



The Mediation Directive

European Implementation Assessment

IN-DEPTH ANALYSIS

EPRS | European Parliamentary Research Service

Author: Jan Tymowski

Ex-Post Impact Assessment Unit

PE 593.789 December 2016

Directive 2008/52/EU on certain aspects of mediation in civil and commercial matters

European Implementation Assessment

In-depth Analysis

On 4 February 2016, the European Parliament's Committee on Legal Affairs requested authorisation to draw up an own-initiative implementation report on the Mediation Directive 2008/52/EU - rapporteur: Kostas Chrysogonos (GUE/NGL, Greece). This triggered the automatic production of this European Implementation Assessment by the Ex-Post Impact Assessment Unit, Directorate for Impact Assessment and European Added Value, DG EPRS. The in-depth analysis, written in-house, focuses on the implementation of the Mediation Directive and, in particular, on its application in the Member States since 2008.

Abstract

Taking into account the limited objectives set within the Mediation Directive, namely to facilitate access to alternative dispute resolution and promote mediation that would operate in a balanced relationship with judicial proceedings, its implementation throughout the European Union has been rather successful and unproblematic. In some Member States, it has triggered the establishment of previously non-existent mechanisms and institutions; in others, it has ensured some alignment of procedural law and various practices. The challenges lying ahead are linked to the limitations of comparing different national solutions without the benefit of coherent data on the use and impact of mediation, and to experience with the implementation of other European Union (EU) acts (such as the Alternative Dispute Resolution (ADR) Directive from 2013). The growing recognition of the usefulness of mediation as such will in any case be further strengthened by the continuous exchange of best practices in different national jurisdictions, supported by appropriate action at the European level.

AUTHORS

Jan Tymowski, Ex-Post Impact Assessment Unit.

ABOUT THE PUBLISHER

This paper has been drawn up by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament.

To contact the Unit, please email EPRS-ExPostImpactAssessment@ep.europa.eu

LANGUAGE VERSIONS

Original: EN

This document is available on the internet at: <http://www.europarl.europa.eu/thinktank>

DISCLAIMER

The content of this document is the sole responsibility of the author and any opinions expressed therein do not represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

Manuscript completed in December 2016. Brussels © European Union, 2016.

PE 593.789

ISBN 978-92-846-0408-1

doi:10.2861/902931

QA-07-16-141-EN-N

Contents

Executive summary.....	4
1 Introduction	5
2 Legal basics	7
2.1 The limitations of EU legislation in the area of civil law	7
2.2 Definitions	9
2.3 The scope	10
3 Good intentions.....	11
4 Procedural matters	13
4.1 Do the courts suggest mediation directly to the parties?	13
4.2 What is the effect on limitation and prescription periods?	16
4.3 Are the agreements resulting from mediation enforceable?	17
4.4 Is confidentiality guaranteed?	18
5 Quality service	20
5.1 Rules of conduct and other measures	20
5.2 Training of mediators.....	23
5.3 Information for citizens and business	24
6 Conclusions and future perspectives	25
7 Table: State of play on the implementation of the Mediation Directive by Member States	29

Executive summary

The Mediation Directive adopted in May 2008 is an important element of European judicial cooperation in civil matters, supporting the general observation that mediation can deliver cost-effective and swift extra-judicial resolution of certain disputes. The directive committed EU Member States to providing a number of procedural principles regarding mediation in their national laws, at least for cross-border cases (covered by the formal legal basis in the Treaty on the Functioning of the European Union (TFEU)). It also obliged them to support the establishment of mechanisms in favour of good quality mediation services, as well as those aimed at raising awareness among possible users.

Starting with the definition of mediation, and of the mediator, the implementation of the directive was not problematic, even if its transposition was not necessarily carried out verbatim in some countries. The application of those provisions of the Mediation Directive that deal with recourse to mediation, limitation and prescription periods, enforceability of agreements, and confidentiality, differs in detail across the EU. The same is even more true with regard to codes of conduct, mediators' training and providing information to the public. This situation is due mainly to the fact that, in most of these matters, Member States were left with a large margin of freedom to choose specific solutions. Importantly, though, almost all countries decided to extend the scope of application of the directive to domestic cases, thus avoiding differences in treatment between national and cross-border disputes.

Overall, the most significant difference in impact of the Mediation Directive identified was between those countries that already had an established system of mediation, on the one hand, and those that previously had no, or limited, practices. The difficulty of comparing existing national provisions on mediation is mostly due to the absence of comprehensive statistical data. Apart from the ongoing exchange of various best practices, which is facilitated by specific European networks and programmes, additional efforts could be made to better understand the differences in mediation systems, before attempting to align them further.

It is also important to note that two separate legal acts on consumer-related disputes, adopted by the EU in 2013 (the Directive on alternative dispute resolution and the Regulation on online dispute resolution), contain more detailed rules on out-of-court settlements, and cover domestic as well as cross-border cases. Their implementation, and experience with their application, might also result in future proposals for revision of the Mediation Directive.

1 Introduction

Solving a dispute between two or more parties in relation to their legal rights and obligations has been a prerogative of the relevant authority (typically linked to a given territory) throughout recorded history. The functioning of the internal market, and the many other (non-economic) relations between persons and businesses within the European Union, are not without occasional conflicts. Resolving them sooner rather than later, preferably without disrupting future relations, surely contributes to overall welfare and efficiency. This motive (aside from potential savings in monetary terms) constitutes the main reason for the introduction of alternative dispute settlement schemes with regard to court litigation. Amongst these schemes, mediation is essentially characterised by the active participation of a third party (the mediator), who assists those in disagreement in finding a solution.

Following the extension of the then European Community's areas of activity to cover the field of judicial cooperation in civil matters,¹ and several years of preparatory work,² the adoption of Directive 2008/52 on 21 May 2008³ was a recognition that mediation can deliver cost-effective and swift extra-judicial resolution of disputes in civil and commercial matters. The directive committed EU Member States to ensuring that their national laws featured a number of principles regarding mediation, at least for cross-border cases. The transposition date was set for 21 May 2011, and most Member States⁴ fulfilled this obligation within the deadline.⁵

The main objective of the Mediation Directive, as set out in its Article 1, is 'to **facilitate** access to alternative dispute resolution and to **promote** the amicable settlement of disputes by **encouraging** the use of mediation and by **ensuring** a balanced relationship between mediation and judicial proceedings.' (emphasis added) In the corresponding clarification, recital 7 of the directive explains that introducing framework legislation was deemed necessary to **promote** further use of mediation and **ensure** that parties having recourse to mediation can rely on a predictable legal framework. Unfortunately, for the analysis of the

¹ Enshrined in the Amsterdam Treaty, signed on 2 October 1997. The term 'European Community' was then fully replaced by 'European Union' in the Treaty of Lisbon (13 December 2007).

² Including especially the Tampere European Council of 1999 and the [European Commission's green paper of 2002](#).

³ OJ L 136, 24 May 2008, p. 3. Referred to in this in-depth analysis as the Mediation Directive, or the directive.

⁴ Including Croatia which joined the EU on 1 July 2013, but excluding Denmark as it used an opt-out for this directive).

⁵ Six countries which transposed the directive after the deadline were: Cyprus, Czech Republic, France, Latvia, Luxembourg and Sweden.

implementation of this act, no assessment criteria were provided for two of its essential elements: *balance* and *predictability*.

Moreover, because of the legal basis available to European legislators, only cross-border disputes were covered by the Mediation Directive, although Member States were free to extend the application of its rules to purely domestic cases.

Additional efforts have since sought to extend the EU *acquis* in the field of consumer disputes, and two related legislative acts were finally adopted in 2013: Directive 2013/11 on alternative dispute resolution⁶ and Regulation No 524/2013 on online dispute resolution.⁷ Both were intended to be transposed by early 2016, and - as stated in the 2016 Justice Scoreboard - the use of alternative dispute resolution for solving disputes between consumers and traders 'is expected to increase in the future' with the implementation of the ADR Directive and the ODR Regulation.⁸ These might have an important effect on European mediation practices and legislation. However, the analysis of the specific impacts of these two acts is not within the scope of this paper.

