

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**CROSS-BORDER ACTIVITIES
IN THE EU - MAKING LIFE
EASIER FOR CITIZENS**

Workshop for the JURI Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Cross-border activities in the EU

Making life easier for citizens

WORKSHOP FOR THE JURI COMMITTEE

This workshop was requested by the European Parliament's Committee on Legal Affairs.

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CIVIL LAW AND JUSTICE FORUM *with the participation of National Parliaments¹*

"Cross-border activities in the EU - Making life easier for citizens"

DRAFT PROGRAMME
Thursday, 26 February 2015
09:30 - 12:30 and 14:30 - 18:30

Brussels
Room ASP 5 G 3 -European Parliament, Brussels

09:30 - 10:00
OPENING

09:30 - 09:40

Welcome and opening remarks: What is it all about?

Pavel Svoboda, Chair of the Committee on Legal Affairs

09:40 - 09:50

Using EU private international law to facilitate the free movement of citizens

R.L. Valcarcel Siso, Vice-President in charge of relations with national parliaments

09:50 - 10:00

The Latvian Council Presidency -agenda for the area of civil law

Inese Libina-Egnere, Vice speaker of the Saeima and Vice chair of the Legal affairs committee

10:00 - 12:30
SESSION I
LESS PAPER WORK FOR MOBILE CITIZENS

10:00 - 10:10

Opening remarks: Towards a European Code on Private International Law?

Prof. Giesela Rühl, Jena University, and Prof. Jan von Hein, Freiburg University

¹ With the support of the Directorate for relations with National Parliaments - Legislative Dialogue Unit

- 10:10 - 10:30** **Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and beyond (Proposal for Regulation, COM(2013) 228)**
- Prof. Pierre Callé, Paris Sud University (Paris XI)
Michael P. Clancy, Solicitor, United Kingdom (The Law Society of Scotland)
- 10:30 - 11:00** **Debate**, opened by Mady Delvaux, MEP, rapporteur for the public documents proposal
- 11:00 - 11:15** **Coffee break**
- 11:15 - 11:25** **Towards European Model Dispositions for Succession and Family Law?**
- Prof. Christiane Wendehorst, Vienna University
- 11:25 - 11:45** **EU Regulation 650/2012 on successions and on the creation of a European Certificate of Succession**
- Kurt Lechner, Notary Chamber of Palatinate, Germany
Eve Pötter LL.M, Legal advisor of the Estonian Chamber of Notaries
- 11:45 - 12:30** **Debate**

14:30 - 16:30
SESSION II
CROSS BORDER FAMILIES AND FAMILIES CROSSING-BORDERS

- 14:30 - 14:40** **Opening remarks**
- Mairead McGuinness, Vice-President, European Parliament Mediator for parental child abduction,
- 14:40 - 14:50** **Presentation of study: "Cross-border parental child abduction in the EU"**
- Dr Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne
- 14:50 - 15:00** **Mediating International Child Abduction Cases**
- Spiros Livadopoulos, Lawyer and Mediator, European Cross-border Family Mediators' Network
- 15:00 - 15:30** **The Brussels IIa Regulation: towards a review?**
- Hans van Loon, The Hague, Member of *Institut de Droit International*, Former Secretary General of the Hague Conference on Private International Law
- Michael Shotter, Head of Unit on Civil Justice Policy, DG Justice European Commission

15:30 - 16:00 **Debate**

16:00 - 16:10 **Name Law - is there a need to legislate?**

Prof. Paul Lagarde, Université Paris I (Panthéon-Sorbonne)

16:10 - 16:30 **Debate**

16:30 - 18:30 SESSION III BUSINESS AND CONSUMERS' CONCERNS

16:30 - 16:40 **Opening remarks on private international law as a regulatory tool for global governance**

Dr Harm Schepel, Professor of Economic Law, Brussels School of International Studies, University of Kent at Brussels

16:40 - 16:50 **The European Small Claims Procedure and the new Commission proposal**

Dr Pablo Cortés, University of Leicester

16:50 - 17:10 **Debate**, opened by Lidia Geringer de Oedenberg, MEP, rapporteur for the review of the Small Claims regulation

17:10 - 17:20 **Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)**

Prof. Giuseppe De Palo ADR Center Srl

17:20 - 17:30 **The 2005 Hague Convention on Choice of Court Agreements and the recast of the Brussels I Regulation**

Dr Gottfried Musger, judge at the Austrian Supreme Court (OGH)

17:30 - 17:50 **Debate**

17:50 - 18:00 **Conclusions**

Pavel Svoboda, Chair of the Committee on Legal Affairs

18:00 **End of the Workshop**

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Session III - Business and consumer's concern

Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)

Giuseppe De Palo

Mediation as a form of Alternative Dispute Resolution offers substantial quantifiable and non-quantifiable benefits. The EU has played a valuable role promoting it among Member States, particularly through the Mediation Directive (2008/52/EC). Studies show that the most effective way to build reliance on mediation is to integrate a mediation step into appropriate civil and commercial cases. Yet, in its current form, the Mediation Directive leaves this to Member States to decide. Mediation levels are a fraction of what they could be, resulting in tens of billions of Euros wasted each year. Seven years after its adoption, it may be time to upgrade the Directive to incorporate an integrated mediation obligation for Member States.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CEDR	Centre for Effective Dispute Resolution
CEPEJ	European Commission for the Efficiency of Justice
CMC	Civil Mediation Council
CPR	Civil Procedure Rules
MESO	Mediation Enforcement Settlement Order
MIAM	Mediation Information Assessment Meeting
ODR	Online Dispute Resolution

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EXECUTIVE SUMMARY

Background

Alternative dispute resolution (ADR), particularly mediation, is making life easier for the citizens of the European Union (EU), but further reform and development are necessary to achieve its potential. The Mediation Directive of 2008 was issued by the European Parliament and the Council *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* (the Mediation Directive). The Mediation Directive builds upon nearly a decade of ADR reform in Europe with the aim to provide access to justice for citizens of the EU by establishing a balanced relationship between mediation and judicial proceedings. Citing a need for judicial cooperation and the proper market functioning of the European Community, the Mediation Directive provides a broad framework for Member States to adopt mediation into their domestic legal systems.

Today, Member States have effectively transposed the requirements of the Mediation Directive to varying degrees, yet the actual number of cases being mediated have remained disproportionately, and disappointingly low. To address this issue, the European Parliament commissioned a study to examine the cost-impact of mediation in the commercial context. The study, *Quantifying the Cost of Not Using Mediation – a Data Analysis*, (the 2011 Cost Study), found that even with very low mediation success rates, mediation could produce significant time and cost savings if integrated into the litigation process. The “EU Mediation Paradox” became apparent—if increasing the use of mediation brings such significant time and cost savings to the parties (and to the judiciary), why were Member States experiencing such low rates of mediation? This finding was particularly pronounced in the context of a global recession. The Legal Affairs Committee of the European Parliament went so far as to ask the European Parliament whether legal action was needed against Member States for their failure to achieve a “balanced relationship between the number of mediations and judicial proceedings” sought by the Mediation Directive. Consequently, a “Balanced Relationship Target Number” (BRTN) for Member States to achieve was suggested to realize this balance. As an outgrowth of this research, in 2013, the European Parliament commissioned a study to examine the status of mediation in Member States and establish the root causes of low levels of mediation. This study – *“Rebooting” the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, (the Rebooting Study), which surveyed over 1,000 professionals in the EU and conducted case studies on each Member State, found that the most effective regulatory feature associated with a significant increase in the number of mediations domestically was an element of mandatory mediation.

The 2011 Cost Study and the Rebooting Study, read together, indicate that mediation objectively saved significant time and money, but in order to realize these savings, an element of mandatory mediation integrated into a Member States judiciary (Integrated Mediation) may be necessary to achieve a balanced relationship between the total number of mediations and judicial cases. Italy, for instance, requires parties to meet with a mediator before litigating in court at which point the party may opt-out of mediation and proceed to the judiciary. Once this system was adopted in Italy, the number of mediations jumped from a few hundred cases per year to over 200,000. Some mandatory mediation schemes, however, may not be practical. In Romania, parties were required to attend a mediation information meeting prior to initiating certain civil disputes outside of court. The Romanian Constitutional Court found the mandatory information meeting put an undue burden on litigants by causing them to “opt-in” to the court system. An instructive

approach between Italy's "opt-out" method of integrated mandatory mediation and Romania's "opt-in" may have been struck in the Alassini case of the European Court of Justice (ECJ). In that case the ECJ ruled on a challenge to Italy's Electronic Communications Code, which mandated an attempt at out of court settlement prior to commencing a case. The ECJ in that case established a bright line, "safe harbour," for mandatory out of court settlement systems. The bright line established mandatory out of court settlement must not: (1) result in a decision binding on the parties by the mediator; (2) not cause a substantial delay; (3) not suspend the period for time barring of claims; and (4) not give rise to cost, or are low cost.

Aim

Moving forward, since mediation has been defined, analysed, accepted and implemented, it may now be time to realize the result. To do so, establishing a Balanced Relationship Target Number, as suggested in the 2011 Cost Study, should be considered. The BRTN would require each Member State develop a target percentage or number of cases in proportion to the total number of civil and commercial cases – including cross-border – and report annually on their performance providing a key performance indicator (KPI). The BRTN would ensure Member States are in compliance with the Directive and allow for a quantifiable measure of the progress.

In addition, consideration should be given to adoption of an integrated mediation approach providing mandatory elements in mediation into their judiciary like those of Italy and in compliance with the Alassini framework. This approach has been shown to dramatically increase the number of mediations domestically with the potential to save disputants significant resources in the form of time and money. Member States may also wish to not take action on the Mediation Directive to avoid risk until more data can be obtained. An in-depth analysis is currently being written as a follow-up on the Rebooting Study to gather information on whether a balanced relationship exists now between mediation and the judiciary and whether integrated mediation would increase the number of mediations.

While Member States by and large have appropriate regulatory structures in place as required by the Mediation Directive, a balance between mediation and judicial procedures in Member States remains to be seen. It is now time for Member States to give thorough consideration of whether and how integrated mediation processes should be established in the Mediation Directive as a Member State requirement for appropriate civil and commercial cases.

1. INTRODUCTION

1.1. Mediation as Access to Justice

Mediation can be viewed as part of the most recent wave of development within the “access to justice” movement. In the European Union, although access to justice is recognized as a fundamental right, there are no codified definitions or comprehensive statements of the elements needed to constitute access to justice.¹ But the phrase “access to justice” does currently have a generally understood meaning, originally recognized in the 1970’s, that broadly refers to claimants’ ability to avail themselves of the various institutions through which a claimant might pursue justice.

Before the 1970’s, however, the concept of access to justice had been much narrower, consisting only of the right to access to the courts.² This more restrictive view would exclude alternative dispute resolution (ADR), such as arbitration and mediation, because ADR methods are, by definition, outside of the courts. Unfortunately, this institution-tied view still exerts residual influence today: opponents of integrating a mediation step into the judicial process often argue that mediation would constitute an obstacle to the parties’ rights of “access to justice”.

