 3.1.1

⁶ Ibidem, Table 3.1.1

Lithuania	€ 61	13%	€ 8
Luxembourg	€ 64	0%	€ 0
Malta	€ 9	92%	€ 8
Netherlands	€ 889	18%	€ 163
Poland	€ 1,227	30%	€ 373
Portugal	€ 513	26%	€ 133
Romania	€ 385	6%	€ 23
Slovak Republic	€ 146	36%	€ 52
Slovenia	€ 162	22%	€ 36
Spain	€ 3,906	0%	€ 0
Sweden	€ 340	1%	€ 4
UK	€ 1,751	31%	€ 546

Source: CEPEJ (2010)

Unfortunately therefore, it is difficult to provide a reliable assessment of such data, as available data are not sufficiently detailed and robust to enable an accurate assessment of cost savings to the State due to reduced B2B litigation³. This is due to the fact that expenditure data for courts is not systematically broken down by case type to allow us to assess the average cost per B2B dispute across all Member States. Moreover, national ADR experts consulted for this study were not able to provide data on this aspect of litigation.

Box 6.3

Method for calculation of State Costs/Savings in presence of robust and reliable data

If we could assume that this percentage represents the average share of court costs recouped by the State in fees, the average State cost per dispute brought to court is calculated, for each Member State, as follows:

Average state cost = Average business expenditure on court fees x (1 / Percentage of court costs covered by court fees).

This method would have assumed that the percentage of court costs covered by court fees for the exemplar B2B dispute is reflected by the extent to which court costs are covered by fees across the entire court system.

As a second element of costs/savings, in most Member States the actual impact of a reduction of disputes coming to court is enabling the backlog of cases to be processed more quickly. This reduction in the delay in resolving disputes will generate savings not to the State but to the litigants themselves (i.e. businesses, as well as other users of the court system). Reduced delay may not necessarily impact on direct business costs (the actual money and staff time spent on the dispute), but it will generate wider benefits for business by having disputes resolved more quickly. In the long run, however, we might assume that supply equates to demand in the court system and a reduction in the number of cases will deliver savings to the State. Again, lack of clear and robust data on such backlog hinder any robust estimates.

Finally, a potential impact for the State is a reduction in court costs resulting from lower demand for litigation. However, a reduction in the number of cases being brought to court will not necessarily lead to any *financial savings* for the State, as many of the costs incurred by courts are effectively fixed, at least in the short term. There may be no reduction in the number of buildings or staff employed and hence no reduction in budgets. So even such estimates cannot be provided as we expect reduction of litigation will not affect any fix court costs.

³ We have considered alternative approaches based upon: disaggregating overall Ministry of Justice data (which appears not be feasible, at least for the UK); or, building up estimates on a 'bottom up' basis from data/assumptions about personnel and property inputs to the Court case concerned (substantially more complex and difficult to quality assure)

6.2.3 Costs in establishing and running an ADR Provider

Costs incurred by ADR Providers can be additional costs for the States, in case State subsidies are required to support local demand for more ADR procedures. Assessment of a sample of ADR Providers⁶⁴ suggests a considerable variation of cost structures, particularly in terms of annual revenues and running costs. Of particular note is the fact that, even for the median country, the evidence suggests that ADR provider is operating at a loss, as signified by a negative EBITDA⁶⁵.

Box 6.4

Standard case adopted to estimate revenues and cost of an exemplar ADR Provider across the EU

The costs for setting up and running a public or private ADR Center in the capital city of EU Member States, with an office of about 170 mq2 with 7 rooms (including meeting rooms) and about 5 full-time employee has been estimated across the EU. This exemplar case is estimated to be managing about 2 to 6 ADR cases per day.

Based on the cost structure illustrated in the figure hereby, we can use the median estimates to calculate that **an exemplar standard provider faces an annual shortfall of about €15,000⁶⁶**. As on average the losses being made by providers are much higher than average, we would expect that with growing number of ADR Providers might finally get a break even. Still, as in case of mediations fees are still substantially lower than arbitration and court (Chapter 6.1) and losses might also be due to discounted prices for such services. Therefore, as a working hypothesis we might expect that a growing popularity of ADR could lead to larger increase in fees (e.g. the doubling of mediation fees) to allow ADR providers to be sustainable in the future.

Table 6.4

Estimate of costs and revenues for ADR providers

SETTING UP COST	Lower quartile (€)	Median (€)	Upper quartile (€)
Furniture	10,000	20,000	50,000
Office Renovation	6,000	10,000	15,300
Equipment	6,500	12,000	15,000
Office supplies	2,500	5,000	5,000
Website (with possible online compliance procedure)	2,000	4,000	6,000
Training	0	1,500	5,000
Promotion	2,000	10,000	15,000
Various costs	2,000	5,000	5,000
Other	0	0	0
Total Setting Up Costs	57,600	75,000	124,000

⁶⁴ Estimates were provided by a sample of ADR Providers in 12 Member States.

⁶⁵ Due to difficulties in getting actual revenue structures of ADR Providers, a standard case has been estimated by local stakeholders.

⁶⁶ Median investment is €75,000 which we assume to be €7,500 per year over 10 years while median annual running costs amount to about €257,500. When compared to median annual revenues of €248,750, this gives an annual shortfall of just over €15,000.