A number of studies have already been undertaken on the implementation of the Mediation Directive, including an analysis prepared for the European Parliament in January 2014.⁹ In the conclusions of this study, it was established that 'the number of mediations, on average less than 1 % of all cases litigated in the EU, falls short of what it should be.'¹⁰ Accordingly, its authors proposed to make mediation mandatory, or at least to set a numerical target in order to achieve the 'balanced relationship' desired between mediation and judicial proceedings.

In March 2016, an up-date of a European Commission [study 'for an evaluation and implementation' of the Mediation Directive](#) (the earlier version of which was published in October 2013)¹¹ identified three problems with the practical functioning of national mediation systems:¹² the adversarial tradition of many Member States, low level of awareness of mediation, and the functioning of the quality control mechanism.

⁶ OJ L 165, 18 June 2013, p. 63. Further referred to as the ADR Directive.

⁷ OJ L 165, 18 June 2013, p. 1. Further referred to as the ODR Regulation.

⁸ See European Commission, [2016 EU Justice Scoreboard](#), page 33.

⁹ ['Rebooting' the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU](#), DG IPOL, Policy Department C, European Parliament, PE 493.042.

¹⁰ *Idem*, p. 162.

¹¹ Further referred to as 2013/2016 study and Milieu Study 2016 in the footnotes. No additional interviews were held with the stakeholders previously contacted by the contractor, and thus the content of its part on 'evaluation of implementation' was only fact-checked.

¹² *Idem*, p. VI.

Finally, the European Commission (EC) published an impact report,¹³ which was required by Article 11 of the directive, on 26 August 2016. In addition to the abovementioned 2013/2016 study, the EC report was also based on a public consultation that was undertaken from September to December 2015 (with 562 contributions received from various stakeholders).¹⁴

This in-depth analysis looks at the current state-of-play in all EU Member States with regard to specific provisions of the Mediation Directive, on the basis of readily available data and analysis.

2 Legal basics

This part of the analysis looks at the basic elements of the Mediation Directive: its legal basis, the definitions, and scope.

2.1 The limitations of EU legislation in the area of civil law

The objectives and content of each piece of European legislation are largely dependent on the legal basis provided by the Treaty on the Functioning of the European Union (TFEU). With regard to procedural civil law, it is important to understand the limited field of responsibilities of the EU, which evolved from intergovernmental cooperation between the Member States (available at the time of the Treaty of Rome) to the standard community method under the area of freedom, security and justice (introduced as a general objective by the Amsterdam Treaty).¹⁵

The Mediation Directive was signed and published after the adoption, but before the entry into force, of the Lisbon Treaty, which moved European integration in the area of civil procedural law beyond the market focus.¹⁶ What nevertheless still remains in the relevant provisions of the current Article 81 TFEU, is the fact that European law can only regulate judicial cooperation in matters having cross-border implications. Interestingly, the ADR Directive adopted in 2013 is based on Article 114 TFEU (allowing for harmonisation of laws in the internal market), which allowed for its immediate application to both cross-border and domestic cases.

¹³ COM(2016) 542 final, further referred to as EC report.

¹⁴ <https://ec.europa.eu/eusurvey/publication/MEDIATION2015>

¹⁵ For details of the problematic of the legal basis for EU civil procedural law - see Rafał Mańko, [Europeanisation of civil procedure](#), EPRS, PE 559.499, pp. 9 -16.

¹⁶ *Inter alia* by deleting the necessity of the link to the proper functioning of the internal market in Treaty articles dealing with the judicial cooperation in civil matters (now Article 81 TFEU).

Moreover, articles constituting the legal basis for the Mediation Directive at the moment of its adoption only allowed for *framework* legislation on common principles in the area of civil procedure, which was a concept used for the third pillar of justice and home affairs, as established by the Maastricht Treaty. In view of this, it should not be surprising that the directive in question sets rather general objectives (of encouragement) and some basic minimum standards.

An acknowledgement of this situation, in a positive sense, was made *inter alia* by the Parliament's resolution on alternative dispute resolution in civil, commercial and family matters, adopted on 25 October 2011, which was a response to the European Commission's consultation paper on ADR in commercial transactions. After noting that 'a balanced approach has to be sought, which takes into consideration both the flexibility of ADR systems on the one hand and the need to ensure consumer protection and fair procedures on the other',¹⁷ the Parliament stressed that the European framework for ADR (as exemplified by the Mediation Directive) 'should be careful not to limit diversity in the field of ADR as there is no "one size fits all" solution...'.¹⁸

In a separate resolution on the Mediation Directive, based on another own-initiative report of its Legal Affairs Committee, and adopted on 13 September 2011, the European Parliament stated that predictability and flexibility should guide Member States in implementing the directive.¹⁹ The limited potential for this predictability, as set out in the directive (where the term was used in its objectives), is related to the fact that 'the judicial development of the minimum standards on a case-by-case basis does not automatically guarantee that citizens and companies can rely on clear, precise and predictable rules with regard to the minimum EU standards of civil procedure'.²⁰

This of course does not mean that there is no *rationale* in action at European level in matters of civil law. As the experience of the European Judicial Network in civil and commercial matters²¹ shows, facilitating cooperation between national authorities is essential in dealing with cases of a cross-border character.

In addition, the importance of effective judicial systems for each and every EU Member States has been reflected by their coverage in the framework of the European Semester since 2012. As stated by the EC report, '[T]he EU Justice Scoreboard feeds the European Semester and assists Member States to improve

¹⁷ P7_TA(2011)0449, point J.

¹⁸ *Idem*, point 4.

¹⁹ P7_TA(2011)0361; the full title of the resolution was: 'on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts'.

²⁰ [Europeanisation of civil procedure](#), PE 559.499, p. 7.

²¹ https://e-justice.europa.eu/content_about_the_network-431-en.do

the effectiveness of their justice systems²² but although the Scoreboard contains data on Member States' activities promoting the voluntary use of ADR methods, the assessment provided in its 2016 edition²³ covers more than just the Mediation Directive, while separating civil and commercial disputes from those in labour and consumer matters.

2.2 Definitions

Article 3 of the Mediation Directive contains two definitions for the purposes of that act - one on 'mediation' and one on 'mediator'. Both are quite broad, reflecting the reality of the various ways in which a number of Member States had already regulated this matter.

In the case of 'mediation' itself, the important element is that the process possibly leading to an agreed settlement of a dispute needs to be 'structured', while the name of the process is not really relevant. It also has to be attempted 'on a voluntary basis', although the same paragraph then says that it can be initiated either by the parties or 'suggested or ordered' by the relevant court or law. Recital 13 clarifies that the mediation process is voluntary 'in the sense that the parties are themselves in charge of the process and may organise it as they wish'. The problematic nature of 'compulsory mediation' will be discussed in part 4.1.

As for the 'mediator', the directive is again concerned less with the title given to the third party (or the third party's profession), or with the way of being engaged, but describes him or her as a person 'who is asked to conduct a mediation in an effective, impartial and competent way'. This could potentially indicate the criteria for someone conducting mediation, but the case of the ADR Directive (in its Articles 6 and 8) shows that specific provisions would need to expressly regulate how to apply these terms. The Mediation Directive itself thus only portrays the reasonable expectation of the parties, rather than conditions for being considered a mediator.

In view of this, the implementation of these two definitions by the Member States was not, and is not, problematic. The 2013/2016 study conducted for the European Commission provided details of their literal transposition (as well as that of cross-border character and domicile), highlighting such issues as the lack of the word 'effective' in the national definitions in some countries (Italy, Spain, or Sweden) or the fact that Polish law does not define 'mediator' and 'mediation' at all.²⁴

²² COM(2016) 542 final, page 2.

²³ Figure 27 in [2016 EU Justice Scoreboard](#)

²⁴ Adding that 'the applicable legislation ensures that the main requirements set out in the Mediation Directive are reflected' - see Milieu Study 2016, p. 37.