The more modern and encompassing view of access to justice has been well elaborated by Mauro Cappelletti, a leading Italian jurist and scholar, who describes it as “*the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state ... [which] ... must be equally accessible to all ... [and] ... must lead to results that are individually and socially just.*”³ Thus, under this more liberal view, access to justice has two aspects: equality of access and just outcomes, regardless of whether redress is sought through a court or through other means.

Overall, access to justice has evolved over three successive waves of development.⁴ The access to justice movement originally emerged in most western countries during the immediate post-World War II era. The “first wave” was the emergence of legal aid. This wave focused on providing access to legal representation in the courts for the economically disadvantaged, especially through the creation of more efficient systems of legal aid or advice. A “second wave” of change focused on group and collective rights. This stage of development brought class actions and public interest litigation to address systemic problems of inequality. Representation was also extended to diverse interest groups, such as environmentalists and consumers. It was in the “third wave” of development that access to justice began to include a range of alternatives to litigation in court for dispute resolution, as well as reforms to simplify the justice system and facilitate greater accessibility. In this phase ADR emerged as a means of securing access to justice. Cappelletti and Garth refer to this third wave as signifying the emergence of a fully-developed access to justice approach.⁵

¹ M. Pinedo, *Access to Justice as Hope in the Dark in Search for a New Concept in European Law*, International Journal of Humanities and Social Science, Vol. 1, No.19, 2011.

² Pinedo

³ M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey*, Vol. 1, Sitjoff and Noordhoff - Alpehenaandenrijn, Milan, 1978.

⁴ Cappelletti and Garth. The notion of access to justice developing in waves was first introduced by Cappelletti and Garth.

⁵ Cappelletti and Garth.

1.2. Mediation as a Means to Alleviate Judicial Burden

As various studies for the European Parliament and Commission have shown, traditional judicial systems in Europe are heavily burdened by the costs and delays associated with courts and the litigation process. In addition, power imbalances and unfair treatment have significantly impacted citizens' access to justice.⁶ Across the EU in 2013, the average time of resolution through the court system was 566 days—over a year and a half. The average cost of court litigation was over 9,000 Euros, effectively blocking many citizens from access to the formal court system to seek redress.⁷

As a result of these and other systemic problems in accessing justice, the ADR movement has been steadily growing in both civil and common law jurisdictions. Over the last two decades, the EU has increasingly promoted mediation and other forms of ADR as mechanisms for achieving access to justice; in its 2002 Green Paper, the European Commission noted the “increasing awareness of ADR as a means of improving general access to justice.”

In previous reports, the European Commission for the Efficiency of Justice (CEPEJ) has stated not only that “[a]ccess to justice may . . . be facilitated through the promotion of Alternative Dispute Resolution,” but also that “these policies . . . should be further developed.”⁸ Of all the various ADR processes, mediation, in particular, has been at the forefront of EU discussions about access to justice and efficient dispute resolution. Notably, the Committee of Ministers of the Council of Europe has adopted several recommendations promoting mediation and CEPEJ has recommended that member states should be encouraged to further develop mediation procedures.⁹

This shift toward mediation, in preference to other methods of ADR, suggests that mediation is advancing the access to justice movement. Mediation can serve as a process that complements and works alongside the formal justice system. As has been shown in various studies, mediation not only reduces the workload of the courts (thus improving the availability of judges for cases that must go through the traditional justice system), it also significantly reduces the time and cost of dispute resolution.

Access to justice, especially for the poor and disadvantaged, is best facilitated through mediation, which is well equipped to address many of the key obstacles facing these groups. As the most recent CEPEJ report notes, a majority of the Member States provide some form of legal aid for mediation procedures. In addition, from a rights-based perspective, successful mediation results in a settlement, which often provides a *win-win* solution, with both parties satisfied with the result. More broadly, the expanded use of mediation and alternative dispute resolution mechanisms has become a significant factor in ensuring confidence in the legal framework as a whole, thus allowing more citizens to feel confident seeking redress.

Mediation's prominence as an access to justice vehicle in the EU was enhanced by the Mediation Directive issued in 2008 by the European Parliament and the Council. Among the stated goals of the Mediation Directive is improving access to justice (especially for the

⁶ *Quantifying the Cost of Not Using Mediation – a Data Analysis*, by Prof. Giuseppe De Palo, Ashley Feasley, and Flavia Orecchini (European Parliament Manuscript completed in April 2011). Also see, “*Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*,” by Prof. Giuseppe De Palo, Leonardo D’Urso, Prof. Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer, and Reagan Florence (European Parliament, manuscript completed in January 2014).

⁷ Rebooting Study

⁸ CEPEJ Report on “European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice”

⁹ CEPEJ 2014 Report

average citizen with low-value claims) by simplifying the mediation process. The Mediation Directive, whose features will be explained in detail below, required Member States to implement structures to support mediation of cross-border commercial disputes in the EU by May 2011. The Mediation Directive highlighted the importance of facilitating access to ADR and promoting the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial procedures (required in Article 1). Consequently, securing better access to justice through mediation, as well as through other methods of alternative dispute resolution, can now be said to be part of the established policy of the European Union.

1.3. Non-Quantifiable Benefits

This In-Depth Analysis explores mediation as a form of access to justice, and seeks means to maximize the benefits by exploring ways to increase the use of mediation to resolve disputes. In doing so, it focuses on significant opportunities for cost savings and time savings if mediation were used more. In addition to very substantial cost and time savings benefits set out below, mediation also brings many benefits that are unquantifiable, but are just as important. These include mutual satisfaction of the parties to a settlement agreement, specially tailored solutions, greater compliance, win-win outcomes (rather than win-lose), empowerment of the parties, equalization of weak/strong party imbalances, preservation (or reestablishment) of relationships, and amicable termination of relationships, to name a few. While this In-Depth Analysis emphasizes cost and time savings opportunities, these very significant non-quantifiable benefits should be considered as well.

2. MEDIATION AND ARBITRATION DEFINED AND DESCRIBED

This In-Depth Analysis addresses mediation as a general form of ADR in civil and commercial cases in the EU.¹⁰ Mediation within the EU, however, is only one option on a rather large range of services available to disputing parties, each addressing the various needs of the parties and the peculiarities of the underlying dispute.

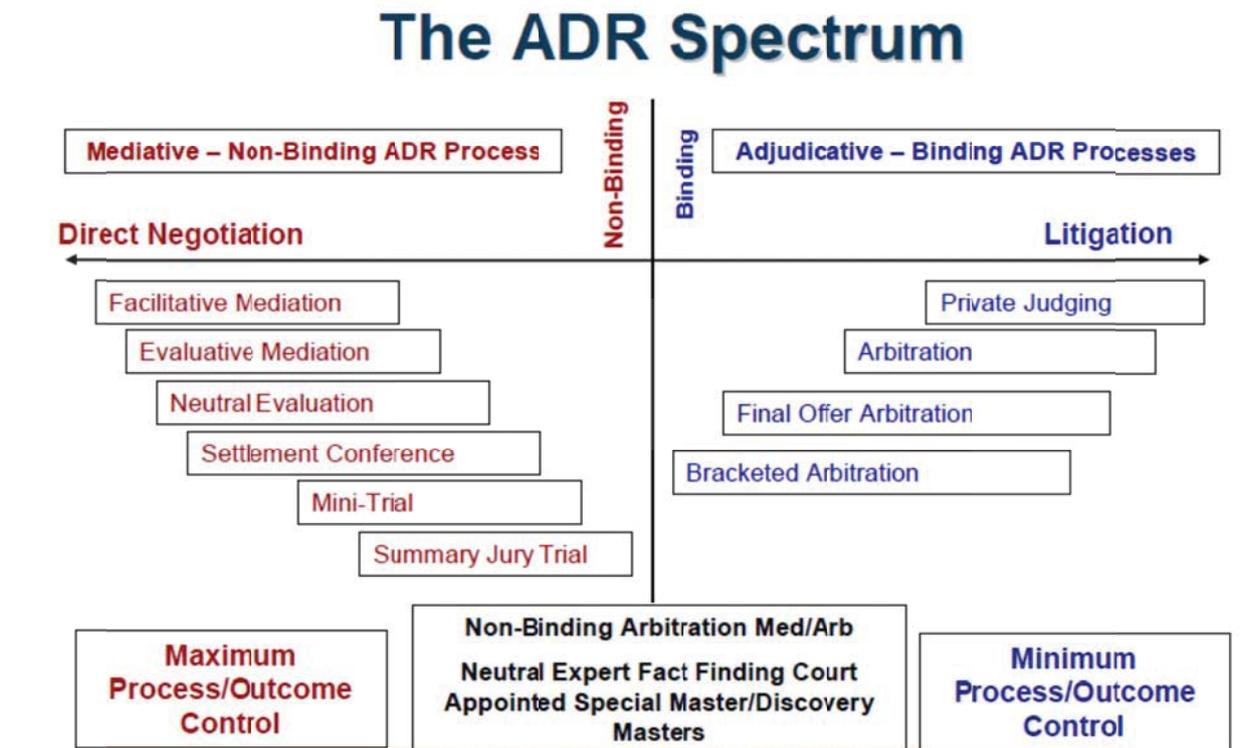
A relatively broad list of modern ADR mechanisms ranges from arbitration, to mediation, to negotiation, and to facilitated discussions, and includes some hybrid methods. The principal shared characteristics among all ADR mechanisms are that they:

- 1) involve addressing disputes outside of, or at least partially outside of, the formal judicial system (and, consequently, reduce reliance on traditional judges and complex civil procedures and appeal processes);
- 2) involve engaging a professional or panel of professionals who are neutral and independent in order to address the dispute; and
- 3) depend upon agreement among the parties at the outset (arbitration) or throughout the process (mediation) in order to carry out the process.

The types of ADR vary significantly but can be viewed on a spectrum tracking the decision-making power of the neutral versus the control by the parties over the process. At one end of the spectrum, the neutral's decision-making power is absolute and binding, and the procedures tend to be rigid and formalistic. At the other end, the neutral has no decision-making power at all, and the parties retain much more control over the process.

¹⁰ The discussion of ADR in this In-Depth Analysis encompasses ADR in the civil and commercial dispute context. There are ADR mechanisms and possibilities in criminal justice, but these are beyond the scope of this In-Depth Analysis. Except where specified otherwise, references to ADR address ADR in the civil and commercial dispute resolution context.

Figure 1: The ADR Spectrum



2.1. Arbitration

Arbitration represents the strongest decision-making power on the part of the neutral. The neutral serves as a final decision-maker, issuing binding and non-appealable decisions on the dispute or on critical issues within the dispute. Arbitration has enjoyed general awareness and formal recognition extending back into the eighteenth century, and it is, consequently, more deeply established. In arbitration, parties usually agree on detailed rules of information-sharing, applicable rules of evidence, the role of expert witnesses, direct and cross-examination of witnesses, and other formalities. There are various types of arbitration, ranging from those where the decision determines specific issues or facts, applicable law, and/or range of damages in a larger dispute (Special Issue Arbitration) to those where the decision resolves the entire dispute (General Arbitration).