INCOME STATEMENT (per year)	Lower quartile (€)	Median (€)	Upper quartile (€)
REVENUES			
Revenues from Mediation Fees	29,475	75,000	175,000
Revenues from Arbitration Fees	57,000	100,000	437,500
Other Revenues	73,750	77,500	138,750
Total Revenues	65,740	248,750	775,000
RUNNING COSTS			
Mediator fees (variable cost related to the revenues)	22,988	75,000	140,000
Arbitration fees (variable cost related to the revenues)	26,250	56,000	200,000
Other fees (variable cost related to the revenues)	42,500	55,000	77,500
Office space	25,380	30,000	34,650
Staff personnel	54,000	72,000	112,500
Utilities (phone, internet, etc..)	5,100	8,000	12,000
Promotion	2,000	6,000	24,000
Various other costs	2,760	12,000	24,000
Total Running Costs	135,330	257,500	818,500
EBITDA (Revenues - Running Costs)	-70,705	-1,513	27,688

Source: Ecorys analysis based on local stakeholders estimates

If we weight such data by number of cases managed per year, the results are as follows.

Table 6.5

Estimate of mean costs and revenues for ADR providers per case

INCOME STATEMENT (per year)	€
Mean revenue per case	1,800
Mean revenue cost per case	2,350
Mean EBITDA	-450

Source: Ecorys analysis based on local stakeholders estimates

As already introduced in Chapter 2, set-up cost depends by the nature (public or private) of the ADR provider: private investors, chamber of commerce, or professional and business associations. Particularly, public bodies use additional public resources to cover their costs, chamber of

commerce ask for additional membership contributions, whilst private ADR providers integrating their revenue with additional activities such as training and consulting. Usually, after legislation reform has been introduced to strongly promote ADR processes private investors tend to have greater interest in setting up of an ADR provider, although even in countries where some form of ADR has been made mandatory (i.e. Italy), ADR Provider still need to develop additional services (e.g. training activities, certification support, etc.) to get a break-even.

Because the large part of revenues comes on average from arbitrations, collected evidence suggests that mediation-based ADR providers are particularly challenged, unless they try to minimise their costs. In order for fees to cover fully the costs of ADR provision, the costs incurred by businesses – and particularly these for mediation – would be expected to rise in the future, thus possibly reducing the anticipated cost savings through increased use of ADR (Chapter 6). The market is still at an embryonic stage in many EU Member States, it seems, to come with any definitive statement on cost structures and profitability of ADR Providers. Therefore State costs might be needed to support possible future development (e.g. tax benefits or direct incentives for the use of ADR for specific businesses such as micro-enterprises), as it is happening in Member states where B2B ADR is somehow regulated and as it is the norm in B2C ADR practices in many EU Member States (SANCO, 2010).

6.2.4 Costs due to policy obligations

Costs for Providers

In addition to the data provided in the section above, we collected information specifically related to the potential costs that would be incurred by ADR providers to comply with a potential Directive governing ADR for B2B disputes⁶⁷. Importantly, the costs presented below are not necessarily exclusive of the costs presented in the section above⁶⁸. The following table shows an indication of the compliance costs that might be incurred by an "average" ADR provider in relation to such requirements. Due to differences amongst ADR Providers and Member States these figures are obviously to be considered as indicative.

Table 6.6

Indicative "average" compliance from ADR providers across EU Member States

COST	
Website	€5,000
Extra costs to deal with cross-border disputes (e.g. translation)	€1,000
Compliance with data protection rules	€750
Training of mediators and arbitrators	€2,000 per trainee
Publishing information	€3,000
Communicating information to competent authorities	€2,000 per annum
Total (assuming 10 mediators/arbitrators)	€ 31,750

Source: Ecorys analysis based on local stakeholders estimates

We therefore estimate an **approximate total yearly cost of about € 32,000**, by considering the following items:

- Costs of having a website to enable disputing parties to submit a complaint online and communicate via electronic means⁶⁹ – estimates of the one-off cost for an ADR provider to set up a compliant website vary from € 300-500 to € 10,000;

⁶⁷ We have taken as a reference the EU Directive Proposal on B2C ADR, Articles 5 (2) a-b, 5 (2) c, 5 (2) d and 6.

⁶⁸ Estimates were provided by a sample of ADR Providers in 12 Member States.

⁶⁹ EU Directive Proposal on B2C ADR, Art. 5 (2) a-b

- Extra costs to deal with cross-border disputes⁷⁰ – the main additional cost identified was for foreign language translation and is not a significant additional cost in many countries;
- Compliance with data protection rules⁷¹ – these costs are also not likely to be significant, and cover expenses such as special software or registration fees for data protection authorities;
- Training of mediators and arbitrators⁷² – estimates of the cost of training a mediator or arbitrator to the required standard vary from € 285 to € 8,000 per trainee;
- Costs of publishing information – this relates to Article 7 of the Directive on consumer ADR and ensures that providers are fully transparent in terms of electronic and printed publishing of information. As a one-off cost, estimates vary from € 1,200 to € 10,000 per provider;
- Costs of communicating information to competent authorities in Member States relates to Article 16 of the Directive on consumer ADR and estimates vary from € 200 to € 5,000 per year.