Additionally, Article 3 covers mediation conducted by a judge (not responsible for any judicial proceedings concerning the dispute in question),²⁵ but 17 Member States actually bar their judges from acting as mediators. Infringement procedures against those rules are highly unlikely. On the other hand, Croatia only recently lifted a restriction allowing the conduct of court mediation by judges only.

2.3 The scope

As pointed out earlier, the legal basis of the Mediation Directive limits its application to cross-border disputes, and that is described in detail in its Article 2. At the same time, the importance of establishing extrajudicial procedures for the settlement of disputes was known already before the adoption of the directive, also, or even more so, with regard to the much more numerous domestic cases. The directive was thus aiming to contribute to the functioning of the internal market (which was a link still necessary in 2008) in the sense of improving access to justice in civil and commercial matters throughout the European Union.

Accordingly, recital 8 indicated that the provisions of the Mediation Directive apply only to mediation in cross-border disputes, but that nothing should prevent Member States from applying those provisions also to internal mediation processes. Of 27 Member States that are bound by the directive (with Denmark explicitly opting out), 24 countries decided to extend its scope to domestic cases when transposing it into national law, and three (Ireland, the Netherlands and the UK) kept the limitation to cross-border.²⁶ The European Commission continues to express satisfaction with the dominant practice, underlining in its report that 'the number of domestic cases exceeds that of cross-border cases by far' and that there is 'no reason to differentiate between the two types of cases'.²⁷

The material scope of the directive is defined by its Article 1(2), in addition to the title (already mentioning the civil and commercial matters). It also provides for obvious exception, namely the rights and obligations which are not at the parties' disposal, but - in addition - clarifies that taxation, customs and administrative matters (as well as *acta iure imperii*²⁸) are not covered. With regard to national laws, this does not mean, of course, that Member States are not allowed to introduce some forms of dispute resolution there. They cannot, however, be

²⁵ Not transposed verbatim in six Member States: Croatia, Hungary, Ireland, Latvia, Malta and Portugal, but unproblematic in practice.

²⁶ In the case of the UK - some of the provisions of the directive (Articles 4, 5 and 9 - on quality, recourse and information) are also applicable to domestic cases.

²⁷ COM(2016) 542 final, page 5.

²⁸ Acts and omissions in the exercise of State authority.

assessed against the provisions of the EU law. With that in mind, it is not clear why it was felt useful to note in the 2013/2016 study that in France only cross-border cases are permitted in the mediation in administrative matters.²⁹

Because in a number of Member States mediation was already regulated and/or practised, the transposition measures varied considerably with regard to the scope of conflicts covered. The 2013/2016 study pointed out that in case of labour disputes, some countries did not specifically cover them when adopting new laws,³⁰ but if the existing national regulations already fulfilled the obligations of the directive, the objectives were met. Special attention is repeatedly given to family law, where the conciliatory character of mediation might be of additional importance. The EC report highlighted the preparation, by a working group of the European Judicial Network in civil and commercial matters, of a set of recommendations aimed at enhancing the use of family mediation in a cross-border context, in particular in child abduction cases.³¹ With regard to that last category, it is important to note the work of the *European Parliament Mediator for International Parental Child Abduction*,³² an office which was created in 1987 - more than 20 years before the adoption of the Mediation Directive. Coordinated by the European Commission, a separate section of the *European e-Justice Portal* provides information on the national mediation systems in family matters.³³

The 2013/2016 study provided some additional information on the specific types of disputes signalled by Member States as being particularly suitable for mediation (such as those concerning copyright or traffic accidents), but considered that 'the types of disputes that could be subjected to mediation in the different Member States are rather varied and no common trends could be identified.'³⁴ Separately, the EC report drew attention to the potential use of mediation in insolvency proceedings.

3 Good intentions

Solution of disputes as such clearly has a positive connotation, and doing so on the basis of an agreement between parties sounds even better. It is thus easy to identify the intended results of the Mediation Directive, both in purely economic terms (such as savings made thanks to avoided litigation) and broader.

²⁹ Milieu Study 2016, p. 34, footnote 52.

³⁰ *Idem*, p. 47.

³¹ COM(2016) 542 final, page 2.

³² See <http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator>

³³ See https://e-justice.europa.eu/content_crossborder_family_mediation-372-en.do

³⁴ Milieu Study 2016, p. 48.

In a specific note published by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs in 2011 (the year in which the directive entered into force), a calculation was made of the costs of not using mediation in the EU, with the examples of Belgium and Italy constituting the foundation of a European assessment.³⁵ The study found that the average cost to litigate in the European Union was €10 449 while the average cost to mediate was €2 497, and that a successful mediation could therefore bring savings of over €7 500 per dispute.³⁶ Taking into account the differences between national systems, this quantification might be over-simplified.

The non-monetary aspect of mediation's value was well expressed by the European Parliament resolution of the same period, which stated: 'parties who are willing to work toward resolving their case are more likely to work with one another than against one another'.³⁷ This element continues to affect the appreciation of mediation in family matters, as a possible contribution to the preservation of the relationship the parties had before the dispute, especially when there are children involved. The 2013/2016 study, in its part based on stakeholders' consultation, provides illustrative examples of the high percentages of family cases (such as 25-30 % in Hungary) among all those put to mediation.

Similar reasoning led in 2013 to the adoption of the ADR Directive, as stated in its recital 4: 'Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market.' That act was accompanied, as mentioned above, by the ODR Regulation to further facilitate solving consumer disputes on-line.

While the previously described differences in legal basis of the Mediation Directive and the ADR/ODR package resulted in significant differences in terms of scope and depth of regulation, all these acts should also be seen in the context of improving the efficiency of the justice systems in the European Union as a whole. The promotion of alternative dispute resolution mechanism was thus also covered by the European Commission's Justice for Growth agenda, as a factor contributing to the goals of the Europe 2020 strategy. This consistency was also confirmed by the stakeholders interviewed for the purposes of the 2013/2016 study, in support of the Mediation Directive's potential to contribute to growth.³⁸

³⁵ [Quantifying the costs of not using mediation - a data analysis](#), DG IPOL, Policy Department C, European Parliament, PE 453.180, April 2011.

³⁶ *Idem*, p. 4.

³⁷ P7_TA(2011)0361, Point 14.

³⁸ Milieu Study 2016, p. 67.

In order to assess the actual effect of the directive on what might previously have been considered the wishful thinking associated with alternative dispute resolution, a detailed comparison would need to be made of the effectiveness of mediation before and after its transposition by Member States. This has continuously proved to be challenging, not only because in some countries very limited changes needed to be made to the already existing systems, but also because of the lack of data. As the European Commission states in its recent impact report, 'it is very difficult to obtain comprehensive statistical data on mediation, e.g. the number of mediated cases, the average length and success rates of mediation processes, with a special focus on cross-border mediation.'³⁹ What the existing studies provide is thus rather a collection of interesting, but separate, examples from different jurisdictions, based on situations which are often not comparable.

4 Procedural matters

It is important to note that the process of mediation itself is not regulated by the Mediation Directive. This is explained in its recital 13, which states that mediation 'should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish...'⁴⁰, and that 'the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.' The limited effect of the directive on how mediation is actually managed will be described in the following chapter (5), while this one covers the incentives for, and consequences of, a mediation process, as laid down by EU law.

Four elements, of which three are obligatory for the Member States, aim to ensure the balanced relationship between mediation and judicial proceedings, which was mentioned above as an important factor among the directive's objectives: referral and incentives, suspension of deadlines, enforceability, and confidentiality. A short assessment of these points by all EU Member States is also shown in the table annexed to this analysis.

4.1 Do the courts suggest mediation directly to the parties?

The first of the four elements, as mentioned above, is the one that is not actually obligatory. In both cases mentioned in Article 5(1) (court inviting the parties to use mediation, or information sessions about mediation) the term 'may', rather than 'shall', sets the common standard at the lowest possible denominator: that of an existing mediation system, the use of which could be considered if the judge

³⁹ COM(2016) 542 final, page 4.

