

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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



The Implementation of the Mediation Directive 29 November 2016

Compilation of In-depth Analyses



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

LEGAL AFFAIRS

**The Implementation of the Mediation
Directive**

WORKSHOP

29 November 2016

Compilation of In-depth Analyses

Abstract

The workshop, organised by the Policy Department for Citizens' Rights and Constitutional Affairs upon request by the JURI Committee, will provide an opportunity to discuss the state of implementation of the Mediation Directive (2008/52/EC), in the light of the recently published European Commission report on the application of the Directive (COM (2016) 542) and in view of the European Parliament's Implementation Report. The papers included in this compilation examine the application of the Mediation Directive in the Member States, as well as its relationship with both judicial proceedings and other forms of alternative and online dispute resolution. The papers propose possible avenues to improve the situation, in particular by promoting a better use of mediation and ADR and facilitating the intra-EU recognition of settlements.

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Achieving a Balanced Relationship between Mediation and Judicial Proceedings

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IN-DEPTH ANALYSIS

Abstract

The 2008 EU Directive on Mediation has been a key milestone for all Member States in introducing various national legislation on mediation in civil and commercial matters. However, the goals stated in Article 1 of the Directive, towards encouraging the use of mediation and especially achieving a "balanced relationship between mediation and judicial proceedings" have clearly not been realized. This paper, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs upon request by the JURI Committee, examines this issue in detail. Despite the lack of homogeneous statistics, in almost all of the Member States mediation is used in less than 1% of the cases in court: for 1 mediation, 100 cases go to court. The only exception is the result of the Required Initial Mediation Session model currently used in Italy in a small portion of civil cases which is emerging as a best practice. The EU legislator should consider revising Article 5.2 of the Directive, requiring parties, in certain disputes, to participate at least in an initial mediation session with a trained mediator. This mediation attempt should be fast and inexpensive. As an alternative, the EU should require the Member States to use the current version of Article 5.2 to a fuller extent, taking into consideration the type of dispute.

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ADR	Alternative Dispute Resolution
EC	European Commission
EU	European Union

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EXECUTIVE SUMMARY

Mediation relieves overburdened courts and enhances citizens' access to justice by helping them resolve disputes without the enormous costs and prolonged trials and appeals that characterise court procedures. It has also been shown that the savings across the EU for increasing numbers of mediations would be significant. The main aim of this briefing note is to analyse whether the purpose of the 2008 Directive on Mediation as stated in Article 1 has been achieved, i.e., "a balanced relationship between mediation and judicial proceedings".

As the starting point of our analysis, we believe that there is a clear need to first describe the main legislative models used by the Member States in implementing the Mediation Directive. For example, national legislations as well as the public and academic discourse use the general terms "mandatory mediation" and "voluntary mediation" without specifying their different characteristics and applications. Too often, the policy debate on mediation has been focused on the choice of voluntary vs. mandatory models, with only a general knowledge of these two options. In fact, we have identified four distinct mediation models that Member States have used in implementing the Directive: Full Voluntary Mediation; Voluntary Mediation with Incentives and Sanctions; Required Initial Mediation Session; and Full Mandatory Mediation. These four models have been applied differently throughout the EU, in different types of disputes. An analysis of the four models described above, based on their actual effects in reaching the Mediation Directive's main goals, shows that the Required Initial Mediation Session combines the most effective elements of both the voluntary and the mandatory models.

In order to measure the effectiveness of the different mediation models, two indexes should be taken into consideration: the numbers of mediations in relation to the number of cases in court and the mediation success rate. Following this methodology, the aim of the authors is to both measure and visualize – in a scientific and statistically sound way – how far most Member States are from achieving the balanced relationship between mediation and court proceedings and, at the same time, provide a methodology for mediation researchers when more data is available. At the present time, only Italy has official data on mediations. With the few data available, a first tentative attempt to apply the two above-mentioned indexes has also been proposed for Romania and Greece. Using the proposed methodology, further analysis is necessary to cover the remaining EU Member States in order to measure with accuracy the achievement of the goal of the Directive in each Member State.