If we consider (Chapter 3.5.1) that only 15% of ADR providers have a website with content and forms translated in a foreign language, whilst presumably training activities are already run to ensure skilled mediators/arbitrators, we can assume that approximately five out of six ADR Providers will have additional costs of about € 12,000⁷³ per year to comply with policy requirements in case of a directive for B2B ADR is in place. Depending on whether training costs are considered or not, **approximately € 0.8 to 2 million per year for each EU Member States in case direct subsidies to ADR Providers are needed** to cover such costs⁷⁴. An **additional € 0.6 million are required for training costs for individuals** currently offering ADR services on a country average.

Costs for Agencies

When it comes to additional compliance costs for the State, additional activities of collecting and assessing data on ADR usages⁷⁵ can be run by ADR monitoring authorities or other public or independent bodies. Due to the current serious lack of comparable and robust information on ADR in B2B disputes, our study suggest that data requirements, which might not imply additional direct costs to the State, could instead provide great added value in the full understanding of usages, trends, costs and performances of B2B dispute resolutions patterns across the EU.

Our assessment in a sample of different monitoring bodies existing across selected EU Member States⁷⁶, suggests that the range of possible costs varies between those for more basic and those for more complex roles. Such additional compliance costs for the State are either: i) significant (i.e. dedicated agencies for the specific area) and therefore externalised to end users in the form of fees, or ii) they are minimal (e.g. exchange of data already existing) and therefore they make no difference if compared to the overall costs of judicial systems and data management of dispute resolutions practices within each country.

The following box, resumes the status of existing monitoring bodies across EU Member States. When such bodies exist they are often established within an already established institution (e.g. the Ministry of Justice or the Institute of Statistics), whilst in other areas similar authorities exist (e.g. Insurance, Telecommunication) and registration fees are typically requested to the main player in the sector, in order to cover the cost of the authority. Still, it can be the case that new policy requirements imply additional costs for the State and therefore the significance of possible additional compliance costs are assessed in this section.

⁷⁰ EU Directive Proposal on B2C ADR, Art. 5 (2) c

⁷¹ EU Directive Proposal on B2C ADR, Art. 5 (2) d

⁷² EU Directive Proposal on B2C ADR, Art. 6

⁷³ Result of €32,000 total costs minus €20,000 estimated for training mediators/arbitrators.

⁷⁴ We consider here an average of approximately ADR Providers per country based on data presented in Chapter 3.

⁷⁵ We have taken as a reference the EU Directive Proposal on B2C ADR.

⁷⁶ A full list of existing monitoring bodies is provided in Chapter 3.1.2

Existence of ADR Monitoring Authorities across EU Member States

As described in Chapter 3 of this study, some form of Monitoring Authority already exists in the majority of EU Member States. Still, in the majority of cases further efforts (office space and personnel) might be needed to fulfill policy obligations as those assumed in the directive Proposal for B2C ADR. Countries fulfilling some monitoring or coordination functions are: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Spain, Slovakia and Sweden.

An overview of possible costs in running Monitoring Authorities across selected countries is presented hereafter to provide a general estimation of possible compliance costs in more complex tasks. Although the assessment is indicative, it provides a good overview of different ranges of costs across different roles and in a variety of EU Member States. Although these are based on rather anecdotal evidence, some general understanding emerges on possible relevance of additional compliance costs due to monitoring requirements for EU Member States⁷⁷.

State costs might therefore imply a range of 3 to 10 full time employee, with yearly cost ranging from about € 8,000 for a junior administrator in Belgium to € 65,000 for a senior in the UK, and office costs ranging from € 25,000 in Spain to € 160,000 in Austria. These are obviously wide ranges based on estimates and depending on many variables. Nonetheless, we can assume that an average possible cost for complying to monitoring regulation for Member states per year could be in a range of € 75,000 to € 220,000 for personnel and € 25,000 to € 160,000 for office costs. A total compliance cost could therefore be in range between approximately €100,000 and €400,000. This can be averaged to an approximate € 1.5 to € 6.0 per ADR case in each country, given an average of about 60,000 cases per country in the selected sample.

Table 6.7

Assessment of costs in running a monitoring Authority in selected EU Member States sample

COUNTRY	COSTS (Year/Net)	CASES (Year/1,000)		
		Arbitration	Mediation	Total
Austria	Office: €160,000 Staff: 10 professionals (€27,000/€54,000 each)	□ 0.7	□ 3.5	□ 4.2
Bulgaria	Staff: 3 professionals (€8,400/€25,000 each)	□ 6	□ 12	□ 18
Italy	Staff: 6 professionals (€40,000/€60,000 each)	□ 63	□ 290	□ 353
Latvia	Staff: 5 professionals (€17,000/€25,000 each)	□ 1.6	□ 1.8	□ 3.4
Luxembourg	Office: €96,000 Staff: 4 professionals (€36,000 each)	□ 0.2	□ 1.5	□ 1.7
Slovak Republic	Office: €24,300 Staff: 4 professionals (€24,000/€30,000 each)	□ 49	□ 20	□ 69
Spain	Costs: €150,000 Staff: 3 professionals (€25,000/€45,000 each)	□ 23	□ 30	□ 53
Sweden	Staff: 4 professionals (€65,000 each)	□ 0.6	□ 2.9	□ 3.5

⁷⁷ Further details for these estimates are provided in Annex II.