Some arbitrations employ a variant of game theory to resolve disputes. For example, in **bracketed arbitration**, the parties establish a result range that is not shared with the arbitrator, and they agree to be bound by the arbitrator's decision but only to the extent of the range agreed to among themselves. Overall, the neutral's role in arbitration processes is to issue a decision, not to broker an arrangement between the parties. The decision is not appealable and is usually available to register and enforce as a court judgment.

2.2. Mediation and Hybrid Models

Developed more recently, in the second half of the twentieth century, mediation also offers a broad range of types that vary based upon the needs of the parties. Common to all types, however, is that there is no binding decision by the neutral, although any agreement reached by the parties may include provisions for enforcement as a court judgment where provided for by law.

Pure facilitative mediation represents the far end of the mediation side of the spectrum. The neutral is normally called a “mediator” and works to get the parties to reach agreement on some or all of the disputed issues between them. In pure facilitative mediation, the parties have significant power to shape the process and have agreed that the mediator exercises no decision-making power. The mediator works to build communication between the parties and to break down barriers with an ultimate goal of reaching agreement on the dispute or on key issues in the dispute.

Evaluative mediation is similar to facilitative mediation in that the neutral (sometimes called a conciliator) has no decision-making power. However, in evaluative mediation sometimes the neutral is provided with some degree of authority to evaluate the parties’ relative positions and provide opinions on the relative merits of the case or on particular issues. The evaluative mediator sometimes may offer a prediction on a likely outcome and urge discussion based upon that prediction. Based on the particulars of the case, the evaluator may also suggest value ranges for discussion. Nevertheless, it is still an entirely voluntary process, and no decisions are issued; the parties must still reach agreement if the dispute is to be resolved.

There are other, hybrid models that appear on the spectrum between pure arbitration and pure mediation methods. For example, **Early Neutral Evaluation**, involves presenting cases to an independent party, often called a “neutral evaluator”, who then renders a non-binding decision on the merits of the issues or dispute. The decision is usually written and accompanied by a detailed rationale. Since it is non-binding, the parties may then use the decision as a basis for further discussion. Early neutral evaluation can help parties identify and understand the relative strengths and weaknesses of their case and is often used where there are complex factual disputes or relatively ambiguous applicable rules. The procedures for early neutral evaluation are far less formal than they are for arbitration; the goal is for the parties to understand each party’s case, and there can be a fair amount of free-flowing, back and forth discussion. The result is usually a better understanding by each side of their relative merits, which can lead to settlement discussions and eventual settlement out of court.

The **Mini-trial**, or mock trial, is a more formalized method of ADR that still does not involve a binding decision. In a mini-trial, the parties agree upon a neutral, or panel of neutrals, and rules, and they present their case with relative formality that is similar to, but still far less rigid than, a court proceeding. The idea is for the parties to mimic the experience of a trial by exchanging exhibits, briefs that present each side’s case, and rebuttal documents that address the other side’s contentions. Formalized and rigid rules of evidence do not apply as they would in court. After presenting their respective cases, the parties may ask the neutral panel to issue a reasoned, non-binding decision. The parties may then use the decision to evaluate their respective positions.

No matter the particular type of mediation, the key elements of mediation that distinguish it from arbitration and other more formal types of ADR are that mediation-based mechanisms involve no power to impose decisions over the parties, and parties retain a greater degree of control over the process applied. Before there can be any enforceable result to mediation, the parties must reach agreement on the terms of settlement.

2.3. Best Practices in Mediation Systems

Over the years, professionals have developed relatively wide agreement on practices that are crucial for mediation to function effectively as a form of ADR. These practices are intended to assure parties that they will not be prejudiced by participating in the process. This assurance is important, because mediation is an entirely voluntary process. If the parties do not have confidence in the process, they will not participate in it. Although identified as “best” practices, the practices should instead be viewed as minimum requirements critical to the effective functioning of a mediation system. This section identifies those practices and discusses why they are important.

Protection of Confidentiality

The mediation process encourages parties to mutually disclose private information and opinions in order to generate possibilities for settlement. This information may need to be protected from public disclosure by the mediator as well as from disclosure to the opposing side. For example, a key technique used by mediators is to conduct a colloquy, or separate meeting, individually with each side in order to hear private concerns and learn private motivations or goals that apply to the dispute. In order to ensure this information can be shared in confidence, the mediator is bound by an agreement, or by applicable rules, to respect confidentiality. If there are no rules in place, or the rules in place are inadequate to protect this confidentiality, parties may find it very difficult to share private information with the mediator. True, a mediator that breaches confidentiality may find it very difficult to get future business, but the legal system must do its part as well. The legal system must provide that confidence, usually through effective penalties for unauthorized disclosure to the other side or in public.

Another aspect of confidentiality is an evidentiary one. In mediations, parties may make offers to settle or may take a position on a key issue that is ultimately unsuccessful. In the event the mediation is not successful and the dispute winds up in court, the discussions and offers made during the proceedings should not be admissible as evidence in the court case. To allow otherwise would greatly inhibit the flow of information during the mediation, as each party would constantly have to evaluate the risks of each disclosure. Mediation agreements almost always include waivers by each side stipulating that they will not be able to present as evidence in a later court procedure any information disclosed during the mediation process. A legal system’s rules should enforce these waivers. Evidentiary rules in a judicial system should prohibit discussions held during mediation from being raised as evidence in later court proceedings on the dispute, or at least limit the extent to which they may be.

A corollary to this prohibition is to preclude the mediator from being called as a witness in a later court case addressing the dispute between the parties. Parties are usually required by the mediator to waive any potential right to call the mediator as a witness in a later court proceeding on the dispute. Best practice legal systems will respect that waiver. To allow otherwise can significantly inhibit the flow of information critical to facilitating an agreement.

Time Limitations

Mediations take time to apply for, schedule, and conduct, and therefore mediation agreements usually provide for the tolling (pausing) of any limitations periods—periods in which a court case must be brought—during the pendency of the mediation. Failure to toll these time periods may work to the disadvantage of one or more parties, particularly if a period is expected to expire in the near future or if the mediation is expected to take

significant time. Consequently, mediation rules and mediation agreements often provide for applicable limitations periods to stop running during the pendency of the mediation. Best practice legal systems provide for these agreements to be honoured or otherwise automatically suspend the running of these time periods.

Enforceability

Settlement agreements reached in mediation often must be enforceable. The ability to enforce the agreement with the force and effect of a court judgment may be the difference between a full settlement and a failed mediation. If one side can offer a quick, certain, and enforceable judgment, it can be a powerful incentive for the other side to settle. Consequently, enforceability should be available as a negotiation tool for mediation settlement discussions. Providing for enforceability of most settlement agreements reached through mediation is a best practice for mediation-enabling environments.

Quality Control

As should already be clear from other best practices in mediation environments, the parties' confidence in the quality of the process and the neutrality and professionalism of the mediator are critical to the role that mediators can play. Standardization and quality control mechanisms, public and private, play a role in establishing this confidence. State-level quality control mechanisms, such as required professional training, testing, and certification requirements, help establish minimum levels of professionalism in mediation and provide public confidence in this professionalism.

The degree and types of controls vary among systems, with some jurisdictions depending entirely upon privately-established certification and training systems, analogous to a guild or institute, and others imposing these controls through state or quasi-state entities, such as Ministries of Justice. Alternatively, they may be provided for at the mediation provider level, such as court-connected mediation programs or mediation referral programs. Whatever the form, quality control usually includes establishing codes of conduct for mediators and mediation providers, guidance on mediation agreements and standard waivers and protections, regularized training to enter the profession, and continuing education training to remain in the profession.

Active Public Awareness

While mediation availability in developed economies is often high, awareness of and reliance on mediation are often lower than might be expected relative to the potential benefits that can accrue to the parties. As discussed elsewhere in this In-Depth Analysis, the capacity to provide mediation does not mean that mediation is widely relied upon. The factors influencing mediation use are likely many, ranging from lack of awareness by the parties to active resistance by legal representatives. Many systems include training programs and clinics as part of lawyer education programs, while others depend upon active referral of certain types of cases by courts to mediation. Some of these court referral programs are developed within the court system, such as court-annexed programs, while others are outside the courts, such as mediation referral programs or mandated mediation requirements as a pre-condition to case initiation or court hearings. Some mediation providers market their services through meaningful channels, such as networking, websites, and very occasionally, active advertising.

3. MEDIATION IN THE EU

Mediation is addressed and regulated at the EU level, and Member States largely have legislation and rules in place that allow for mediation and address the best practice/minimum requirements discussed above. Due to years of mounting concern about court costs, court congestion, and other obstacles to cross-border dispute resolution in the single market, the focus on mediation in the EU has steadily increased. A Directive addressing mediation regulatory environment is currently in place, and Member States are largely in compliance with the specific requirements. Nevertheless, there is still a long way to go: the number of mediations remains extremely low in relation to the number of court cases in Member States. How the Mediation Directive is addressed in the near future may have a significant effect on the rate at which parties will rely on mediation in the European Union.

3.1. Brief History of Mediation Regulation in the EU

The regulatory push at the EU level started with the October 1999 European Council of Tampere, which shifted from a “laissez-faire” approach to mediation and called for the Member States to create alternative, extrajudicial dispute resolution procedures. The efforts that followed spanned nearly a decade and culminated in the adoption of *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* (the Mediation Directive).

To fully cover the mediation regulatory environment in the EU, however, there are other relevant instruments that should be addressed.

The Recommendations

Before the adoption of the 2008 Mediation Directive, the European Commission had already endeavoured to promote greater use of ADR procedures in resolving consumer disputes by issuing two Recommendations: 98/257/EC¹² and 2001/310/EC.

The 1998 Recommendation contains principles designed for ADR providers (bodies responsible for out-of-court consumer dispute resolution) to adhere to. This recommendation was designed to ensure that out-of-court procedures offer the parties minimum guarantees such as independence, transparency, adversarial principle, effectiveness, legality, liberty, and representation. However, this recommendation did not concern procedures that merely involved an attempt to bring the parties together to find a solution by common consent; instead, it only concerned those procedures designed to lead to settlement of a dispute through active intervention of a third party. Thus, mediation did not fall under the scope of this recommendation.

In 2001 the Commission issued another recommendation, adopting a new set of principles that also applied to consensual out-of-court consumer complaint resolution schemes, such as mediation. The principles of this recommendation were impartiality, transparency, effectiveness, and fairness.

The Consumer ADR Directive

In 2013, the European Parliament adopted a sector-specific Directive on consumer ADR – *Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC* (the Consumer ADR Directive). The Consumer ADR Directive aimed

to increase consumer protection. Member States were given two years to implement the Directive, with the Directive coming into force by July 2015. According to Article 1, the Directive aims *"to contribute to the proper functioning of the internal market by ensuring that consumers can ... submit complaints against traders to entities offering independent, impartial, transparent, effective and fair alternative dispute resolution procedures."*

The Consumer ADR Directive applies to domestic and cross border disputes that arise out of sales or service contracts (online and offline) between EU resident consumers and established EU traders. It applies in all economic sectors (subject to certain exceptions such as health and education) but does not apply to trader to consumer disputes and trader-to-trader disputes.