⁴⁰ Time-limits are then specifically mentioned as possibly permitted by national law.

finds it appropriate. In effect, all Member States can be considered as having properly implemented this provision, although the individual regulations might differ substantially.

The EC report provides just a few examples of national practices with regard to this point, without any attempt to make judgements on their effectiveness. What it does, however, is to sum up the view of a majority of stakeholders, according to which the existing practices (apart from a notable exception of family law) are not effective in motivating parties to use mediation.⁴¹ Two issues accompany this observation:

- a reported claim that judges do not know or trust mediation, and
- suggestions for improvement, all of which introduce some obligatory presence of mediation in the judicial procedure – either to be declared on the application form (whether or not an attempt for mediation was made), as an information session for all parties, or by mandatory 'consideration of mediation' by the judge.

Such proposals seem to rely on the assumption that a simple reminder of the fact that mediation possibilities exist in a given State, would automatically increase the number of parties willing to try it. In the view of the judges - who are not only willing to accept agreements reached outside of the court, but also often engage in finding a solution acceptable to both/all parties of a dispute - the Mediation Directive is too general to ensure a coherent reliance on a European-style mediation.⁴² It is also worth noting that regardless of the differences between the efficiency of national judicial systems, most (if not all) cases before the courts come about because of a disagreement between parties that they were not able to solve themselves. At a point where at least one of them feels that agreement is not possible, it is only natural that a body representing the authority of law (that is the court) is involved to settle the argument.

In accordance with the general approach of the Mediation Directive (its limitation to setting a legal framework), Article 5(2) clearly leaves the Member States the freedom to make mediation compulsory or subject to incentives or sanctions, under the standard condition that any such legislation does not prevent the parties from exercising their right of access to the judicial system.

The compulsory use of mediation was only introduced in a handful of Member States, mostly for very specific cases: family matters in Croatia (since 2015), child-custody in Hungary, and anticipated termination of apprenticeship contract (in agriculture) in Austria.

⁴¹ COM(2016) 542, p. 7.

⁴² Les enseignements tirés de l'exécution de la directive sur la médiation: le point de vue des juges, DG IPOL, Policy Department C, European Parliament - PE 453.169, April 2011.

The stakeholders dealing with mediation often propose making it obligatory because they are convinced that it could also be effective in many more cases. But the majority of Member States (and academics – as reported by the European Commission) are opposed to such a solution, claiming for example that this would be in opposition to the very essence of mediation being a *voluntary* process.⁴³ Indeed, even if only an attempt for mediation were to be compulsory for all cases, those not willing to mediate would still go to court and thus bear even more costs and/or spend even more time in proceedings than if they opted for a judicial process directly.

The exceptional case of Italy, where the introduction of compulsory mediation (by government decree) helped to relieve an overburdened judicial system, before being struck down by the Constitutional Court in December 2012 for procedural reasons,⁴⁴ was highlighted in the European Parliament's 2011 resolution. The latter expressed appreciation of the positive effect, but stressed that mediation 'should not be a compulsory part of the standard judicial procedure'. The EC report concludes that the 'question whether mediation should be compulsory or not is controversial'.

Those national regulations which constitute financial incentives (including sanctions, although they are mentioned separately by the directive) are portrayed somewhat differently. These exist in a larger number of Member States, with court mediation being accessible free of charge in some (Croatia, Hungary, Lithuania and Slovenia) or with lower court costs in case of successful mediation in others (11 countries - see annexed table). In some Member States, there is the possibility of legal aid (mostly in court mediation), and some financial sanctions can be applied in specific cases (such as unreasonable refusal to at least try mediation).⁴⁵

This analysis does not attempt to list in detail all the possibilities that Member States have introduced, but takes note of the variety serving the same purpose: to make mediation economically attractive, so that parties at least give it a try. The European Commission presents these categories of measures (incentives and sanctions) as means to 'promote the use of mediation'.⁴⁶ However, the legally forced distinction between the situation of those parties that attempted mediation, and those who did not (or did not accept its outcome), could also be considered as making mediation quasi-compulsory in practice and perception.

⁴³ See [Lexology - 'should mediation be mandatory?'](#)

⁴⁴ Another government decree in June 2013 re-introduced the compulsory mediation in a number of specific conflicts, for a period of four years. For details, see Milieu Study 2016, pp. 32 and 48.

⁴⁵ For detailed examples of both, as well as financial incentives, see Milieu Study 2016, pp. 59-60.

⁴⁶ COM(2016) 542, p. 8.

In fact, the Parliament's 2011 resolution acknowledged the main usefulness of both instruments (financial incentives⁴⁷ and mandatory mediation) in reducing the courts' workload, while also stressing the condition already set by the directive: 'that this does not prevent parties from exercising their right of access to court'. The EC report additionally indicates the relation to Article 47 of the Charter of Fundamental Rights of the European Union (on access to justice), without going any further into solving the controversy mentioned earlier. In response to the simplified dilemma as to whether or not to make mediation compulsory, an expert present at the Mediation Directive workshop held in the European Parliament in November 2016 sought to propose an obligatory *initial mediation session* as potentially the most effective way forward.⁴⁸

4.2 What is the effect on limitation and prescription periods?

The simplest obligation introduced by the Mediation Directive concerns the procedural effect of starting mediation in relation to any deadlines set by national law in judicial proceedings. Article 8 obliges the Member States to ensure that parties are not subsequently prevented from pursuing justice at court or in arbitration, which - again - shows that mediation might replace those proceedings only as long as all parties to the dispute are satisfied with the mediation's outcome.

This provision was implemented by all Member States without any problems, which was duly noted in the Parliament's 2011 resolution. The 2013/2016 study dealt with the matter quite shortly, in its part on transposition of the directive. It also presented a number of examples, in the section on measures going beyond the EU requirements, of how the suspension of potential or running court proceedings is arranged in individual countries.

The second paragraph of Article 8 of the directive provides a reassurance with regard to international agreements, which was explicitly transposed only by a few Member States (Cyprus, Malta, Sweden and UK). This is, of course, not considered problematic in view of the precedence of such acts over national law.⁴⁹

In light of such a result, it only makes sense that the ADR Directive contains exactly the same rules on limitation and prescription periods as the one on Mediation.

⁴⁷ With examples of a 50 % refund in Bulgaria and 100 % in Romania.

⁴⁸ For details, see *Achieving a balanced relationship between mediation and judicial proceedings*, in the [compilation](#) of papers prepared by Policy Department C for the workshop organised at the request of Parliament's Committee on Legal Affairs.

⁴⁹ Milieu Study 2016, p. 41. This point is therefore not included in the overall table below.

Indirectly related to the matter of limitation and prescription periods is the issue of possible deadlines for mediation. The 2013/2016 study only referred to the example of Latvia, where the judge can impose a deadline of six months for its completion.⁵⁰ A possibility for such a deadline was explicitly mentioned in recital 19 of the directive, following the description of mediation as a voluntary process that the parties can terminate at any time.

4.3 Are the agreements resulting from mediation enforceable?

The second provision formulated as an obligation for the Member States, concerns the outcome of a successful mediation. In spite of the formulation of recital 19 of the directive, arguing that compliance with the agreement should not depend solely on the good will of the parties, Article 6 requires enforceability only when either both parties to a dispute, or one with the explicit consent of the other, ask(s) for it. This is of course coherent with the remaining provisions of the Mediation Directive, in the sense that mediation does not replace judicial proceedings but rather makes them obsolete by helping the parties to solve the problem instead.

All Member States provide ways to make mediation enforceable. A few examples where national law actually permits only one party to request the enforceability of an agreement (Belgium, Czech Republic, Greece, Italy, Hungary and Slovakia),⁵¹ with an additional reference to some of the consultation's respondents, permitted the European Commission to suggest enforceability without consent of all parties as the best practice to follow throughout the EU. Although one can assume that by agreeing to a certain solution found through mediation, all parties implicitly accept that outcome to take effect,⁵² making it enforceable against the will of one of the parties would probably question the existence of the agreement itself.