There is no doubt that the 2008 Mediation Directive has been a major milestone in the European mediation movement. There is also no doubt, however, on the basis of the methodology proposed, that the key goals of the Directive remain far from being achieved. Indeed, the intention behind the Directive was to encourage more people and businesses to use mediation and to establish a balanced relationship between mediation and judicial proceedings. Eight and a half years after the adoption of the Directive, as all available statistics confirm, in the majority of the Member States mediation is on average still used in less than 1% of the cases in court: 1 mediation for each 100 cases in court. The only exception is the result of the Required Initial Mediation Session used in Italy in a small portion of civil cases, which is emerging as a best practice.

There appear to be two main options to reach a balanced relationship between mediation and judicial proceedings.

- The first and most effective of these options would be to strengthen Article 5(2) of the Directive by requiring, not just allowing to require, the parties to go through an initial mediation session with a mediator before a dispute can be filed with the courts in all new civil and commercial cases, including certain family and labour disputes where the parties' rights are fully disposable. This has been shown to have a significant impact in achieving a balanced relationship between mediation and judicial proceedings. The CJEU's *Alassini*¹ case establishes clear guidelines for required elements in ADR at the EU level.

A proposed rewrite of article 5(2) could read as follows:

"Member States shall ensure that a mediation session is integrated into the judicial process for civil and commercial cases, except for such cases as Member States shall determine are not suitable for mediation. The minimum requirements for such a mediation session are that the parties must meet together with a mediator, subject to the condition that the procedure shall be non-binding and swift, suspend the period for time-barring of claims, and be free of charge or of limited cost if any party decides to opt out at the initial session."

- As an alternative, the EU should press all Member States to use the current version of Article 5(2) to a greater extent.
In particular, in its implementation resolution, the Parliament should consider asking that the Commission send a letter to each EU Government asking them (a) to measure the balanced relationship using the indexes proposed in this briefing note and (b) to explore the reasons for the failure to achieve the balanced relationship, which is the objective of the Mediation Directive.
Failure to respond and to achieve the balanced relationship could lead to the evaluation of an infraction procedure for failing to comply with the Directive.

In December 2014, in her message for the EUROCHAMBRES' conference "Mediation for Growth", Commissioner Jourová defined as "impressive" the results of the study on "Rebooting the mediation directive" produced for the European Parliament. In particular, she focused on the striking difference, in average cost and time, between mediation and litigation. The indications are that further in-depth economic research will show that achieving a balanced relationship between mediation and court proceedings could save billions of euros and millions of days of unnecessary litigation, every year.

The proposals presented in this briefing note appear in line with those of the experts' report produced for the Commission. This apparent consensus, and the extraordinary potential of requiring reasonable efforts at mediation, point to the need for the EU institutions to act on these recommendations, and to make the Member States act. If they do so, one year from now, the EU could start counting, and celebrating, the social and financial benefits of a greater use of mediation.

¹ On 18 March 2010, in the joined cases of *Rosalba Alassini and Others* (C-317/08 and C-320/08) the ECJ found that the Italian requirement to undertake ADR before court proceedings was a legitimate objective of Italian law, and that it was in the general interest, for parties to pursue less expensive methods of dispute resolution and to reduce the burden on the court system.

1. INTRODUCTION

1.1. Context

On 21 May 2008, the European Parliament and the Council approved Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.² The main goal of the Directive was to encourage the use of mediation by “ensuring a balanced relationship between mediation and judicial proceedings” as stated in Article 1. The application of the Directive was limited to cross-border civil and commercial disputes, including under EU law, family and labour disputes.

All Member States transposed the Directive into national laws by 21 May 2011. Although the Directive contains few compulsory rules, which all Member States complied with, many took further actions to promote mediation and all but three of them also applied the Directive to domestic disputes. The national laws on mediation enacted in the Member States vary greatly in the use of different models, in legal provisions, and above all, in final results with respect to the number of mediations generated.³

Eight years after the approval of the Directive and five years after its transposition into national law, the Committee on Legal Affairs of the European Parliament (JURI) has asked for an analysis to determine which national mediation model – among the many existing ones – is working most effectively towards the achievement of the real goal of the Directive, that is, increasing the number of EU people and businesses using mediation.