The Consumer ADR Directive requires Member States to ensure that:

- consumers have access to quality out of court ADR procedures to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a business;
- entities acting as ADR entities meet certain quality criteria including independence, transparency, expertise, effectiveness, and fairness, etc.;
- traders inform customers about ADR entities/schemes which cover the trader's sector and whether or not the trader subscribes to those ADR schemes;
- the appointment of a competent authority charged with the monitoring the functioning of ADR entities established in its territory;
- qualified ADR entities resolve disputes within 90 days; and
- ADR procedures be free of charge or of moderate costs for consumers.

The Consumer ADR Directive is supported by the Regulation on Online Dispute Resolution (ODR). The Regulation, which provides the mechanisms for resolving consumer disputes online, will come into force by January 2016. The Regulation requires the establishment of an online, interactive portal (the 'ODR Platform') for contractual disputes to be resolved out of court, using techniques such as 'e-negotiation' and 'e-mediation'. Once EU consumers submit their disputes online, they are linked with national ADR providers who will help to resolve the dispute. The Regulation applies to consumer to trader, domestic and cross border disputes, and certain disputes brought against a consumer by a trader. Each member state must propose an ODR contact to assist with disputes submitted through the ODR Platform. Online traders must inform customers of the ADR option and provide a link to the ODR Platform on their website.

Ultimately it is hoped that both of these new measures will increase competition within the EU and give consumers better access to and confidence in alternative methods of dispute resolution.

3.2. The Mediation Directive

Scope of Application

Citing a need to adopt measures for judicial cooperation and proper market functioning in the European Community, the European Parliament and the Council of the European Union issued the 2008 Mediation Directive 2008/52/EC ("the Mediation Directive"). The Directive sought to simplify and provide access to justice by utilizing mediation as a cost-effective and quick judicial resolution mechanism in civil, commercial and cross-border contexts. While expressly stating that it applied only to cross-border disputes, the Mediation Directive also provided in its Recital 8 that *"nothing should prevent Member States from applying*

[its] provisions also to internal mediation processes." Thus, while specifically only addressing cross-border disputes, it is clear that the Directive's requirements are also applicable, though not required, in addressing internal disputes. The Mediation Directive provided a three-year period of transposition, until May 21, 2011, for Member States to bring legislation into conformity with the Directive.

The Mediation Directive's definitions establish a broad framework for Member States' use in drafting legislation to implement the Directive. With the goal of achieving a balanced relationship between mediation and judicial proceedings, the Directive focuses on quality, sovereignty, enforceability, and confidentiality to achieve its ends. Mediation is defined in Article 3 as, *"a structured process however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis to reach an agreement on the settlement of their dispute with the assistance of a mediator."* Article 3 leaves open the possibility for mediation to be voluntarily initiated among the parties, court initiated, or prescribed by Member State legislation. A mediator is deemed to be, *"any third person who is asked to conduct a mediation in an effective, impartial and competent way."*

Structural Requirements in Mediation Regulation

The Mediation Directive establishes minimum requirements for the best practices mediation regulatory environment discussed above: **Confidentiality, Time Limitations, Enforceability, Quality Control, and Public Awareness.**

Article 7 addresses confidentiality as a fundamental requirement for the mediation process to encourage parties to exchange ideas freely in attempting to reach a mutually acceptable resolution. With limited exceptions to confidentiality based on public policy or enforcement concerns, Article 7 provides, *"Member States shall ensure that, unless the parties agree otherwise, neither mediator nor those involved in the administration of mediation shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration"* As discussed above, this presumption of immunity from disclosure in future adversarial proceedings is critical to ensure full, effective and meaningful engagement by the parties to a mediation.

Tolling of time limitations is addressed in Article 8, which provides, *"Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."* The function of this minimum requirement is to ensure the broad availability of mediation even where concerns about statutes of limitations might otherwise preclude parties from engaging in mediation.

Enforceability of settlement agreements arising from mediations, and the principle of reciprocity, are aspects critical to the functional, community-wide implementation of mediation. Accordingly, in Article 6, *"Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable."* This affords parties access to the powerful settlement tool of an enforceable agreement.

Quality Control is addressed somewhat more loosely in the Directive. Rather than a mandatory requirement to establish a system, Article 4 provides that, *"Members States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and*

organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services." Member States are also "encouraged" to provide training for mediators to ensure the integrity of mediation, *i.e.* that mediations are "*conducted in an effective, impartial and competent way.*" Finally, quality, competence, and professionalism are also addressed in Recital 17 of the introduction of the Directive, which provides, "*Mediators should be made aware of the existence of the European Code of Conduct of Mediators.*"

Public awareness is also addressed. Article 9 provides, "*Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.*" While the language of "*by any means which they consider appropriate*" is a significant qualifier, this article sends a clear signal that Member States are expected to promote mediation.

Mandatory Mediation

The Mediation Directive also addresses mandatory mediation in its Article 5(2), which expressly allows Member States to mandate mediation: "*This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial systems.*" In the future, this permission may play a significant role in bringing mediation practice in Member States up to a meaningful level—in other words, a level that achieves the "balance" between mediation and judicial procedures identified in Article 1 as a core objective of the Directive.

4. THE FUNCTIONING OF THE MEDIATION DIRECTIVE IN MEMBER STATES – CASE STUDIES

Member States have by and large successfully transposed the requirements of the Mediation Directive. The following discussion includes a representative cross-section of Member State mediation regulatory environments that provides a picture of how the best practices addressed in the Mediation Directive are actually carried out. Importantly, while the Directive expressly only applies to cross-border disputes, states largely apply the requirements to both internal and cross-border disputes. As such, the Mediation Directive serves a very beneficial role on propagating best practices throughout Member States.

4.1. Greece¹¹

Greece implemented the EU directive by enacting Law 3898/2010, which came into force on December 16th, 2010¹². This law, which bears the title “Mediation in Civil and Commercial Matters” (hereinafter referred to as the “Greek Mediation Law”) has already undergone two reforms¹³ and was soon followed by a series of other legislative acts, including Presidential Decree 123/2011 on “the licensing and operation of mediation training providers” and several ministerial decisions regulating particular aspects on mediation.

Although the Directive is limited to cross border mediations and applies to civil and commercial matters—expressly excluding those rights and obligations which are not at the parties’ disposal under the relevant applicable law—Greece applies the Directive to internal disputes on civil and commercial matters.

The Greek Mediation Law establishes quality controls. The standards set by the Greek legal framework to ensure quality in mediation in accordance to the Directive’s requirements refer to (a) regulation of the training and accreditation of mediators¹⁴ (b) adherence to a specific code of conduct and (c) the existence of effective quality control mechanisms concerning the provision of mediation services. Mediators are accredited by the Administration Directorate General of the Greek Ministry of Justice, Transparency and Human Rights. There is a Mediators Code of Conduct that is almost identical to the European Code of Conduct for Mediators.

The Directive’s requirement for enforceability is respected by Article 9 of the Greek Mediation Law, which provides that once the settlement agreement¹⁵ is signed by the mediator, the parties, and their attorneys, the mediator may, upon request of one of the parties—even without the consent of the other—submit it to the court of first instance of the jurisdiction where the mediation took place. It becomes an enforceable title.

To ensure protection of confidentiality, the Greek Mediation Law provides in its Article 10 that mediation should be conducted in a way that should not compromise confidentiality,

¹¹ This subsection was derived from material generously contributed to the authors by Elena Koltsaki, PhD, an attorney, accredited mediator and mediator trainer in Greece.

¹² Government’s Gazette (Fyllo Efimeridos tis Kiverniseos—FEK A 211/16.12.2010)

¹³ Act of Legislative Content (FEK A 237/5.12.2012) and Law 4254/2014 (FEK 85/7.4.2014)

¹⁴ Presidential Decree 123/2011 on “the licensing and operation of mediation training providers”

¹⁵ Minimum content of the minutes is also provided by law and requires the name and surname of the mediator, the time and place of the mediation proceedings, the names and surnames of all participating in the mediation proceedings, the agreement to mediate which confirms the parties decision for the mediation to take place and the settlement agreement.

unless the parties agree otherwise. All persons participating in mediation commit themselves in writing, before attending, to respect the confidentiality of the process and, should they wish, they may also agree to preserve the confidentiality of the content of any agreement they might reach during the mediation. The law also provides that mediators, parties, their attorneys, and anyone attending the mediation proceedings may not be summoned as witnesses nor may they be compelled to give evidence in any subsequent legal or arbitration proceedings regarding information resulting from or in connection with the mediation process (unlike the respective provision of the Directive, where the scope is limited to civil and commercial proceedings). Nevertheless, exactly as prescribed in the Directive, the Greek law provides for a few exceptions, namely where necessary for overriding considerations of public policy. Such considerations are: a) for ensuring the best interest of children or to prevent the harm to physical or psychological integrity of a person; and b) where disclosure to the courts of the content of the agreement arising from mediation is necessary in order to enforce or implement the agreement.

Finally, in line with the Mediation Directive's provisions on limitation and prescription periods, Article 11 of the Greek Mediation Law ensures that parties who use mediation as an alternative way of resolving their dispute are not prevented from initiating court proceedings by the expiry of limitation or prescription periods during the mediation process. More particularly, the Greek Mediation Law provides that the initiation of a mediation process has the effect of suspending the prescription period for the right of action by either party during the mediation process. The limitation period is resumed once the mediation attempt has been unsuccessful either by virtue of a unilateral termination served by one party to the mediator and to the other party or of the minutes signed by the mediator testifying the termination or by any other way.

4.2. Italy¹⁶

The Italian Parliament has attempted to regulate mediation for decades. Mediation was first mentioned in the Italian Civil Code in 1865. In 1931, mediation was used in the context of public safety provisions. Then in 1940, mediation was added to the Code of Civil Procedure as an internal procedure conducted by judges in court. Italy later began using mediation in labour disputes during the 1960s. In 1973, pursuant to Law No. 533, mediation and conciliation were established in the Code of Civil Procedure. In December 1993, the chambers of commerce established mediation and arbitration commissions for the purpose of resolving disputes among companies and between companies and their clients. And in 2003, Legislative Decree 5/2003 initiated mediation for dispute resolution in certain financial matters and in all corporate matters.

Although mediation had been used in certain sectors until 2003, it was not used by the general public as a method of alternative dispute resolution. After the adoption of the EU Mediation Directive, the public became aware of mediation as a result of the Directive's implementation. In June 2009, the Italian Parliament issued Law 69, which recognized mediation as a dispute resolution option for civil and commercial disputes. It also granted the Italian government the power to issue a legislative decree on mediation, which resulted in the enactment of Legislative Decree 28 in 2010. Eighteen months later, in October 2012, Legislative Decree 28 was invalidated on the technical basis that the mediation rules had been implemented by a government act that had not been passed as a statute by

¹⁶ The description of Italy is derived and updated from a larger analysis of Italy law and mediation contained in the 2013 Study, which analysis was based on information from Giuseppe De Palo and Chiara Massidda's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille, and "Lead 5.4 Million Thirsty Horses to Water, and the Vast Majority Will Drink" by Giuseppe De Palo.