UK	Office: €145,000 Staff: 5 professionals (€30,000/€65,000 each)	□ 3	□ 5	□ 8
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Source: Estimates based on informed opinion of local experts and publicly available secondary data

7 Secondary effects of increased ADR use

7.1 Introduction

Any study of B2B ADR without attention to secondary effects would miss the point

From the beginning, it has been clear from the collaboration with DG JUST that any future policy initiative to promote B2B ADR should contribute to the broader Europe 2020 Agenda and the “Justice for Growth” initiative. Hence, the relation between an increase in the use of B2B ADR and its economic effects deserves a specific analysis, especially in times of severe and lasting economic, financial and public budget crisis. This part of the analysis has not been specified as such in the Terms of Reference. However, in our technical proposal we have stated that such effects – here called secondary effects in line with the Standard Cost Model terminology from the Impact Assessment Guidelines – should be part of any such study. The subsequent meetings and exchange with the Commission services have also been beneficial to explore these issues.

A check on our assumptions

From the outset, an analysis of secondary effects depends strongly on the assumptions made. We will proceed with the assumptions as developed in the previous chapter, namely a baseline scenario will assume a natural 0.5% yearly increase in the total amount of disputes. This baseline is compared against alternative scenarios:

- Scenario 1, where 0.5% of disputes resolved by litigation in the previous year are resolved by ADR in the present year (with the proportion between mediation and arbitration remaining constant);
- Scenario 2, where 0.5% of disputes resolved by litigation in the previous year are resolved by arbitration in the subsequent year (with no change in the number of mediations);
- Scenario 3, where 0.5% of disputes resolved by litigation in the previous year are resolved by mediations in the subsequent year (with no change in the number of arbitrations)."

The direct costs/savings of these scenarios have already been presented in the previous Chapter. So is this all there is? The answer is clearly no. A limitation of the above assumptions is that they are formulated mostly from a state perspective: B2B court litigation contributes to the burden of the legal system, and any reduction in that burden by ADR is welcomed in the light of the need to reduce public costs and budgets. And the ability to reduce such costs is limited at least in the short-term due to the large amount of sunk costs. But this is only part of the story.

An important part of the story: change in the share of unresolved disputes

With the insights now obtained, we can state that the above cost savings are only part of the story. The real point is, as stated in Chapters 4 and 5, is the fact that a solid and increasing number of B2B disputes is not resolved at all: 26% of disputes were unresolved in 2006, and 38.4% in 2012 (and 35.8% for cross-border disputes).⁷⁸ Behind this statistic is emerging a reality that consists of lack of payments, cash-flow problems especially for SMEs, and timeframes of dispute resolution processes (in several Member States up to 5 years) that go far beyond the energy and capacity of SMEs, especially so in the current economic and financial climate, and more importantly – in a global economic climate where business interactions increasingly are frequent and real-time. It leads to a decrease in turnover, stressed supply-chains, lack of credit lines and can ultimately contribute to failure and bankruptcy. And indeed, the number of bankruptcies (insolvencies)

⁷⁸ These are corrected (TT) percentages.

happens to be currently increasing dramatically across large parts of Europe. This is a significant challenge that deserves to be addressed by the competent public authorities.

What is behind all these unresolved disputes?

Evidence emerging from the Eurobarometer study, secondary data and our own field research bring us to three types of unresolved disputes, namely those where:

- Dispute resolution has not started: negotiations or any informal conflict resolution mechanism has failed, but none of the parties has yet initiated a formal dispute resolution mechanism; meanwhile the
- Disputes resolution is pending; we expect this to be a substantial type of unresolved disputes, especially so in countries where court litigation takes longer period of times. For example in Italy, the number of unresolved disputes is as high as 53%, while even 61% in Greece. In countries with more efficient litigation, these percentages are lower (e.g. 26% in Denmark and 17% in the Netherlands). The weight of pending disputes as part of overall unresolved disputes is high, as it returns every year. To illustrate this point, we take a Bulgarian cargo transport company which has one dispute every year, and which resorts to court litigation. As it takes the Bulgarian court system up to 5 years to come up with a verdict, this implies that in any given year up to 5 unresolved cases are pending, while one new one is added. This equals a rate of unresolved disputes of 84% (5 out of 6 cases).
- Dispute resolution has failed; Chapter 5 has pointed to the fact that a share of mediation results fails, which does not always lead to subsequent actions. As mediation cases represent only a small part of the overall number of disputes, this type is expected to be limited in importance.

ADR can effectively reduce these unresolved disputes

On the basis of the above findings, an important additional assumption is that *ADR adds additional capacity to dispute resolution and has the potential to address the substantial and increasing problem of unresolved disputes.*

This potential can be illustrated by taking the above (pending) dispute of the Bulgarian cargo transport company, which has in any typical year 6 ongoing cases. If it would be able to solve only 1 out of 5 disputes through mediation (in less than one year), the number ongoing cases would be 5 instead of 6.

In the subsequent sections of this Chapter, we will therefore assume that an increase in the use of ADR (accompanied by a similar decline in court litigation) will also lead to a modest reduction of the number of unresolved cases.