1.2. Objectives

Given the context above, this briefing note addresses the following objectives:

1. Describe how the Mediation Directive is applied in practice;
2. Analyse the relationship between mediation and court proceedings;
3. Examine the potential advantages and disadvantages of the adoption of any given scheme to promote mediation;
4. Determine what a balanced relationship between mediation and court proceedings would be;
5. Identify best practices that have been used in the Member States to ensure that such a balanced relationship is achieved.

The final goal of this briefing note is to contribute to the discussion on the review of the Directive, as provided by its article 11.⁴

1.3. Methodology

In order to achieve the abovementioned objectives and propose some recommendations, the following step-by-step methodology has been adopted in this briefing note:

1. Classify the principal mediation models adopted by the Member States;
2. Propose two indexes to measure the balanced relationship between mediation and judicial proceedings;

² 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

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>

³ Study for an evaluation and implementation of Directive 2008/52/EC – the Mediation Directive, European Commission – Updated version 16/3/2016.

⁴ Article 11 – Review. Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

3. Apply the formula to the models used in several Member States where statistics are available and identify best practices and ineffective ones;
4. Illustrate the general status of the Mediation Directive eight years after its approval;
5. Draw conclusions and propose recommendations.

2.A PROPOSED CLASSIFICATION: FOUR MEDIATION MODELS USED IN IMPLEMENTING THE DIRECTIVE

KEY FINDINGS

- In the application of the Directive, four different models of mediation appear to exist: Voluntary Mediation; Voluntary Mediation with Incentives and Sanctions; Required Initial Mediation Meeting; and Full Mandatory Mediation.
- These four models have been applied differently throughout the EU, in different types of disputes.
- From an analysis of the four models, it has emerged that the Required Initial Mediation Session combines the most effective elements of both the voluntary and the mandatory models.

As the starting point of this briefing note, we believe that there is a clear need to identify the main legislative models used by the Member States in implementing the Mediation Directive. For example, both in legislation and common legal jargon, the general terms “mandatory mediation” and “voluntary mediation” are used without specifying their characteristics and applications. Too often, the policy debate on mediation has been focused on the choice of voluntary vs. mandatory models with only a general knowledge of the two.

In fact, we have identified four distinct mediation models that Member States have used in implementing the Directive. The goal of such a taxonomy is to identify both best and ineffective practices that emerged after the implementation of the Directive. The four models are:

1. **Full Voluntary Mediation:** the parties can engage a mediator to facilitate the resolution of any dispute that they have not been able to settle by themselves. In this case, a mediation legal framework is not even required.
2. **Voluntary Mediation with Incentives and Sanctions:** the parties are encouraged to have recourse to mediation, thus fostering the practice. This model requires a mediation law in place.
3. **Required Initial Mediation Session:** the parties are required to attend an initial meeting with a mediator, free or at a moderate fee, to establish the suitability of mediation. This model, too, requires a mediation legal framework.
4. **Full Mandatory Mediation:** the parties must attend and pay for a full mediation procedure as a prerequisite to going to court. The mandatory aspect applies only to attending the full procedure, while the decision to reach a settlement is always voluntary.

2.1. Full Voluntary Mediation

The voluntary mediation model is typically a bottom-up approach, based essentially on litigants *spontaneously* agreeing to mediate disputes. In this model, parties agree, on their own, when a dispute has arisen, to resort to mediation as a method of resolving their dispute. The advantages of voluntary mediation are clear, because when parties are amenable to begin a mediation, the process is more likely to be successful. The major disadvantage of the voluntary mediation model is obvious: both parties must agree to start a mediation, and oftentimes during a dispute, one or both of the parties may not be willing to attempt anything at all to find an amicable solution, including resorting to mediation.