Parliament. Parliament remedied this by adopting into law the underlying delegation of authority to the government, with the result that the previous mediation rules came back into effect, with the force of law, on September 20, 2013.

In Italy, mediation is regulated by law, but the mediation procedures are regulated by mediation organizations and service providers. Italy's law regulating mediation applies to both internal and cross-border disputes.

The law sets out the basic best practice requirements for a mediation-enabling regulatory environment. Mediation confidentiality is regulated by Article 9 of Legislative Decree 28. Under it, each individual involved in the mediation process, including parties, counsel and the mediator, has an obligation of confidentiality. This obligation is also applicable to documented statements and information acquired during the proceedings. However, if the parties have consented to the disclosure of information, the mediator is exempt from the obligation of confidentiality. The mediator is also exempt if keeping the information confidential would be in violation of the law. Finally, as regulated by Legislative Decree 28 and Article 200 of the Italian Code of Criminal Procedure, a mediator cannot be required to testify about information obtained during mediation.

The law also provides that mediated settlement agreements are automatically enforceable. When the parties have reached an agreement, it is summarised in the minutes. The minutes are then signed by the mediator, both parties, and counsel for both parties, and then attached to the agreement. According to Article 12 of Legislative Decree 28, each of the parties may file the mediated settlement agreement with the court. It then becomes an executable document with the same legal effect as a court judgment. The reviewing judge checks to ensure that the agreement does not violate public policy or mandatory rules.

Article 5 of Legislative Decree 28 addresses statutes of limitation. When parties mediate their dispute, the mediation proceedings will suspend the applicable statute of limitation for a period of up to four months following the receipt by the mediation service provider of the request to mediate. This limitation suspension only happens once. If mediation fails but the parties start another mediation, the initiation of the subsequent mediation will not suspend the running of the statute of limitations.

Mediator quality control processes are also in place in Italy. The law establishes detailed legal rules governing accreditation and training of mediators and registration of mediation organizations. Mediation organizations that are registered with the Ministry of Justice regulate the certification of mediators. Mediators must be registered with one of the many Ministry-approved mediation organizations. Local bar associations, chambers of commerce, and various professional organizations can establish mediation organizations. Training of mediators can be provided by registered mediation organizations.

4.3. Romania¹⁷

Romania has a stand-alone law on Mediation. Two years before the adoption of the EU Directive, the Romanian Parliament adopted Law No. 192/2006 on mediation and the organization of the mediator profession, published in the Romanian Official Journal On May 22nd, 2006. The adopted draft was the fifth version of Romanian mediation law since 2000. This law regulated the issues of the place of mediation within the dispute resolution field, and the role and obligations of the mediator. It also clarified how to access mediation services and who can act as a mediator. Finally, the law included several key aspects that were then also required by the Directive regarding quality of mediation services, recourse to mediation, enforceability of mediation agreements, process confidentiality and effects on limitation and prescription periods.

Romania has implemented Article 4 of the Directive through a national accreditation scheme that is based on specific training standards (80 hours). To date, one hundred and twenty-two trainers are authorized to train mediators within twenty-three training providers. The whole system is facilitated by the Romanian Mediation Council, a quality control body that, among other things, sets and enables training standards and a code of ethics and deontology, authorizes mediators, and updates the National Panel of Mediators. This independent panel, which is established in the Romanian Mediation Law, has resulted in almost ten thousand mediators that are authorized to provide mediation services in Romania.

The Directive gives every judge in the EU, at any stage of the procedure, the right to invite the parties to have recourse to mediation if they consider it appropriate in the case in question. The judge can also suggest that the parties attend an information meeting on mediation. The Romanian mediation legislation is built on the principle of free will participation. Parties can voluntarily opt for mediation in order to resolve their disputes. Simultaneously, all judicial bodies have the obligation to inform the disputing parties about the mediation process and its advantages and to recommend them its use.

Law No. 202/2010 adopted by the Romanian Parliament allowed the court to invite the parties to use mediation in order to settle a dispute or to attend an information session on the mediation benefits. In enforcing the provisions of Article 5 of the EU Directive, under Article 2 of Mediation Law in Romania (no. 192/2006), parties with certain types of disputes (consumer, family, malpractice, civil/commercial - under approximately 10.000 Euro) have a duty to attend an information session on the benefits of mediation. Thus, beginning on August 1, 2013, the courts rejected a claim as inadmissible if a claimant had not complied with the duty to participate in an information session on mediation prior to filing the claim, or after the trial filing until the deadline assigned by the court for this purpose. However, the Constitutional Court's Decision No. 266/25 June 2014, found the provisions of Article 2 (1) and Article 2 (1[^]2) of the Law No. 192/2006 unconstitutional, disabling this opt-out system of referring cases to mediation.

The Directive, through Article 6, obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. In Romania, the Mediation Agreement becomes enforceable by presenting it to the notarial or judicial authorization (Art. 438-441 of the New Romanian Civil Procedure Code). Moreover, such an authentication of the mediation agreement by a notarial deed or by court approval is directly required in certain situations.

¹⁷ This subsection was developed from material generously contributed to the authors by Adi Gavrilă, an attorney, accredited mediator, and mediation center founder in Romania.

The principle of confidentiality stands at the foundation of the Romanian mediation model and it is even acknowledged in the legal definition of mediation. The assurance of confidentiality is fully implemented in the Romanian mediation law and it creates a safe area for the parties and motivates them to participate in the mediation proceedings. The mediator becomes the holder of the secret information jointly shared by the parties and a recipient of any individual communication of a confidential nature from or among them.

Article 2532 point 6 from the Romanian Civil Code codifies the Directive's requirements about limitations periods. The limitation period will be suspended for the duration of the mediation process if the mediation takes place in the last six months of the limitation period. There is an exception to this rule: point 7 of the same Article applies to the case when the person entitled to act must or could, according to law or contract, try mediation as a pre-trial condition. The limitation period is then suspended during the mediation procedure up to a maximum of three months.

4.4. Spain¹⁸

Spain has implemented the EU directive by enacting the Real Decreto - Ley 5/2012 ("Law 5/2012") on internal and cross-border mediation in civil and commercial matters. It became effective on 28 July, 2012. In addition, the Catalanian legislature had already passed act 15/2009, of 22 July 2009, regarding mediation in the sphere of private law. It has been recently further developed by Decree 135/2012, of 23 October 2012, for matters in the Catalonia region. According to sections 6.1 and 6.3 of Law 5/2012, mediation in Spain is always a voluntary process and therefore there is no obligation to participate or reach an agreement.

Law 5/2012 includes an amendment to article 414 of the Civil Procedure Act (LEC), requiring the court to inform the parties of the possibility of resolving their dispute through negotiation, including mediation, and the court may invite the parties to attend an information session. According to section 12.2 of Catalanian Act 15/2009 and Section 29 of Catalanian Decree 135/2012, mediation may also be initiated at the request of the court in any stage of the judicial proceedings or on referral by a justice of the peace, who may propose mediation to the parties and contact the Centre for Mediation in Private Law of Catalonia in order to conduct an information session. The parties may request suspension of the court hearing by agreement (Article 415 LEC as amended by Law 5/2012) in order to proceed to mediation. In the event the mediation ends without a settlement, either of the parties can request cancellation of the suspension and the resumption of the court proceedings.

Confidentiality is also addressed in the law. Article 9.1 of Law 5/2012 provides that the mediation process and the documents used during it are confidential. Mediators are exempt from the obligation to give evidence in civil and commercial judicial proceedings regarding information arising out of or in connection with a mediation procedure (Article 9.2, Law 5/2012). Section 7 of Catalanian Act 15/2009 states that any professional participating in mediation proceedings is obligated to refrain from disclosing information obtained through mediation. However, there are two express exceptions to the duty of confidentiality: written

¹⁸ The description of Spain is derived and updated from a larger analysis of Spain's law and mediation contained in the 2013 Study, which analysis was based on information from Antonio Sanchez Pedreno's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille.

approval by the parties and a reasoned court order issued by a criminal court (Article 9.2, Law 5/2012).

Mediated settlement agreements are not automatically enforceable. If no judicial proceedings are pending, enforcement of mediation agreements is subject to their conversion into public deeds (Article 23.3, Law 5/2012). If the mediation settlement agreement is reached after the start of a judicial proceeding, under Article 25.4, the parties may request its recognition ("homologacion") by the court.

For limitations, Article 4 provides that the start of a mediation procedure will suspend the running of any applicable statute of limitations. If the initial minutes establishing the scope of the dispute and other issues are not executed within 15 days from the mediation's start, the statute of limitations will start running again. Suspension of the relevant statute of limitations will extend until the execution of the mediation settlement agreement, the signing of the Final Minutes, or the termination of the mediation by any of the termination causes established in Law 5/2012.

Finally, for quality controls, according to section 11 of Law 5/2012, three requirements must be fulfilled by individuals in order to be a mediator: first, they must be able to freely exercise their civil rights; second, they must have an official university degree (or equivalent professional studies) and specific training in mediation (Article 2, section 11); and third, they must take out civil liability insurance or an equivalent guarantee. The training should be acquired through one or more courses provided by a duly accredited training institution. According to sections 5 and 6 of Royal Decree 980/2013, mediation training programs must have a minimum duration of 100 hours and they must include both theoretical and practical contents. A Registry of Mediators and Mediation Institutions overseen by the Ministry of Justice has been created and regulated by sections 8-25 of Royal Decree 980/2013. However, registration is voluntary, except for bankruptcy mediators.

4.5. United Kingdom¹⁹

In the UK, there is no separately standing Mediation Act controlling the procedure or practice of mediation, and there are no current state controls for training, performance, or appointments of mediators. Instead, there are private companies, as well as judicial and government initiatives, to promote mediation and to persuade parties to use mediation. While mediation has existed in the UK for decades as a recognized practice, its formalization in legislation came much more recently. The Civil Procedure Act of 1997, c. 12, introduced the Civil Procedure Rules (CPR), which were intended to enable courts to deal with cases justly, manage cases actively, and require parties to help the courts do so – while encouraging the use of ADR. Since mediation's introduction into the civil justice system in 1997, the judiciary has encouraged mediation, and reforms to the civil justice system have stimulated the use of mediation. The regulatory environment is growing, but as in many Member States, mediation is still used relatively infrequently.

The Directive has been implemented differently in the three UK jurisdictions (England and Wales, Scotland, and Northern Ireland). In England and Wales, it was implemented only for civil and commercial cross-border disputes. It was implemented through two statutory

¹⁹ This sub-section was derived from Andrew Hildebrand's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor.

instruments: the Cross-Border Mediation (EU Directive) Regulations ('the Cross-Border Regulations') and the Civil Procedure (Amendment) Rules ('the Civil Procedure Amendment Rules'). In both Scotland and Northern Ireland, it was implemented only in relation to cross-border mediation (as opposed to internal domestic mediation).