In line with the requirements of the Impact Assessment Guidelines, we will now proceed with:

- The identification of the relevant secondary effects (Section 7.2);
- Quantify some of the more substantial effects (Section 7.3);
- Provide the results of a model-based analysis of the cross-border trade effects (Section 7.4), and do so for different assumptions.

7.2 Identification of relevant secondary effects

On the basis of the case study research, secondary sources research and interviews with business representatives and ADR experts we have identified a number of relevant secondary effects, all of which are considered to be potentially substantial in case of increased ADR use. We identified as the most important secondary effect of increased ADR:

- a) Unblocking passive capital for enterprises (money blocked due to ongoing or expected disputes is not available for investments) and reduced late payments;

In its turn, the unblocking of passive capital can lead to important other knock-on effects:

- b) Securing better access to credit investment due to improved cash flow;
- c) Increasing the survival rate of firms;
- d) Preserving existing trading relations and increased turnover;
- e) Reducing trade risks and improving international trading potential;
- f) Better use of opportunities - more time secured for trading relations & increased turnover ;
- g) Improved (foreign) business climate and attracting FDI.

Also identified, but not pursued here are the following secondary effects:

- h) Interest costs related due to late payments; in most European courts as well as in ADR practice, it is common to compensate for any loss of interest as part of the verdict;
- i) Facilitating domestic start-ups; the reasoning behind this effect is considered too indirect;
- j) Creating new jobs in the ADR sector itself; this should be a means and not an end;
- k) Enabling the state to use more efficiently its finances/resources; this effect would only be relevant for businesses if it would lead to lower taxes, which is highly implausible.

a) Unblocking passive capital and reduced late payments

Representatives of the businesses interviewed stated that the most important effect is the unblocking of passive capital (money blocked due to on-going disputes and not available for investments) for enterprises. Capital unblocked can be invested in more productive activities, or used to get access to financial credit by local banks, and therefore having additional boosting effects for the economies across EU Member States.

Business representatives agree that unblocking passive capital is one of the most important secondary effects of increased dispute resolution. The judicial procedure for B2B disputes in Poland, Bulgaria and Italy, for example, can take up to 5 years. Therefore, going to court means that capital is blocked for a long time. On top of it additional damages in terms of turnover are due to the fact that when a litigation procedure starts the requested services by the contractor can be stopped (in accordance with the particular contractual clauses) or the payment can be suspended. Consequently, the possibility of speeding up the procedure through ADR will allow businesses to have more rapid access to the capital blocked during the dispute.

The importance of blocked capital in this context is therefore difficult to overestimate. The blocking of capital already starts early in the process, at the time the conflict is borne and before it is a dispute. Capital remains blocked until a dispute comes to an end. And even afterwards, capital can remain blocked. For example, after unsuccessful negotiation, one party writes the claim off without telling the other party; the other party keep the amount blocked in order to be able to satisfy any future potential claim.

The impact of blocked capital on a company is related to the size of the dispute in relation to the size and the health of a company. Literature on the subject ⁷⁹ corroborates with interview findings that small and mid-size companies are hindered much by the blocking of passive capital, and therefore by long duration of disputes. For smaller companies, delayed decisions on disputes also cause relatively larger amounts of uncertainty, which have a stronger bearing on any (investment) decisions about the future.

The issue of blocked capital is closely related to that of late payments. A survey on the subject ⁸⁰ points to the large and increasing amounts of late payments amongst businesses in Europe. We will return to the issue on late payments in the section below

b) Securing better access to credit investment due to improved cash flow

The unblocking of capital has one more very important advantages, especially so for SMEs where the amounts disputed tend to be relatively large compared to the balance sheets: securing access to credits. This effect has gained substantially in importance in the context of the current economic and financial crisis. First of all, blocked capital may not count as equity, hence the solvability of companies involved is reduced. This limits the borrowing capacity of companies and/or the conditions and costs related to obtaining credit. Furthermore, in many – if not all – Member States banks are faced with new and increasing capital requirements, which lead to restricted access for businesses, especially SMEs which tend to have higher risk profiles. Faster dispute resolution allows for unblocking of capital, and hence a reduced need to borrow and/or strengthened equity base which enhances the credit rating of the companies involved.

c) Increasing the survival rate of firms

The unblocking of capital also helps to increase the survival rate of firms, particularly micro-enterprises and SMEs. Available sources⁸¹ show how enterprises and SMEs in particular are facing problems of liquidity due to an increased delay of payment as a consequence of the economic crisis. In order to survive, SME are often inclined to settle a dispute in an informal way. The reason is mainly because litigations in court are often too long, and incur many costs (expert fees, lawyers' fees, taxes). Hence, for an SME it is often better to find a quick solution – even when these are not necessarily the best outcomes. This explains why even informal agreements are often not fair for SMEs as counterparts (big/medium enterprise) tend to have more contractual power: the sheer prospect of court litigations often leads SMEs to settle.

As a corollary, neither delayed and fair nor quick and suboptimal decisions may be sufficient to prevent SMEs from bankruptcy. This is why it is necessary to seek an agreement that balances the interests of both sides. For example, a higher use of ADR could prevent the bankruptcy rate of SMEs in the construction sector, as their low performances pose higher pressures on them to find an equal and convenient solution⁸².

d) Preserving existing trading relations and increased turnover

The unblocking of capital can also contribute to preserving existing trading relations. At a more general level, better and cheaper dispute resolution procedures might provide substantial support in tackling endless disputes due to delays in payment, one of the main problems for businesses in the EU and particularly SMEs and micro enterprises whose very existence is threatened by collapse in turnover due to unexpected delays in payments.