The accompanying provisions of Article 6 deal with the obvious limitations to enforceability (such as the content being contrary to law), its form (to be decided by the Member States),⁵³ information on competent authorities (to be provided to the European Commission), and cross-border effects (with an additional disclaimer concerning family law referred to in recital 21). As such, they do not

⁵⁰ *Idem*, p. 52.

⁵¹ The case of Poland, where the consent is given at the moment of signing the agreement, does not qualify to be in that group.

⁵² In the words of the Parliament's 2011 resolution: 'mediation is more likely to produce a result that is mutually agreeable, or "win-win", for the parties' and 'acceptance of such an agreement is more likely and compliance with mediated agreements is usually high' - point 17.

⁵³ Unsurprisingly, all Member States transposed it 'effectively', as found by Milieu Study 2016, p. 42.

raise any concerns. Even if Article 6(4) on the recognition and enforcement in another Member States has been transposed explicitly only by four countries,⁵⁴ the 2013/2016 study is right to note that the European regulations concerned (referred to in recital 20 of the directive) are directly applicable,⁵⁵ so no harm is done.

Improving the free circulation of mediation agreements across the EU was also discussed at the Mediation Directive workshop in the European Parliament in November 2016, with special attention given to the work currently undertaken by UNCITRAL (the United Nations Commission on International Trade Law).⁵⁶ An alternative option of creating a new legal instrument - an EU Mediation Settlement Certificate that would not depend on the enforcement procedures as mentioned only in general terms in the Mediation Directive - would certainly require additional standards to be set with regard to the form and content of the mediation process. It is rather unlikely that this would find support among Member States at this point.

4.4 Is confidentiality guaranteed?

Article 7 of the directive obliges Member States to ensure that neither mediators nor persons involved in the administrative side of mediation shall be compelled to provide in other proceedings (judicial or not, civil or commercial) any information gained during mediation, unless all parties agree or it is overridden by considerations of public policy (such as a child's interest or integrity of another person).⁵⁷ All EU Member States have these rules in place.

It is important to note that this is a minimum harmonisation provision, as the second paragraph allows stricter provisions on confidentiality in national laws. Three specific examples for that are provided in the 2013/2016 study:⁵⁸

- Cyprus, where the confidentiality obligation for the mediator lasts longer than his/her mandate (a legitimate question to ask is whether it is not obvious);
- Malta, where the confidentiality also covers information whether or not an agreement was reached (the usefulness of this restriction could be questioned);
- Latvia, where confidentiality also extends to criminal and other proceedings (that are not covered by the Mediation Directive).

⁵⁴ France, Cyprus, Malta and Portugal.

⁵⁵ Regulation No. 44/2001 and Regulation No. 2201/2003; see also Milieu Study 2016, p. 42.

⁵⁶ For details see *Mediation and private international law*, in the [compilation](#) of papers prepared for that workshop.

⁵⁷ Additional point also deals with the disclosure necessary to implement or enforce the reached agreements, but that is rather an obvious procedural issue.

⁵⁸ Milieu Study 2016, p. 44.

Whereas the need to restrict the third parties' possible use of information obtained during the mediation process seem to be largely accepted (with only small differences in the implementation of this provision by Member States), it is not at all obvious with regard to the parties themselves. While the Mediation Directive does not address this issue, the 2013/2016 study makes a reference to the Greek example (where the parties have to specifically agree to keep the content of the agreement confidential),⁵⁹ and at least one participant in the public consultation held in late 2015 by the European Commission suggested that the provisions of Article 7(1) should be extended to cover all those involved in a mediation process.

The directive itself does not mention any other specific element of confidentiality (apart from the mediator or administrative persons not providing information in other proceedings). Nevertheless, the majority of Member States have explicitly regulated that confidentiality of mediation holds *per se* (and not necessarily in relation to other legal actions). The example of Luxembourg, where the breach of professional secret can lead to jail or a significant fine,⁶⁰ of course falls under the area of material criminal law, so it is difficult to imagine that any revision of the Mediation Directive would propose to extend such a solution throughout the EU.

It is also worth noting that the very last point of the European Code of Conduct for Mediators (considered in point 5.1. below) states that the mediator must keep confidential all information related to the mediation, 'including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it'. The other part of this point deals with the obligation of the mediator *vis-à-vis* the other party, namely that 'any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law'. The Mediation Directive - limited as it is - does not contain any provisions to guarantee such an effect, although it would be difficult to imagine a trustworthy mediator not following such a rule in practice (which might be considered as a quality-related issue - see next chapter).

According to the EC report, some stakeholders regret that mediators do not have exactly the same status as lawyers with regard to confidentiality (which is understood more as a right than as an obligation, it seems). Just as in the case of its compulsory character, or automatic enforceability, introducing more similarity of mediation with judicial proceedings could potentially be in conflict with its voluntary and subsidiary nature.

⁵⁹ Milieu Study 2016, p. 43.

⁶⁰ *Idem*, p. 63.

5 Quality service

As already mentioned above, the Mediation Directive does not set any specific requirements for the functioning of the mediation processes, and the parties are left the liberty to organise it as they wish. In the view of the stakeholders, 'the flexibility of the directive allowed mediation processes to be adapted to the national situations'.⁶¹

At the same time, the success of each mediation might depend, not only on the willingness of the parties to find a mutually acceptable solution to their dispute, but also on the context in which the mediator provides his or her services, including possible rules of conduct or other quality control mechanisms, training, and information provided to the general public. This chapter looks at the implementation of these elements, as set by the directive, with a short assessment also shown in the annexed table.

5.1 Rules of conduct and other measures

Article 4 of the Mediation Directive, on ensuring the quality of mediation, is quite clear in the sense that it mentions the voluntary codes of conduct simply as an example of a quality control mechanism. The Member States are obliged to encourage, 'by any means which they consider appropriate', the development and adherence of mediators and/or relevant organisations to such codes, while all the quality control mechanisms are supposed to be 'effective'.

In addition to the explanation provided in recital 16 as to the relation between these mechanisms and the necessary mutual trust regarding the procedural rules described in chapter 4, further quality-related intentions are given in recital 17. This states that the mechanisms 'should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way'.

This combination led to the establishment of two interlinked mechanisms in a majority of EU Member States: the registration or accreditation procedures, and the codes of conduct themselves. Taking into account their shared objectives, it would make sense to consider them jointly.

The most basic instrument of ensuring the necessary level of services is a formal procedure of granting authorisation to provide them. In as many as 19 Member States, obligatory accreditation procedures exist for mediators, with specific requirements such as full legal capacity, as well as minimum age and an appropriate state of health. The EC report also confirmed that most EU countries

⁶¹ Milieu Study 2016, pp. V and 49.

have introduced registries for mediators, and that in those Member States where national authorities do not manage either accreditation procedures or registries as such, it was the mediation organisations that arranged for them. Without making attempts to list or compare the individual solutions, the European Commission considered that there 'currently exists a great variety of quality control mechanisms in the EU'. As already mentioned above (see part 2.2. on definitions), national systems also vary considerably with regard to whether or not judges can be mediators.

The last element is illustrative of the general argument as to mediation being, or not, a potential substitute for traditional, judicial proceedings. The directive is explicit in that it does not cover the attempts made by the court to settle the dispute, while the references to flexibility of the process, and autonomy of the parties, indicate the positive value in a certain openness of extra-judicial attempts made to reach agreement. At the same time, the minimum standards for the mediator are summed up in two characteristics: impartiality and competence. In procedural terms, mediation is conducted differently in various Member States, especially with regard to the balance between oral and written procedures, the presence of lawyers, provision of information, and other matters.⁶²

In practice, the most popular way to bring together a number of indications or objectives within a procedure that is not fully regulated by the law is indeed to establish a code of conduct, and then choose the best way to make it effective (also as a tool of quality control).