Enforcement of mediated settlement agreements is addressed effectively. Following the implementation into UK law of the Directive, an agreement reached in a cross-border mediation (as defined by the Directive) may be enforced by way of an application to a court under the CPR. Where a dispute is cross-border, and there are no existing proceedings, a court application can now be made under rule 78.24 of the CPR for a new type of order, called a mediation settlement enforcement order (MSEO). The settlement agreement is attached to the MSEO and the court will require evidence that each party has given its explicit consent to the application being sought.

In response to Article 4 of the Directive regarding either voluntary codes of conduct by mediators and mediation provider organizations or additional training requirements, no additional legislation has been introduced in England and Wales, either for civil cross-border or domestic mediation. However, the Civil Mediation Council (CMC) is planning on introducing a mediator registration scheme that will also cover individual mediators and mediation training.

In England and Wales, confidentiality is key to the concept of mediation, and courts have generally been unwilling to pierce the mediation veil of confidentiality. Regulations 9 and 10 of the Cross-Border Regulations broadly echo Article 7 of the Directive. Regulation 9 states that a mediator has a right to withhold mediation evidence in civil cross-border proceedings (and in arbitration) and makes that right subject to regulation. Regulation 10(b) states that the test as to whether a mediator can be ordered to disclose mediation evidence is whether 'the giving or disclosure of the mediation evidence is necessary for overriding reasons of public policy'. This gives mediators in civil and commercial cross-border disputes greater protection than the 'interests of justice' test that applies in purely domestic disputes.

In general, it is not only the mediation itself that is confidential, but also the sessions between the mediator and each party. Mediations in the UK are conducted on a "without prejudice" basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to some limited exceptions (such as agreement of all the parties or a legal obligation to disclose the information). Any express confidentiality provisions in essence reinforce the "without prejudice" nature of the mediation.

While there are no official statistics for the number of mediations that take place in England and Wales, or that record their success rates in settling disputes, there have been various informal studies. Most recently, according to a 2014 Mediation Audit conducted by Centre for Effect Dispute Resolution (CEDR), 9,500 commercial and civil cases are now mediated annually, an increase of 1,500 cases, or 9%, in the past two years. The collective value of the cases mediated each year is around £9 billion. Of these cases, 86% settled, either on the day (over 75%) or shortly thereafter. CEDR also estimates that "by achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession ... save(s) the British Economy around £2.4 billion a year in wasted management time, damaged relationships, lost productivity and legal fees".

Mediation in the UK is the choice of the parties as a voluntary process. Subject to any pre-existing contractual arrangement between parties to mediate a dispute, there is no

obligation on litigants to mediate commercial disputes. However, courts are increasingly encouraging mediation and legal representatives are required to confirm that they have explained the various ADR options to their clients. A court may, on its own initiative, stay a hearing to allow a party to participate in mediation. Additionally, a court can impose costs sanctions where it decides that a party has unreasonably refused to engage in ADR.

5. RESULTS OF THE DIRECTIVE'S IMPLEMENTATION AND POSSIBLE PROBLEM AREAS TO ADDRESS

While the Mediation Directive now provides a strong “best practices” guide for unifying mediation systems across Member States, the number of mediations actually occurring varies significantly among the states. Overall, however, the numbers of mediations are very low, representing just a tiny fraction of the total number of cases in the judicial systems of the Member States. The current low number of mediations is referred to as the EU Mediation Paradox.

This paradox suggests a development question and opportunity: How can access to justice be further enhanced in determining the next steps for EU legislation on Mediation in Member States?

5.1. The EU Mediation Paradox

As is seen from the case studies above, adoption of the Mediation Directive in 2008 provided a great deal of guidance and standardization about mediation in the EU. As is good practice, in 2011 (shortly after the Directive's requirements went into effect), the European Parliament began examining the mediation environment within the EU.

By that time, a great range of regulatory responses could be observed among Member States, with some expressly opting to apply the Directive only to cross border disputes. But many others sought, to varying degrees, to apply it to domestic disputes as well. Nevertheless, as two key studies show, while the functional requirements of the Mediation Directive have been largely transposed within Member States, the actual numbers of cases being mediated have been disappointingly low.

The 2011 Cost Study

The European Parliament adopted a Resolution in 2011, noting that the Mediation Directive appeared to have produced only “modest” results. At that time, even the countries experiencing the largest impact hovered in the mere hundreds of mediations per annum, instead of the tens of thousands, or hundreds of thousands, needed to achieve “the balanced relationship between mediation and judicial proceedings” sought by the Mediation Directive. With millions of cases still entering Member State judicial systems each year, the number of mediations would have to grow by several orders of magnitude to achieve that balance.

The European Parliament first sought to understand the problem by quantifying it. In the fall of 2011 it commissioned a study to examine the potential impact of mediation use by determining the cost of commercial litigation and projecting from that the range of economic cost for not using mediation.

The study, *Quantifying the Cost of Not Using Mediation – a Data Analysis*, (the 2011 Study) examined time and cost figures for certain types of litigation across the EU and sought to determine what would happen if mediation were *integrated as a step in the litigation process*. Specifically, the 2011 Study posited various scenarios of possible early settlement due to mediation and found very low “break-even” points for settlement rates, beyond which time and costs would increasingly be saved. EU-wide, the break-even point for time savings was found to be 19%, while the break-even point for cost savings was 24%. These findings were profound, showing that even with very low mediation success rates,

mediation could produce significant time and cost savings if integrated into the litigation process.

The obvious lost economic opportunities brought to the fore the EU Mediation Paradox – if increasing the use of mediation brings such significant time and cost savings to the parties (and to the judiciary), why were Member States experiencing such low rates of mediation? Seemingly, the parties and Member States were acting irrationally, *all other things being equal*. But in actuality, other things are *not* equal. There are many, perhaps countless, factors impacting how mediation is used—key among them being regulatory environment rules, incentive rules, concerns about quality of service and professionalism, and levels of awareness among parties.

The 2011 discussions began a broader-based examination of why the Mediation Directive had not produced a significant increase in mediation use. More than a year later, during a formal hearing in December 2012, the Legal Affairs Committee of the European Parliament asked the European Commission whether legal action needed to be taken against the Member States for their *de facto* failure in implementing the Directive. Three and half years after its issuance—and one and a half years after the deadline for its implementation—mediation was still being used far less often than one case out of a thousand.

Raising the question established a principal focal point for the discussion—whether Member States should be held responsible for the absence of a “balanced relationship between the number of mediations and judicial proceedings” sought by the Mediation Directive. Based on this balanced relationship goal, a Balanced Relationship Target Number (BRTN) theory had been introduced in a compendium examining Member States’ mediation systems that had been published earlier in the year.²⁰ The BRTN theory suggested that, under the Mediation Directive, Member States could each set a target minimum percentage of judicial cases that would need to be mediated for there to be a balance between mediation and judicial proceedings. In other words, the BRTN theory asked whether Member States should each establish performance indicators for their respective mediation systems.

The immediate response was that because only one year had passed since the Directive’s implementation deadline, it would be too soon to pass judgment as to the Directive’s effectiveness in implementation. But it was clear that the apparent lack of impact was a matter of concern.

The 2013 Rebooting Study

Following up on this line of concern, in 2013 the European Parliament commissioned a study to examine the status of mediation in Member States and establish the root causes of low levels of mediation. This study – “*Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*,” (the Rebooting Study) involved conducting a survey of over one thousand professionals in the EU to: 1) estimate numbers, cost, and time of mediations (as there are no uniformly collected data on these across all Member States); and 2) seek opinions about regulatory and non-regulatory methods to increase mediation.

The first key finding of the Rebooting Study was to reconfirm the findings of the 2011 Study that even a very modest mediation success rate of 30% settled cases to total cases mediated would save significant time and money for parties. If accurate, this would mean that, effectively, billions of Euros were being needlessly spent in litigation. The other key

²⁰ *EU Mediation Law and Practice*, (G. De Palo and M. Trevor, 2012, Oxford Press).

finding, based on a review of estimated numbers of mediations, showed that a large number of states were *still experiencing 2000 or fewer mediations per year* – again, a very small percentage of total eligible judicial cases. Only five Member States stood out: Germany, Italy, the United Kingdom, and The Netherlands, with over 10,000 estimated cases per annum, and Italy, with more than 200,000 cases per annum. The Italy experience, discussed below, depicts in sharp relief methods of raising the number of mediated cases.

The Rebooting Study survey's questions regarding regulatory and non-regulatory methods of increasing numbers of mediated cases generated very interesting results. First, it appeared that improved regulatory features for mediation, such as confidentiality of proceedings, effective enforceability of agreements, and accreditation of mediators did not appear to be significant or decisive factors enhancing the *use* of mediation. Instead, by far the single most effective regulatory feature associated with significant increase in mediations was the introduction of "mandatory mediation elements" in Member State legal systems. In other words, while mediation is a voluntary process, the most effective way to increase the number of cases mediated in Member States would be to incorporate some requirements for parties either to attempt mediation or to learn more about it.

The opportunity for Integrated Mediation as a solution

Considered together, the two studies establish that: 1) very significant amounts of resources (time and money) could be saved if mediation were to increase substantially; and 2) including mandatory elements to bring parties to mediation as part of the litigation process could cause the number of cases mediated to substantially increase. Accordingly, these two studies support continued consideration of what further regulatory support can be provided at the EU level to increase the use of mediation and, correspondingly, access to justice within Member States.

The scope of potential economic savings is tremendous, as the number of judicial cases is impressively large. The European Commission for the Efficiency of Justice (CEPEJ) reports on the numbers of cases each year. The data reported in the following table are part of a comprehensive study conducted by CEPEJ, which ended in 2013 and was based on 2012 data collected from 48 countries. At first sight, the number of incoming and pending cases appears very high, but unfortunately the reality is even worse: those numbers show only the situation of processes in civil and commercial matters and they cannot be exhaustive (no information on pending cases available from 3 countries). The landscape might be even darker, because in countries such as Italy, which already have an enormous number of pending cases, another court, (in Italy, the "Giudice di Pace"), is in charge of small claims (more than 1 million according to the Italian Ministry of Justice report of 2011). Those situations are not taken into account in the CEPEJ study.