⁷⁹ See for example Flora Felso and Michiel de Nooij (2011) "When justice takes time: the social cost of legal delay". Paper derived from research commissioned by the Ministry of Justice in the Netherlands.

⁸⁰ Intra Justitia (2012) "European Payment Index 2012"

⁸¹ UEAPME SMEs Barometer (2012), European Payment Index (2010)

⁸² AS reported in the ANAEP and UEAPME reports.

Business representatives interviewed agree in considering that ADR could help in preserving trading relations between parties. However, such clauses are perceived to be largely dependent on an existing degree of trust between parties⁸³. In fact, solving a dispute through ADR enables parties to find a solution on the basis of a preliminary agreement that can be found only in presence of good existing relations. Litigation in court is perceived as a 'violent' way of resolving a conflict, leading to winners and losers, an outcome which does not nurture positive and productive business relationships⁸⁴.

e) Reducing trade risk and improving international trading potential

A more efficient and reliable dispute resolution system across Member States would also clearly boost international trade and allow enterprises – and particularly SMEs – to expand more rapidly in trading outside their own country. This is an effect which is already confirmed by the extensive use of arbitration clauses in cross-border and international contracts by enterprises as a way to mitigate the risks of dealing with unknown legislations in foreign countries and languages which are not proficiently spoken.

The fact that a problem remains unresolved means that resources may not be allocated equitably. If such a problem is widespread for instance for cross-border transactions and engrained amongst businesses, their confidence in contract enforcement across borders will be at stake. This may have a far reaching effect on the economy as it will increase the risk levels of trading operations.

Risk is a crucial factor that determines investment decisions and the price of a product. Economic research has demonstrated that uncertainty of contract enforcement presents hidden transaction costs, which can be so significant that they can affect the decision to trade. Research shows that legal systems, that can enforce contracts effectively and therefore diminish risk, can increase trade by up to 30%.

According to the European Builders Confederation the risk of insolvency of the other partner and reliability of the legal framework are the two main aspects considered by business when dealing with international business partners. Uncertainty in dispute resolution procedures has emerged from interviews as one of the main elements preventing foreign companies from investing in specific countries.

f) Better use of opportunities - more time secured for trading relations

The effects of more time secured for trading relations depends on the size of business. For bigger enterprises an increased use of ADR will not contribute to significant time savings for trading relations. After all, the division of labour in larger companies will result in in-house or external lawyers being responsible for dispute resolution, thus involving other employees or operational management only to a limited extend. Instead, dispute resolution is a higher burden for the management of SMEs, due to the fact that managers have to allocate their time over a wide range of conflicting activities⁸⁵. Dispute resolution is seen as time-consuming and an obstacle to focussing more on core activities of the businesses. For that reason, if SMEs can make increased use of ADR this might result in more time secured for doing business and for managing trading relations.

According to both interviewees and the secondary data quoted, the procedure in court is often more time consuming than ADR. Hence, our aim is to analyse how the potential time gains through ADR

⁸³ Interview with A.Marconi, attached to Case study – Annex 1.

⁸⁴ Interview with M.Quinto, attached to Case Study – Annex 1.

⁸⁵ Lower number of employees, limited use of legal services (either internal or external) and general lack of ADR awareness and legal capacity

could be used and shifted for the operations of a company. Apart from the evident advantage of receiving a payment or finishing a work, a company would benefit from a faster procedure as it could employ the time in looking for more opportunities and initiating new trading relations.

g) Improved (foreign) business climate and attracting FDI

As already indicated in the conceptual framework introduced at the beginning of this report, an increase in the use of ADR is believed not only to have the potential to improve international trading potential but also to increase Foreign Direct Investment (FDI).

Evidence comes amongst others from studies conducted by the World Bank Group (International Finance Corporation). IFC has gathered findings suggesting that 'lack of timely, predictable, and affordable access to commercial justice has a negative effect on the business climate because it increases risks for local and foreign investors'⁸⁶. Although this evidence comes mostly from developing and transition countries, there is no reason to believe that the argument would not play a role at all in the EU-context. This finding is confirmed by external experts who have remarked that a well-developed ADR system can contribute to attracting FDI, due to a more reassuring image towards potential foreign contractors or investment⁸⁷.

The importance of adequate dispute resolution capacity for a foreign investor can be illustrated by the fact that foreign direct investors usually have their own established dispute resolution practice. Reportedly, FDI businesses tend to use ADR providers from the country of their origin or internationally-recognised ADR providers. Possible advantages of such ADR arrangements include improved levels of communication and trust.

The use of mediation may be an additional signal to potential business relations as well. If the public is aware that certain insurance companies act fairly and reasonably, this may positively affect the external reputation of the organisations and increase their attractiveness to clients. Examples of such a trend are the Dutch tax authority and AkzoNobel, the global paints and coating company, which launched an integral conflict settlement system.

Table 7.1 below now summarised the secondary effects of increased ADR use as they have been presented above.