In accordance with Article 4(1) of the Mediation Directive, Member States are obliged to encourage the voluntary codes of conduct by any means considered appropriate. In view of that large margin of sovereign freedom, a significant number of EU countries (19)⁶³ actually introduced legal obligations to this effect (in order for voluntary codes to exist), and the remaining ones cannot be considered as not having implemented this provision. Moreover, in eight Member States (Belgium, Bulgaria, Cyprus, Greece, Italy, Netherlands, Spain and UK), the adherence to codes of conduct is at least in some cases mandatory. As rightly concluded by the 2013/2016 study, in that area these countries went beyond the requirements of the directive.⁶⁴ In fact, the use of the word 'voluntary' in this context is the best demonstration of the minimum harmonisation character of the Mediation Directive.

⁶² For details, see Milieu Study 2016, p. 49-51.

⁶³ Belgium, Bulgaria, Ireland, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Malta, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden.

⁶⁴ Milieu Study 2016, p. 57.

In a legitimate attempt to assure some similarity in the way in which mediation is conducted throughout the EU, the European Commission helped to prepare a European Code of Conduct for Mediators,⁶⁵ already in July 2004, with the participation of various stakeholders from all over Europe. This document, which was only revised once (in 2009, without changes in substance) after the adoption of the Mediation Directive, sets out detailed suggestions in such matters as independence, impartiality, competence and appointment of the mediator, the appropriate manner in which to start, conduct and terminate the process, as well as confidentiality (mentioned above under point 4.4.) and fees.

Within the Mediation Directive, recital 17 declared that 'mediators should be made aware of the existence of the European Code of Conduct for Mediators' and reference to it is explicitly made in some Member States (either in law or in reported practice).⁶⁶ The list of organisations complying with that code is maintained by the European Commission.⁶⁷ Its use - among the establishment of national codes - led the EC report to conclude that 'with regard to codes of conduct, the implementation of the [Mediation] Directive is overall satisfactory'.⁶⁸

The EC report also presented opposing views with regard to developing EU standards for mediation, with a reported large number of individual respondents being in favour, and no support from others or the Member States. It should also be noted, however, that for the consumer disputes, the European Commission's recommendation on minimum quality criteria for mediation (or similar processes) in consumer disputes,⁶⁹ referred to in recital 18 of the directive, was effectively replaced by the ADR Directive (with the addition of the ODR Regulation) adopted in 2013. Without undermining the justified differences in mediation in other areas, the reported argument that 'uniformity would restrict consumer choice and lead to disputes'⁷⁰ is difficult to comprehend.

The European Commission proposed to advance stakeholder-driven development of EU standards in mediation through EU standardisation, but any proper harmonisation of this aspect of civil law might depend more on the success of consumer ADR, possibly leading to new legislative proposals in the future.

⁶⁵ Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

⁶⁶ Milieu Study 2016, p. 58.

⁶⁷ Available at http://ec.europa.eu/civiljustice/adr/adr_ec_list_org_en.pdf

⁶⁸ COM(2016) 542 final, p. 5.

⁶⁹ Recommendation 2001/310 - OJ L 109, 19 April 2001, p. 56.

⁷⁰ COM(2016) 542 final, p. 6.

5.2 Training of mediators

Success in the use of any procedure, but certainly that of solving a legal dispute, depends to a significant extent on the skills of the persons applying it. Especially in order to reach the objective of competence set out in any code of conduct, training of mediators is essential, and as such was reflected in recital 16 of the Mediation Directive. Accordingly, Article 4(2) obliged Member States to encourage the initial and further training of mediators 'in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties' - repeating the objectives listed earlier for all quality control mechanisms.

As many as 17 Member States covered training of mediators by national legislation, with some countries going as far as withdrawing mediator's accreditation in case of failure to attend further training,⁷¹ while in others it is organised in a voluntary way. As the formulation 'by any means appropriate' applies as much to training as to other quality control mechanisms, there is no benchmark against which to claim that some of EU countries have not fulfilled their obligation. This resulted also in a significant divergence of the scope of mediators' training throughout the European Union.⁷²

The European Parliament addressed this issue already in its 2011 resolution, by acknowledging 'the importance of establishing common standards for accessing the profession of mediator in order to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the Union'.⁷³ But, apart from the 'proper training and continuous updating of their education and practice in mediation skills' mentioned in the European Code of Conduct for Mediators, no such standards exist yet. An exception could be identified in the field of family law, where specific training results in being listed as specialist in cross-border family conflicts, especially in view of possible child abductions,⁷⁴ but this network has a (useful) global reach, not limited to the EU.

The European Commission additionally reported on its *Justice Programme*,⁷⁵ which co-finances training for judges and mediation practitioners. The Mediation Directive became a priority act for correct implementation in that project's work programme for 2016.⁷⁶

⁷¹ Austria - Milieu Study 2016, p. 54.

⁷² A few specific examples were provided in the Milieu Study 2016, pp. 55-56.

⁷³ P7_TA(2011)0361, point 20.

⁷⁴ See <http://www.crossbordermediator.eu/>

⁷⁵ http://ec.europa.eu/justice/grants1/programmes-2014-2020/justice/index_en.htm

⁷⁶ The order of priority concerned the budget line on Facilitating and supporting judicial cooperation in civil and criminal matters (33 03 02).

5.3 Information for citizens and business

In parallel with the need for training that would ensure adequate competences of mediators, the Mediation Directive also addressed the issue of providing information to the public - that is, the potential parties that could use mediation. Article 9 obliged Member States to encourage public availability of information on how to contact mediators and organisations providing mediation services. As in the case of training and quality control mechanisms, the accompanying formulation of 'by any means which they consider appropriate', left it open for national authorities to decide how exactly this awareness-raising should be achieved, indicating only that it should in particular take place on the internet.

Having looked at specific activities in all countries, the 2013/2016 study concluded that, especially in those Member States where the transposition of the Mediation Directive meant important changes in existing rules and practices, a variety of measures had been adopted to inform citizens and businesses about mediation. In accordance with the already acknowledged differences between European legal systems, these measures also differed significantly and were found to 'depend mostly on the national budget allocated for this purpose'.⁷⁷ The obligation to spread information was included in national legislation by only 13 Member States - that is less than half.⁷⁸ In addition to the activities of the relevant authorities, information on the advantages of mediation and practical information was and is being provided in all Member States by mediators and/or legal associations. Examples of conferences, public campaigns, and other ways of raising public awareness about mediation show that many different means can serve this purpose.

In its 2011 resolution, the European Parliament called for further action relating to education, growing awareness of mediation and enhancing mediation uptake by businesses.⁷⁹ With regard to this last point, a special note prepared at the time by *Eurochambers* identified a huge potential for mediation that was blocked by lack of awareness among lawyers and corporations.⁸⁰ It also envisaged that a couple of years would be needed for the trends in business approach to mediation to emerge. The Polish Mediation Centre of the Financial Supervisory Authority,⁸¹ with an increasing number of cases solved through mediation, is just one example proving that this expectation was correct.

⁷⁷ Milieu Study 2016, p. 61.

⁷⁸ COM(2016) 542, p. 10.

⁷⁹ P7_TA(2011)0361, point 18.

⁸⁰ Lessons learnt from the implementation of the EU Mediation Directive: the business perspective, DG IPOL, Policy Department C, European Parliament, PE 453.173, p. 4.

⁸¹ http://www.knf.gov.pl/regulacje/Sad_Polubowny/

The European Parliament also suggested that national authorities should develop programmes promoting adequate knowledge of alternative dispute resolution among lawyers, notaries and businesses (in particular SMEs) and academics, focusing on the main advantages of mediation in terms of costs, success rates and time efficiency. In fact, recital 25 of the Mediation Directive instructed Member States to encourage legal practitioners to inform their clients of the possibility of mediation, and some Member States⁸² transposed this into national law. The 2013/2016 study considered such rules to go beyond the requirements of the directive⁸³ and described them together with examples of legal provisions concerning mediation suggested by the courts, which is a matter covered separately by Article 5 of the directive (see point 4.1. above).