Figure 2: Table of Numbers of Judicial Cases in the EU

COUNTRY	POPULATION	PENDING CASES	INCOMING CASES	TOTAL CASES	CASES/POPULATION
Austria	8,451,860	45,414	136,767	182,181	0.021
Belgium	11,161,642	NA	792,762	NA	NA
Bulgaria	7,284,552	100.225*	477.315*	577.540*	0.79
Croatia	4,262,140	304,121	275,739	579,860	0.13
Cyprus	865,900	41,863	35,289	77,152	0.089
Czech Republic	10,509,286	190,855	456,382	647,237	0.061
Denmark	5,602,628	26,290	54,342	80,632	0.014
Estonia	1,286,479	8,965	18,344	27,309	0.021
Finland	5,426,674	11,538	14,011	25,549	0.004
France	65,585,857	1,677,085	1,917,066	3,594,151	0.054
Germany	80,233,100	795,969	1,576,577	2,372,546	0.029
Greece	11,062,508	525,039	672,411	1,197,450	0.1
Hungary	9,908,798	129,673	458,465	588,138	0.059
Ireland	4,591,087	NA	180,892	NA	NA
Italy	59,685,227	3,929,361	1,745,510	5,674,871	0.095
Latvia	2,044,813	31,368	42,337	73,705	0.036
Lithuania	3,003,641	32,105	122,869	154,974	0.051
Luxembourg	525,000	3,471	5,987	9,458	0.018
Malta	421,364	10,464	5,151	10,615	0.037
Netherlands	16,778,025	312.830*	1.286.702*	1.599.532*	0.095
Poland	38,533,000	528,772	1,195,921	1,724,693	0.044
Portugal	10,487,289	364,305	369,178	733,483	0.069
Romania	21,305,097	676,972	1,294,604	1,971,576	0.092
Slovakia	5,410,836	181,517	222,005	403,522	0.074
Slovenia	2,058,821	47,924	47,810	95,734	0.046
Spain	46,006,414	1,366,476	1,927,185	3,293,661	0.071
Sweden	9,555,893	32,793	68,579	101,372	0.01
U.K.	61,881,400	NA	339,174	NA	NA
	TOT. POPULATION	TOT. CASES	TOT. CASES	TOT. CASES	AVERAGE C./P.
	509,929,331	11,375,395	15,739,374	27,114,769	0.053

(* All non-criminal cases)

Source: CEPEJ Report on "European judicial systems – Edition 2014"

With these numbers, the cases, the potential for cost and time saving opportunities for mediation are very substantial—in the range of tens of billions of Euros—even with only modest settlement rates. According to the findings of the Rebooting Study, the most effective way to increase mediations would be for mandatory elements to be applied.

Within the modern view of access to justice, such “mandatory elements” could consist of integrating a mediation step in certain judicial procedures, which the parties can easily opt-out of by paying a small fee to the mediator. The authors of this In-Depth Analysis refer to this as “*Integrated Mediation*”. In Integrated Mediation, judicial processes would incorporate into the judicial process an initial meeting with a mediator, which the parties could then “opt-out” of at the time of the meeting. The parties would have the opportunity to mediate, but would not be forced to do so. This approach of integrating a mediation step into the judicial process in appropriate types of cases may help achieve the potential savings that the 2011 Study and the 2013 Rebooting Study indicate are possible.

The following section looks at how mandatory elements in Mediation, such as integrated mediation, have been applied in the EU so far.

5.2. Experience in the EU with Mandatory Elements in Mediation

There is a growing trend toward mandatory elements in mediation in the EU. For example, Italy, as described above in its case study, has a mediation step integrated into the court process for certain civil and commercial disputes.

The UK includes a Mediation Information Assessment Meeting (MIAM) for certain disputes. Representing a step towards introducing integrated mediation in the UK, all potential applicants in relevant family court proceedings are now required to attend a MIAM to consider dispute resolution options. Courts are required to know that non-court dispute resolution has been considered before parties can proceed with an application and a court has the ability to adjourn proceedings if it considers that mediation is more appropriate.²¹ Use of the MIAM may even be expanding beyond family matters in the UK. At the CMC 2014 Conference, the Minister of Justice, Lord Faulks, stated, “the Ministry of Justice is also willing to reconsider compulsory mediation information and assessment meetings – or MIAMs – in civil claims.”

Also, the Greek Mediation Law includes a reference in to the possibility of a mediation being initiated through an obligation provided by law. As yet there are no provisions in the Greek law providing for mandatory mediation, although there have apparently been discussions about drafting changes to Greece’s Mediation Law to create mandatory mediation. There are reports that a working group has been formed for the purpose of applying “mandatory mediation” for certain categories of disputes, and that a draft has been submitted to the Ministry of Justice in January 2015, followed by a promising press release.

Finally, EU-level instruments are starting to impose mandatory ADR at the sector level, as is the case with the Universal Services Directive (discussed below in relation to the Alassini decision by the ECJ).

²¹ The MIAM in certain types of family disputes is now a statutory requirement codified in the Child and Families Act 2014, s 10.

Italy's Experience with Integrated Mediation – On/Off Switch

Italy presents a special case demonstrating the very significant, and positive, impact of Integrated Mediation. As reported in the Rebooting Study, Italy went from reporting a *de minimis* number of cases to reporting more than 200,000 per annum. This presents a very sharp contrast with the numbers in other Member States.

That difference in numbers is almost certainly due to Italy's mediation regulatory environment. As stated above, in 2011, Italy put in place an integrated mediation step for initiating certain civil and commercial cases. Before litigating in court, parties must meet with a mediator, at which meeting one or both of the parties may opt-out of mediation, with each party then paying the mediator a modest fee for the mediator's time. The requirement was established through the government-issued Legislative Decree 28 of 2010, which went into effect on March 21, 2011. The number of mediations immediately jumped from likely a few hundred cases per year to over 200,000 cases per year.

In addition to increasing mediations by several orders of magnitude, however, the requirement also triggered strong opposition by lawyer organizations. As mentioned above in the case study for Italy, Legislative Decree 28 was suspended. This was due to a legal challenge that resulted in a Constitutional Court decision in October 2012 invalidating Legislative Decree 28 on the technical basis that the mediation rules had been implemented by a government act that had not been passed as a statute by Parliament. Immediately following the Court decision, virtually all mediations came to a halt in Italy, even those that had been voluntarily initiated. The Italian Parliament responded to this decision as quickly as it could by adopting into law the underlying delegation of authority to the government, with the result that the previous mediation rules came back into effect, with the force of law, on September 20, 2013. The number of mediations in Italy immediately jumped back up to tens of thousands of cases per month.

In effect, the Italian experience provides both a factual and a counterfactual example for the proposition that an Integrated Mediation mechanism—one where mediation is integrated into the litigation process (with the opportunity to opt-out simply and easily)—will likely very significantly increase the number of mediations in a Member State. While not dispositive on the issue of whether Integrated Mediation should be imposed, or otherwise serve as a policy option for the EU, it demonstrates that Integrated Mediation can have a strong effect on establishing a balance between mediation and judicial proceedings.

Romania's Experience with Mandatory Mediation Information Sessions

Despite the positive experience in Italy, obligatory elements regarding mediation may be controversial in some Member States. The experience in Romania suggests that such may be the case with a more conservative, historical approach toward access to justice that focuses on access to courts. Until recently, Romania's Law on Mediation had rules in effect that required parties to attend a mediation information meeting prior to initiating certain kinds of civil cases. The law also contained a provision expressly requiring the court to dismiss a case when the parties have not attended a mediation information meeting.

In holding both of these provisions to violate Romania's Constitution, the Romanian Constitutional Court in Decision No. 266 of May 7, 2014, stated: "*[M]andatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and through the application of legal proceedings' inadmissibility, this right is not just restricted, but even prohibited.*" The court supported this ruling by reasoning that the procedure, "*appears undoubtedly as a violation*

of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty to inform, and not an actual attempt to resolve the conflict through mediation, so the parties briefing before the mediator has a formal character."

Thus, the Romanian Constitutional Court relied on a finding that the information meeting was a "filter" against the exercise of the constitutional right of access to justice. However, the court was careful to distinguish this from a requirement to actually attempt to resolve the conflict through mediation. So it is not certain how that court would have ruled on an Integrated Mediation process; such a process was neither contained in the Romanian Mediation Law nor before the Court. It is important to note, however, that one of two of the statutory provisions thrown out was one that mandated dismissal of a case, which can have extreme consequences for litigants who were not properly advised. A less draconian penalty might simply be for the court to defer a hearing on the case until the mediation step has been attempted and one or both of the parties have opted out.

EU-Level Experience – The Alassini Case

In a case that demonstrates the modern, liberal view of access to justice, the European Court of Justice examined mandatory out-of-court settlement requirements transposed under force of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002—the Universal Service Directive. Specifically, in the Alassini case²² the ECJ addressed providers' claims that a suit brought against them could not proceed because of requirements in national legislation (Italy's Electronic Communications Code then in force) that mandated an attempt at out-of-court settlement before commencing a case.

In finding that the Member State law's requirement violated neither the principle of equivalence and effectiveness nor the principal of effective judicial protection, the ECJ laid down a bright line—or safe harbour—for mandatory out-of-court-settlement systems. Mandatory systems must:

- Not result in a decision binding on the parties
- Not cause a substantial delay
- Suspend the period for time barring of claims
- Not give rise to cost, or are low cost

The ECJ provided a strong rationale for mandatory mediation:

[T]he imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem – in the light of the detailed rules for the operation of that procedure, referred to in paragraphs 54 to 57 of this judgment – disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives.

By analogy, at least at the EU level, the Alassini ruling provides clear guidance for mandatory elements in mediation requirements, suggesting that Integrated Mediation mechanisms may be established so long as they observe the above four limitations.²³

²² Judgment of the Court (Fourth Chamber) of 18 March 2010, *Rosalba Alassini v Telecom Italia SpA (C-317/08)*, *Filomena Califano v Wind SpA (C-318/08)*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08)* and *Multiservice Srl v Telecom Italia SpA (C-320/08)*

²³ It is important to note that the European legislator is aware of the significance of moving away from the model of total voluntariness in mediation at the sectoral level. In this respect, there are two prominent additional examples to consider. First, the pending proposal to review the Insurance Mediation Directive, dated 2012, proposed to rewrite current article 13 to include a requirement that "ensure that all insurance undertakings and

6. THE WAY FORWARD

This In-Depth Analysis of the functioning of the mediation regulatory environment in the EU has identified clear, successful functioning on the Mediation Directive's specific structural requirements for mediation regulatory systems among Member States. But its principal objective, identified in Article 1—building a balanced relationship between mediation and judicial procedures—seems much more difficult to achieve. The passage of almost seven years from the adoption of the Mediation Directive, and almost four years since its transposition date, may now provide an opportunity for review and decision making, particularly as the Mediation Directive may be reconsidered in 2016. It may be time to begin planning the next steps, including updating or upgrading the Mediation Directive. As such, this In-Depth Analysis expects to generate discussion that may lead to well-informed recommendations for the next generation of mediation development in the EU context. It concludes by suggesting some options for consideration and discussion and by advising of a new survey to gather data on mediation possible further developments.