⁸⁶ <https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/alternative-dispute-resolution/>

⁸⁷ Interview with M.Quinto, attached to Case Study – Annex 1.

Table 7.1 Estimate of substantial secondary effects of increased ADR use in combination of a reduced number of court litigations (positive ↑ and negative ↓)

Secondary effects	Litigation		Arbitration		Mediation	
	SMEs	Large	SMEs	Large	SMEs	Large
A. Unblocking passive capital (money blocked due to ongoing disputes and not available for investments) for enterprises and late payments	↓	↓	↑	↑↑	↑↑	↑
B. Securing better access to credit investment due to improved cash flow	↓	↓	↑	↑	↑↑	↑
C. Increasing the survival rate of firms	↓	↓	↑	=	↑	=
D. Preserving existing trading relations & increased turnover	↓	↓	↑	↑↑	↑↑	↑
E. Improving international trading potential	↓	↓	↑	↑↑	↑	↑
F. Better use of opportunities - More time secured for trading relations	↓	↓	↑	↑↑	↑	↑
G. Improved (foreign) business climate & attracting FDI						

Source: Assessment of interviews with business representatives in a range of economic sectors and EU Member States

7.3 Quantitative estimation of secondary effects: the unblocking of capital

Introduction

Not all the secondary effects are quantitative, and not all quantitative effects can be actually estimated, either due to lack of reliable data or a too complex amount of indicators to be considered resulting in pure guesses. However the following studies have provided us with interesting information:

- The EIM report on 'SME access to Alternative Dispute Resolution systems', published in February 2006: the report provides useful insight on how ADR is applied by SMEs in general and it provides support in identifying some main secondary effects;
- The UEAPME report on the analysis on the EU craft and SME barometer 2012, 'EU SME business climate stabilisation at a low level' has provided us with EU data on the construction sector.;
- Annual Reports of the European Payment Index, the latest from 2012.
- The Eurobarometer Survey 2012

On the basis of the available material, we can now make three estimates with regard to the impact of unblocking of capital by increased use of ADR:

- a. Amounts of unresolved domestic disputes at stake;
- b. Amounts of unresolved cross-border disputes at stake;
- c. As a consequence, less written-off debts.;

a. Less written-off debts due to reduction of unresolved B2B disputes

First of all, we have estimated the amounts written-off due to unresolved B2B disputes. The following argument can be built:

- Intentional late payment (by those already in financial difficulties) is the main cause for delays in payment amongst businesses, being the reason for 70% of total losses for an overall value of € 340 billion per year, as estimated by the European Payment Index (2012);
- Of the above amount, 57% applies to B2B relations (European Payment Index (2012), p. 50).
- In addition the EPI report states that in 20% of late payments, there is a loss due to long disputes; as there are multiple reasons for each case, we can deduce that 10% of late payments is due to long and costly disputes;
- We assume that the reasons for late payments are similar to the reasons for writing-off debts (our assumption after discussion with EPI);⁸⁸
- SMEs - particularly micro enterprises - are particularly exposed to difficult financial circumstances, as emerging from a recent survey (UEAPME 2012), and are particularly vulnerable to delay in payments;
- The duration and costs of litigation are either a disincentive to resolve the dispute or a further means by which SMEs (including micro-enterprises) – might be threatened with financial exposure;
- Disputes between firms are therefore either too long to be resolved in a timeframe that would allow turnover recovery – e.g. typically litigations endure more than one year (case studies);
- As a consequence SMEs (including micro-enterprises) attempt direct negotiation which is often unsuccessful, also as often there is no clear contractual evidence amongst parties for the actual case to be discussed (case studies);
- In the absence of any alternative, cheaper and/or faster means to manage the dispute, SMEs – and particularly micro enterprises – are exposed to late payment and suffer as a consequence in terms of: a) decrease in turnover, b) lack of financial support; ci) failure and bankruptcy (assumption);

⁸⁸ Telephone interview with EPI's commercial manager Madeleine Bosch on 24th August 2012.

- This is a cyclical problem. When enterprises have turnover problems or go bankrupt, this creates costs for their own creditors (in terms of delayed or non-recovered payments), whilst recovering credit might also save enterprises from bankruptcy and therefore can preserve jobs and wealth;
- Savings from cheaper dispute resolutions due to greater use of ADR and greater turnover due to higher share of payment disputes resolved might provide resources for additional access to credit.

Therefore, if we use as the above information:

- € 340 billion per year are losses in turnover for EU businesses that are written-off;
- A total of 57% applies to B2B relations (hence € 194 bln.)
- We attribute 10% of such loss to long disputes (the survey mentions that long disputes apply in 20% of all cases, but as there are multiple reasons for each case, we can deduce that 10% of late payments is due to long disputes) (hence € 19.4 bln);
- According to the Eurobarometer, 38% of (domestic) B2B disputes are unresolved.

Hence, the estimated amount of written-off debts amounts due to unresolved B2B disputes is estimated to be € 7.3 billion per year.

We can now estimate the sums to be gained by increased use of ADR, by using the Scenario 1 (Chapter 4), which includes an additional 0.5% of cases per year to be resolved by ADR. As the annual increase will continue over time, we can assume that an additional 2.5% of cases will be addressed by ADR in 5 years' time and 5% in 10 year time. We continue to building on the additional assumptions introduced at the beginning of this chapter, namely that these are additionally resolved cases - previously unresolved.