More specifically, recital 17 of the Mediation Directive called for mediators to be made aware of the existence of the European Code of Conduct (mentioned earlier) and called for it to be made available to the general public on the intranet. It would seem that the European Commission fulfilled this requirement on a pan-European scale with its own website. However, its recent report based on stakeholder consultation expressed a dominant perception that awareness regarding mediation is low, both among legal professionals and the general public.⁸⁴ It could be helpful to develop more specific criteria as to what level of knowledge is considered 'adequate' (the term used in the Parliament's 2011 resolution), and whether the take-up or success rates are equally good indicators of mediation's usefulness in all EU Member States.

Interestingly, the *European e-Justice Portal*, which is managed by the European Commission, also includes detailed information about mediation in all countries (including Denmark), but each language version is updated directly by the national authorities.⁸⁵ Although it usually takes some time to translate the relevant information into other EU languages, all the necessary links are there.

6 Conclusions and future perspectives

Assessing the implementation of the 2008 Mediation Directive needs to take account of its objectives, the scope of regulation, and its transposition and application by the Member States. In view of the directive's deadline for implementation (May 2011), the amount of time that has since passed, should in principle allow for a good overview of its effectiveness throughout the EU.

⁸² Estonia, Ireland, France, Italy, Cyprus, Luxembourg, Finland and the UK (England, Wales and Northern Ireland).

⁸³ Milieu Study 2016, p. 62.

⁸⁴ COM(2016) 542, p. 11.

⁸⁵ https://e-justice.europa.eu/content_mediation_in_member_states-64-en.do

The most important observation that has been made in all studies and reports available until now, is that **in a large number of countries (15)⁸⁶ the direct effect of the Mediation Directive was limited because they already had functioning (albeit often different) extra-judicial disputes resolution systems. A significant improvement**, in the sense of establishing a legal framework for mediation or re-arranging limited rules and practices in place before the directive's adoption, **was thus achieved in the remaining twelve.**⁸⁷ Denmark opted out and is not bound by this EU act, but it does have its own system of unregulated private mediation, as well as authorised court mediation. Interestingly, this distinction in effectiveness escapes the usual north-south or east-west comparisons, and the date of accession to the European Union also seems to have had no significance.

Looking at the real content of the Mediation Directive, it was shown that **there is a very limited number of legal obligations for the Member States, most of which are related** not to the process of mediation itself, but **to the procedural framework** that would facilitate using alternative dispute resolution for the parties of a dispute.

In addition to the simple definitions of mediation and mediator, which did not raise any problems in national laws and different practices, **the directive has harmonised minimum guarantees for enforcement of agreements reached through mediation** (that is when all parties agree), **basic confidentiality principles** (only covering the mediator and his/her administrative staff), **and stopping limitation and prescription periods from expiring**. These provisions have been implemented by all EU Member States, with only a few minor differences.

An important factor in making mediation a real success story is its **quality**. The directive has addressed this issue through:

- the encouragement of voluntary codes of conduct (and other quality control mechanisms);
- initial and further training of mediators (which in some Member States is dealt with within the framework of accreditation and registration);
- provision of information (especially for the general public).

Because each of these three elements was accompanied by a standard qualification, 'by any means they [Member States] consider appropriate', and the directive also left the details to national legislators, **there is currently a multitude of solutions in the European Union, involving both legal provisions and self-regulatory practices**. The European Code of Conduct for Mediators, established

⁸⁶ Belgium, Bulgaria, France, Croatia, Lithuania, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, and parts of the UK (England, Scotland and Wales).

⁸⁷ Czech Republic, Germany, Estonia, Ireland, Greece, Spain, Italy, Cyprus, Latvia, Luxembourg, Malta and Sweden.

even before the adoption of the Mediation Directive, and other coordination efforts undertaken by the European Commission (especially through the European Judicial Network and provision of information on the internet), contribute to a certain extent to some alignment of mediation processes in the EU.

Had the application of the Mediation Directive been restricted only to cross-border cases (in accordance with its formal scope due to the legal basis), much of this harmonisation, encouragement and alignment would have probably not taken place. Fortunately, **almost all Member States decided to apply its provisions** (as limited as they may be) **also to domestic disputes**. For comparison, both cross-border and domestic consumer disputes were more recently covered by the ADR Directive and ODR Regulation, which regulate in a more detailed way how to ensure an efficient, impartial and competent assistance for interested parties in reaching an agreement instead of going to court. Although it was based on a different legal basis (related to the internal market), **the implementation of the ADR/ODR package could probably affect any future modification of mediation in general**.

Apart from addressing the procedural and quality-related matters, the Mediation Directive has had to cover, of course, the very basic element of inviting the parties to use mediation, before or after the start of judicial proceedings. Thanks in part to the explicit condition that any national legislation on compulsory mediation - or specific incentives or sanctions - will not be affected, **the directive made the smallest intrusion possible into the realm of the judicial world**, suggesting simply that the court 'may' invite the parties to either use mediation, or at least attend information sessions. **Member States have implemented these provisions in various ways, including some limited areas** (often in family law) **where the use of mediation is mandatory**. Such examples, in addition to the potential in savings of litigation costs, led some experts to propose a Europeanisation of obligatory mediation, but this idea has very limited support among EU Member States. Extending the obligation to inform parties about mediation possibilities is more likely to be supported, especially in view of the positive results that it brings.

Overall, **the Mediation Directive deserves to be credited for the promotion of amicable settlement of disputes, especially in those countries which did not have mediation regulated before. Its objective has thus, at least partially, been reached**. Assessing whether the balance between mediation and judicial proceedings has been ensured, and whether the legal framework in all Member States is sufficiently predictable, depends not only on the detailed rules and

figures that are different in each jurisdiction, but also on the expected point of that balance and level of that predictability, and these were not defined.

Looking at mediation in the broader context of possible harmonisation and/or unification of civil procedure in the EU, **an appropriate balance would also need to be found between the requirements of the internal market and increasing mutual trust on the one hand** (the Mediation Directive being adopted on the legal basis still maintaining the former link, while contributing to the latter not only in cross-border cases), **and the need to respect Member States' national identities on the other.**⁸⁸

Further promotion of the use of mediation in the EU and facilitation of access to alternative dispute resolution in each Member State, should in any case maintain their essential character, which is that **their success relies on a voluntary engagement of parties and their will to accept the compromise agreement reached with the assistance of a third party.** Continuous exchange of best practices and results between the relevant national authorities, legal practitioners and other stakeholders, does not exclude a useful revision of the Mediation Directive, if a convincing argument to extend or deepen its limited scope and content is made.

⁸⁸ [Europeanisation of civil procedure](#), PE 559.499, p. 8.

7 Table: State of play on the implementation of the Mediation Directive by Member States⁸⁹

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Austria	Para 1: obligations in national legislation, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled	Ensured. No exceptions in national law	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Belgium	Para 1: obligations in national legislation and mandatory adherence, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled	Ensured In judicial mediation, not all parties have to agree to the request	Ensured	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Bulgaria	Para 1: obligations in national legislation and mandatory adherence, plus accreditation procedure Para 2: mandatory initial training	Para 1: fulfilled Para 2: financial incentive for mediation during suspended court proceedings	Ensured	Ensured (including exceptions)	Ensured	Obligation for mediators themselves Information provided on-line Dissemination by mediators / legal professionals

⁸⁹ Based on Milieu Study 2016 and other sources.

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Croatia	Para 1: no legal obligations, plus accreditation procedure Para 2: mandatory initial and (in a limited way) further training	Para 1: fulfilled, with information sessions Para 2: mediation compulsory in family matters; plus financial incentives	Ensured	Ensured (including exceptions)	Ensured	Obligation under national law (excluding family law) Information provided on-line Dissemination by mediators / legal professionals
Cyprus	Para 1: obligations in national legislation and mandatory adherence, plus accreditation procedure Para 2: mandatory initial and (in a limited way) further training	Para 1: fulfilled, with information sessions	Ensured	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Czech Republic	Para 1: No legal obligations; code published by the Bar Association; obligatory accreditation procedure Para 2: voluntary training possible before Bar examination	Para 1: fulfilled, with possible obligatory information sessions Para 2: financial incentive for mediation during suspended court proceedings	Ensured. Not all parties have to agree to the request; No exceptions in national law	Ensured (for mediators only)	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Denmark ⁹⁰ (not bound by the act)	Obligatory accreditation procedure Mandatory initial training and requirements in guidelines	Court mediation may be requested by the parties Private mediation is not regulated by law	Ensured	No legal provisions Can be agreed by the parties	Ensured	Information provided on-line Dissemination by mediators / legal professionals

⁹⁰ As the Danish law regulates court mediation, some of its elements will also be included in this analysis for comparison.