6.1. Options for Consideration

6.1.1. Option 1 – A Balanced Relationship Target Number Requirement

Assuming that the regulatory objectives in Article 1 of the Mediation Directive remains to build a “balanced relationship between mediation and judicial procedures,” the two studies – the 2011 Study and the Rebooting Study – appear to suggest that this relationship may be achieved through multiple means. One possibility is through establishment of a specific Balanced Relationship Target Number (BRTN) requirement.²⁴ Essentially the BRTN would work as a mechanism requiring each Member State to develop a target percentage or number of cases with respect to the total number of civil and commercial cases and report annually on their performance—a sort of key performance indicator (KPI). There would be data collection matters that need to be resolved – source, frequency of collection, quality – that would likely differ for each state. However, some amount of data on court cases does

insurance intermediaries participate in the procedures for the out-of-court settlement of disputes” where certain conditions are observed.

Clearly, this proposal recognized that in order for there being effective out-of-court settlement of insurance disputes, it is important to oblige one of the parties, namely the party with likely more bargaining power, to participate to the alternative dispute resolution proceeding. This proposal is still pending and, as it will be argued, should be re-written, based on the foregoing analysis of the opt out models-

Another example of proposed EU legislation requiring at least one of the parties to participate in the mediation process comes from consideration for EU regulation of Packaged Retail Investment Products, or PRIPs. In this contest, a compromise proposal very similar to the one just described would have obligated, “*insurance, investment product manufacturers and the persons selling investment products . . . to participate in . . . [ADR] . . . procedures initiated by retail investors concerning the rights and obligations established by this Regulation, subject to certain safeguards in conformity with the principle of effective judicial protection.*”

Presumably because of the resistance by the banking and financial industry, this proposal was at the end struck down, so that the current version of it reads as follows: “(28a) Member States should ensure that consumers have access to effective and efficient alternative dispute resolution procedures for the settlement of disputes concerning rights and obligations established under this Directive. Such alternative dispute resolution procedures and the entities offering them shall comply with the quality requirements laid down in Directive 2013/11/EU. [the Consumer ADR Directive]”

Clearly, the new version would be far less effective than the previous one, at least if we accept the rationale of the European Court of Justice in the Alassini case.

These two examples are very powerful because they prove that if one wants to move into the direction of inserting mandatory elements in mediation, this should be done with great care. Possibly, if the old version of PRIP had been written in a way to allow an easy opt out, the final version would not have looked like the current one, which is clearly very vague. This also suggests that the legislator should review the current version of the insurance mediation directive, article 13, so that it does not get watered down again, just as it happened in the case of PRIP. If the legislator comes up with the standard, effective formula based on the opt out models, that formula could be inserted in other pieces of sector specific legislation, such as in the case of banking and insurance matters.

²⁴ The BRTN mechanism, as a potential option, was proposed and described in some detail by several of the authors of this In-Depth Analysis in *EU Mediation Law and Practice*, (G. De Palo and M. Trevor, 2012), Oxford Press, at 8-10.

exist, for example, though the World Bank's annual Doing Business Report, or through data compiled by the European Commission for the Efficiency of Justice created within the Council of Europe. More standardized collection of data on actual mediations would need to be developed as well. A BRTN requirement would provide Member States with latitude and flexibility in establishing targets that make sense within their respective systems, and yet also provide a mechanism for tracking performance over time. That level of awareness alone at the Member State level could provide incentive to improve performance year on year.

This option has the benefit that it would be more permissive, in the sense that it allows Member States to determine on their own how they want to implement it, and how they want to achieve target numbers. It would result in comprehensible and quantifiable performance information. It has drawbacks, in addition to lack of standard data, in that it does not offer much guidance in setting targets, allowing Member States to potentially set "low-bar" expectations.

6.1.2. Option 2 – Mandatory Elements in Mediation (Integrated Mediation)

Another, more direct, mechanism that could be implemented is for the Mediation Directive to require Member States to create mandatory elements in mediation in certain kinds of judicial procedures, like those based on civil and commercial disputes. Where such procedures integrating a mediation step into the judicial procedure—Integrated Mediation—exist, as in Italy, it is already well established that the number of mediations grows tremendously, by several orders of magnitude.

This option has the benefit of directly addressing a desired outcome of the Mediation Directive, and it is likely to be highly effective in doing so. It has drawbacks as well in that there is not complete unanimity in the legal and professional communities that such forms of Integrated Mediation should be imposed on Member States. The Romania Constitutional Court case cited above exemplifies that there may be doubt, although that case dealt with an imposed Mandatory Information Meeting (an Opt-In, rather than an Opt-out, mechanism). Moreover, it would require specific amendment of the Mediation Directive, which currently allows, but expressly does not require, mandatory mediation and applies directly only to cross-border disputes. In any event, given the strength of the observed experience so far, it is an option that should be ripe for discussion.

6.1.3. Option 3 – Do Nothing

It is always possible, as well, to take no action on the Mediation Directive. The Directive can be said to have had a very good salutary effect in providing guidance on best regulatory practice for mediation systems. As in 2011 and 2013, it may be feasible to continue waiting. Deferring a decision on changing the Mediation Directive minimizes risk of substantial, complex debate. However, in light of the persistent low numbers of actual mediation cases and previous deferrals, over time the call to do something will likely continue to increase.

6.2. New Survey of Professionals

At this In-Depth Analysis is being written, the authors are conducting an online survey EU-wide among a variety of professionals to follow up on the critical points raised in the Rebooting Study and discussed, to some extent, here. Opened on January 19 following adjustments made after review and comment by more than 20 senior experts around the world, this survey – the 2015 EU Mediation Impact Survey – requests several types of data in three basic sections:

The Estimation Section – Requests estimates of numbers of mediations and the time and costs of mediation of a moderate-sized case (derived using per capita income data reported by the World Bank);

The Opinion Section – Requests opinions on the potential effect of Integrated Mediation in the respondents' respective Member States, what groups might be expected to support it, and whether other mechanisms might have greater impact on the number of mediations;

The Business and Experience Section – Requests information about the respondents' principal profession and degree of experience in mediation.

The goals of this survey will be to refine and update findings from the Rebooting Study, and to present sound data for recommendations regarding policy options for improving Mediation in the EU and, potentially, for updating or upgrading the Mediation Directive. The **Estimation section** will allow the Study-in-Progress to reconfirm or update the 2013 Rebooting Study's findings regarding the lost economic opportunities of Member States with low levels of mediation. The **Opinion section** responses will allow an assessment of whether the Mediation Directive is being followed effectively by Member States and an analysis of whether other policy options exist regarding Integrated Mediation. The **Business and Experience section** will allow for control analysis to check for bias in the results and verify the level of professionalism and experience.

Because the survey is currently in process, this In-Depth Analysis cannot draw any firm conclusions, but the interim data from more than 300 responses, so far, should be of interest to policy makers. The interim data suggest answers to two key queries, outlined below:

“Does a balanced relationship exist?”

The survey asks participants directly whether they think that a *“balanced relationship currently exists between mediation and the judiciary in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually.”* Although the survey remains open as of this writing, over 88% of respondents so far have indicated either *“No, it probably does not exist”* or *“No, I strongly believe it does not exist.”* This interim result suggests an opinion among professionals that the Mediation Directive's goal of a balanced relationship between mediation and the judicial process does not exist in the respondents' respective Member States. This is preliminary, raw data and it will need to be fully analysed. However, if this opinion and its apparent strength remain after the closing of the survey, it will present a strong case for examining policy updates or upgrade options.

“Would Integrated Mediation increase the number of mediations?”

Another interim observation concerns respondents' opinions regarding Integrated Mediation, which the survey will help focus on and evaluate. In the survey, Integrated Mediation is explained as a process that must take place before initiating a judicial

procedure. In this process, the parties must attend a mediation session and may opt-out during the meeting with no negative consequences (other than the sides each paying the mediator a modest sitting fee to compensate for his or her time). The survey distinguishes this "opt-out" mediation mechanism from those where, in several Member States, parties must attend a "mediation information session" and, based on that meeting, decide if they want to "opt-in" to mediation. The survey asks respondents whether such an "integrated mediation" mechanism in their own country would likely increase the number of mediations.

As applied to Integrated Mediation, the survey seeks to isolate and measure responses to an opt-out mechanism. Although the survey is still in process, interim results indicate an overwhelming majority (currently 77%) of responding professionals indicating their expectation that the number of mediations is "likely" or "very likely" to increase if an Integrated Mediation (opt-out) mechanism is put in place in their Member State. As with the balanced relationship data, this is preliminary data and is subject to additional data coming in and analysis of that data.

As of the date of the submission of this In-Depth Analysis the survey is ongoing, and more than three hundred responses have been received from various professionals, lawyers, judges, mediators, and civil servants from all over the EU. The early indications are, as outlined above, that the next step of development for mediation in the EU will need to effectively increase the reliance on mediation, and that Integrated Mediation is believed to be a very effective tool for this.

7. CONCLUSION

ADR is used world-wide in various forms, and serves as an integral part of the modern concept of access to justice. Disputants increasingly rely on ADR to escape the time, cost, and risk of litigating in court, and as well to have complex disputes addressed by professionals in a particular sector. Its continued growth is not surprising.

The most frequently used types of ADR now are those based on mediation, where the neutral is not expected to make a decision, but rather is engaged to help the parties communicate and come to an agreement. The mediator has several tools to help break down barriers and identify key concerns that may not be obvious to either party, and there are a large number of types of mediation, each tailored to the specifics of the dispute between the parties. Being a mediator is increasingly becoming a popular profession, both for lawyers and non-lawyers, who want to offer their skills at bringing disputing sides together. Mediation service providers are becoming more numerous as public awareness of mediation as a cost and time saving alternative grows.

The European Union, and its Member States, have done a lot of work both to promote mediation as a viable form of access to justice and to create an appropriate mediation-enabling regulatory environment. The discourse on mediation will, and should, continue, as there are still many things to do to bring mediation to the fore and increase awareness and reliance on mediation.

While there has been significant progress in creating a functional environment for mediation, particularly through the Mediation Directive, the outcome sought by the Mediation Directive—establishing a balance between mediations and judicial procedures in Member States—remains elusive. Member States by and large have appropriate regulatory structures in place as required by the Mediation Directive, but the numbers of mediations that actually occur remain a tiny fraction of the enormous caseload faced by Member State judiciaries and cannot realistically be viewed as having attained a balanced relationship with judicial procedures. Something else clearly needs to be done.

The Rebooting Study demonstrates that the single most effective way to increase the number of mediations that take place, thereby reducing the burden on courts and providing relieve to disputing parties, is for mandatory elements to be in place for mediation in appropriate cases. The Italian case study shows definitively the effect of putting Integrated Mediation into place, stopping it for a period, and then restarting it. The Alassini case establishes clear guidelines for mandatory ADR at the EU level. And finally, the interim results of the current survey of professionals across the EU very strongly suggest that the balance sought by the Mediation Directive does not exist, and that putting Integrated Mediation into place would dramatically raise the reliance on mediation.

In light of this considerable background of study and analysis, the authors believe it is time for comprehensive discussion and consideration of: 1) adopting a Balanced Relationship Target Number (BRTN) requirement, obligating each Member State to establish target figure that is appropriate to that state; and 2) whether and how Integrated Mediation processes should be established in the Mediation Directive as a Member State requirement for appropriate civil and commercial cases.

Biography

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