As a consequence, increased ADR resolution according to Scenario 1 would amount annually to:

- After 1 year: € 36.5 mln. less written-off debt;
- After 5 years: € 183 mln. less written-off debt;
- After 10 years: € 365 mln. less written-off debt.

b. Overall amount of unresolved domestic B2B disputes

We are now in a position to estimate the amount of unresolved B2B disputes on the basis of data collected in the framework of the Eurobarometer survey and those data collected for the purpose of Chapter 4. We have at our disposal the following information:

- On the basis of the Eurobarometer data, businesses surveyed encountered on average 2.1 (domestic) disputes during the last three years; this implies 0,7 disputes per year; as each B2B case implies (minimum) two businesses, it follows that there is 0,35 dispute per year per business.
- When extrapolating the survey to the overall population of businesses, we can see that there are 29.3 mln. businesses in the EU.
- The share of unresolved (domestic) disputes is again 38.4%
- The average value of a (domestic) dispute is, according to the same survey, worth € 28.300.

Hence, the overall value of unresolved (domestic) B2B disputes is estimated at $(a \times b \times c \times d =)$ € 114.2 bln. However, this amount is to be seen as stock data and not as annual data. In the absence of data on this question, we need to speculate about the average duration to solve or to write off a dispute. If the average duration of a case to become resolved or written off is 3 years, than the annual amount related to unresolved (domestic) B2B disputes would equal € 38 bln. per year.

We can now estimate the sums to be gained by increased use of ADR, by using the Scenario 1 (Chapter 4), which includes an additional 0.5% of cases per year to be resolved by ADR. As the annual increase will continue over time, we can assume that an additional 2.5% of cases will be addressed by ADR in 5 years' time and 5% in 10 year time. We continue to building on the additional assumptions introduced at the beginning of this chapter, namely that these are additionally resolved cases - previously unresolved.

As a consequence, increased ADR resolution according to Scenario 1 would amount annually to:

- After 1 year: € 190 mln. value less unresolved;
- After 5 years: € 950 mln. value less unresolved;
- After 10 years: € 1.9 bln. Value less unresolved.

c. Overall amount of unresolved cross-border B2B disputes

We can apply the same analogy to the cross-border B2B disputes. We have at our disposal the following information:

- a. On the basis of the Eurobarometer data, businesses surveyed encountered on average 0.2 (domestic) disputes during the last three years; this implies 0.067 disputes per year; as each B2B case implies (minimum) two businesses, it follows that there is 0.033 dispute per year per business.
- b. When extrapolating the survey to the overall population of businesses, we can see that there are 29.3 mln. businesses in the EU.
- c. The share of unresolved cross-border disputes is now 35.8%
- d. The average value of a cross-border dispute is, according to the same survey, worth € 44,300.

Hence, the overall value of unresolved cross-border B2B disputes is estimated at $(a \times b \times c \times d =)$ € 15.5 bln. However, this amount is to be seen as stock data and not as annual data. For example, if the average duration of a case to become resolved is 3 years, than the annual amount related to unresolved cross-border B2B disputes would equal € 5.2 bln. per year.

We can now estimate the sums to be gained by increased use of ADR, by using the Scenario 1 (Chapter 4), which includes an additional 0.5% of cases per year to be resolved by ADR. As the annual increase will continue over time, we can assume that an additional 2.5% of cases will be addressed by ADR in 5 years' time and 5% in 10 year time. We continue to building on the additional assumptions introduced at the beginning of this chapter, namely that these are additionally resolved cases - previously unresolved.

As a consequence, increased ADR resolution according to Scenario 1 would amount annually to:

- After 1 year: € 26 mln. value less unresolved;
- After 5 years: € 130 mln. value less unresolved;
- After 10 years: € 260 mln. Value less unresolved.

Further consequences of unblocked capital do to ADR for businesses

Evidently, the above amounts are based on a range of assumptions and their value can only be indicative for the orders of magnitude concerned. This is particularly important if linked back to the assessment of important other knock-on effects as assessed in Chapter 7.2.

First of all, it needs to be borne in mind that amounts gained by some companies are those lost by other companies. Hence, the above numbers are gross numbers which might have secondary effects for businesses although they do not provide net benefits to the economy.

Nevertheless, there are in fact a few other important consequences with regard to the above

amounts of unresolved B2B disputes and amounts written-off:

- With regard to the unresolved disputes, the research to date gives rise to the notion that smaller companies would substantially gain from increased dispute resolution vis-à-vis larger companies; as their vulnerability is much higher (see arguments above), an increased amount of resolved cases due to ADR would also lead to less bankruptcies, less credit problems, more decisiveness with regard to future investment decisions, etc. Hence, the unblocking of capital is not necessarily a zero-sum game.
- With regard to written-off debts, it is expected that these amounts need to be recouped by businesses and they would lead to higher bankruptcies as well as higher prices for products and services.

Annexes

Annex I Case Studies

This annex is provided as an attached word file.

Annex II Data

This annex is provided as an attached files.

Annex III Country Reports

This annex has been provided as part of the Interim Report.