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Estonia ⁹¹	Para 1: legal obligation with regard to quality control Para 2: voluntary training possible	Para 1: fulfilled Para 2: financial incentive for mediation during suspended court proceedings	Ensured	Ensured (for future judicial proceedings)	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Finland	Para 1: obligations in national legislation; Mediation Rules set by the Bar Association Para 2: voluntary training possible	Para 1: fulfilled	Ensured	Ensured (but court mediation is open to public), including exceptions.	Ensured	Information provided on-line Dissemination by mediators / legal professionals
France	Para 1: obligations in national legislation; accreditation by mediation organisation Para 2: obligatory in family mediation	Para 1: fulfilled, with information sessions	Ensured	Ensured (for mediators only)	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Germany	Para 1: no specific legal obligations - various codes established by mediation associations; responsibility for quality control given to mediators Para 2: voluntary training possible	Para 1: fulfilled, with information sessions Para 2: compulsory for some matters; plus financial incentive for mediation during suspended court proceedings	Ensured	Ensured (for mediators only)	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Greece ⁹²	Para 1: obligations in national legislation and mandatory adherence, plus accreditation procedure Para 2: mandatory initial and (in a limited way) further training	Para 1: fulfilled	Ensured Not all parties have to agree to the request; No exceptions in national law	Ensured	Ensured	Obligation in national law Information provided on-line Dissemination by mediators / legal professionals

⁹¹ New rules on family mediation in 2016.

⁹² Changes in the Code of Civil Procedure in 2015 (including *compulsory* mediation of over-indebted households).

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Hungary	Para 1: voluntary compliance with the European Code of Conduct, obligatory quality control, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled, with information sessions Para 2: mediation compulsory in child-custody cases; plus financial incentives and some sanctions	Ensured Not all parties have to agree to the request	Ensured	Ensured	Obligation under national law Dissemination by mediators / legal professionals
Ireland ⁹³	Para 1: legal obligation with regard to conduct; accreditation by mediation organisation Para 2: voluntary training possible, with certain compulsory elements	Para 1: fulfilled, with information sessions Para 2: Mediation can be ordered by the judge (for example in personal injury actions)	Ensured	Ensured	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Italy	Para 1: obligations in national legislation and mandatory adherence, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled Para 2: mediation compulsory in some areas until June 2017; plus financial incentive for mediation during suspended court proceedings, and some sanctions	Ensured Not all parties have to agree to the request	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Latvia	Para 1: obligations in national legislation (only for certified mediators) Para 2: mandatory initial and further training (only for certified mediators), voluntary training possible (for others)	Para 1: fulfilled Para 2: financial incentive for mediation during suspended court proceedings	Ensured	Ensured	Ensured	Dissemination by mediators / legal professionals

⁹³ New law in 2015.

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Lithuania ⁹⁴	Para 1: obligations in national legislation, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled, with information sessions esp. in family matters Para 2: mediation compulsory in some areas; plus financial incentive for mediation during suspended court proceedings	Ensured	Ensured	Ensured	Obligation under national law Dissemination by mediators / legal professionals
Luxembourg	Para 1: mediation associations oblige members to comply with the European Code of Conduct; obligatory accreditation procedure Para 2: mandatory initial training, esp. in family mediation	Para 1: fulfilled, with information sessions esp. in family matters	Ensured	Ensured	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Malta	Para 1: legal obligations with regard to conduct, plus accreditation procedure Para 2: voluntary training possible	Para 1: fulfilled	Ensured	Ensured	Ensured	Information provided on-line Dissemination by mediators / legal professionals
The Netherlands ⁹⁵	Para 1: Obligatory accreditation procedure and mandatory adherence to codes of conduct for court reference Para 2: voluntary training possible	Para 1: fulfilled	Ensured	Ensured (but has to be agreed)	Ensured	Information provided on-line Dissemination by mediators / legal professionals

⁹⁴ New law in 2015.

⁹⁵ New laws in preparation.

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Poland ⁹⁶	Para 1: obligations in national legislation, voluntary code of conduct Para 2: voluntary training possible	Para 1: fulfilled, with information sessions Para 2: financial incentive for mediation during suspended court proceedings, and some sanctions	Ensured Consent for enforceability is inherent in the signature of the agreement	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Portugal	Para 1: obligations in national legislation, plus accreditation procedure Para 2: mandatory initial training	Para 1: fulfilled Para 2: financial incentive for mediation during suspended court proceedings	Ensured	Ensured (including exceptions)	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Romania	Para 1: obligations in national legislation, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled, with information sessions Para 2: financial incentives exist, and some sanctions	Ensured	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Slovakia ⁹⁷	Para 1: obligations in national legislation, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled, with information sessions Para 2: financial incentive for mediation during suspended court proceedings	Ensured Not all parties have to agree to the request	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals

⁹⁶ New rules in place since 1 January 2016.

⁹⁷ New rules in place since 1 January 2016.

Member State	Article 4 Ensuring the quality of mediation Para 1: codes of conduct and control mechanisms <i>encouraged</i> Para 2: training of mediators encouraged	Article 5 Recourse to mediation Para 1: the court <i>may</i> invite the parties to use or be informed about mediation Para 2: national legislation decisive	Article 6 Enforceability of agreements Para 1: <i>obligation</i> to make it possible if parties agree Para 2: who and how - national law decides	Article 7 Confidentiality of mediation Para 1: <i>obligation</i> to respect (with regard to the mediator and administrators) unless parties agree otherwise Para 2: stricter national law possible	Article 8 Effects on limitation and prescription periods <i>Obligation</i> not to prevent judicial proceedings	Article 9 Information for the general public Information to be <i>encouraged</i>
Slovenia	Para 1: obligations in national legislation (for court-annexed mediators), plus accreditation procedure Para 2: mandatory initial and further training (voluntary for out-of-court mediators)	Para 1: fulfilled, with information sessions Para 2: financial incentives exist, and some sanctions. Both elements for court-annexed mediators only	Ensured No exceptions in national law	Ensured	Ensured	Information provided on-line Dissemination by mediators / legal professionals
Spain	Para 1: obligations in national legislation and mandatory adherence, plus accreditation procedure Para 2: mandatory initial and further training	Para 1: fulfilled, with information sessions Para 2: financial incentive for mediation during suspended court proceedings	Ensured	Ensured	Ensured	Obligation under national law Information provided on-line Dissemination by mediators / legal professionals
Sweden	Para 1: legal obligation with regard to conduct Para 2: voluntary training possible	Para 1: fulfilled	Ensured	Ensured (for mediators only)	Ensured	Dissemination by mediators / legal professionals
United Kingdom	Para 1: accreditation by mediation organisations and mandatory adherence to codes of conduct Para 2: compulsory training	Para 1: fulfilled (in Scotland limited to commercial disputes), with information sessions esp. in family matters (England and Wales)	No exceptions in national law (Scotland, England and Wales)	Ensured	Ensured	Information provided on-line Dissemination by mediators / legal professionals

This in-depth analysis, produced by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS), aims to present an updated overview of the state of implementation of Directive 2008/52/EU on certain aspects of mediation in civil and commercial matters. It has been drafted following the publication of the European Commission's report on the application of this directive, and takes into account the recent workshop on the matter, organised on the initiative of the European Parliament's Committee on Legal Affairs in view of the preparation of its implementation report on the directive.

This is a publication of the Ex-Post Impact Assessment Unit
EPRS | European Parliamentary Research Service
European Parliament

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work



PE 593.789
ISBN 978-92-846-0408-1
doi:10.2861/902931
QA-07-16-141-EN-N