Furthermore, data has shown that voluntary mediation does not generate a meaningful number of mediations, neither does it appear to contribute significantly to creating a culture of mediation.⁵ Although a voluntary mediation model may result in a very high success rate, the number of mediations is extremely low. Much of this, as noted, can be attributed to the difficulty of getting both parties and their attorneys to agree to start mediation. The social dynamics at play in a dispute that has escalated to litigation are not naturally conducive to mediation. When a dispute arises, litigants and their lawyers are frequently concentrating on legal posturing and do not often take the opportunity for everyone to meet together and discuss the pros and cons of starting a mediation with a neutral third party. In a fully voluntary system, the parties need to opt in by signing a contractual agreement to start a mediation case. They also need to cooperate to select a mediator and pay his or her fees without the guarantee that the dispute will be resolved. Further, it is usual for the defendant not to have any motivation to resolve the dispute at the beginning and, following human nature in reaction to a heated dispute, he or she may tend either to fight back or to opt for flight. Without guidance or substantial encouragement, it is not at all surprising that disputing parties rarely resort to mediation.

This model, where litigants can voluntarily agree to pay a third-party neutral mediator to try to resolve their disputes, was in place in the majority of the Member States before the 2008 Mediation Directive. Clearly, there is no need of a detailed legal framework to use this mediation model, based on the fundamental principle of freedom of contract.

2.2. Voluntary Mediation with Incentives and Sanctions

Since the 2008 Mediation Directive, the majority of Member States have adopted the voluntary mediation model with the addition of various benefits and sanctions in order to incentivize parties to resort to mediation. Without being exhaustive, the main incentives and sanctions adopted are the following.

Incentives. These benefits are often in the form of financial incentives for the parties coming to an agreement after mediation, such as reimbursement of court fees in Slovakia and Estonia, or the refund of a stamp duty as in Bulgaria and Latvia.⁶ Other fiscal advantages adopted have been tax credits for the mediation fees paid, for instance in Italy up to € 500. Many Member States also allow for legal aid to be applied to mediations.

Another incentive adopted is the recognition of the mediation agreement as an enforceable title, either after a fast-track authorization by the competent judicial authority or automatically – as in Italy – with just the signature of the two lawyers and the mediator.

Sanctions. Several Member States also provide for sanctions for the breach of different mediation obligations, such as an unreasonable refusal to consider mediation, as in Ireland and in Italy, if parties do not fulfil the requirement to attend an initial mediation session and go instead straight to court.⁷

An unreasonable refusal by one party to participate in the introductory session describing the benefits of mediation is sanctioned in the Czech Republic by limiting the costs awarded by the court if it decides in favour of that party. Similar sanctions can be found in Slovenia. In Romania, the sanction used for non-compliance with mandatory information sessions

⁵ “Rebooting” the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU”, page 163.

⁶ Study for an Evaluation and Implementation of Directive 2008/52/EC, the “Mediation Directive”.

⁷ *Ibid.*

regarding mediation benefits is the inadmissibility of the court case. In Hungary and the United Kingdom, before filing a court case, the parties must show that they have tried to settle the dispute – directly, or with the assistance of a mediator - and party that fails to bring proof of such efforts may bear the court fees of the other party, regardless of who wins in the litigation process.

2.3. Required Initial Mediation Session

This model stands somewhere between voluntary mediation and full mandatory mediation: it combines the advantages of both the mandatory and voluntary models while minimizing the burdens. Italy adopted this model on 20 September 2013 as a “pilot law project” (the law will sunset on 21 September 2017 if not renewed before then). In about 8% of all civil and commercial cases, litigants will not have direct access to the Italian courts if they cannot prove that they have attended an initial mediation meeting.⁸ While there may be many variations, a system requiring such a mediation session includes ensuring the following three key elements:

1. The effective beginning of a mediation procedure by requiring an initial mediation session with a mediator, at a very low cost, with possible sanctions in the subsequent court proceedings if a party does not attend this initial session in good faith;
2. The quality of the procedure by having the initial mediation session administered by a professional mediator and/or a dedicated mediation service provider; and
3. The possibility of easily declining to proceed with the mediation process at the end of the initial session without any subsequent sanctions or other negative consequences at trial.

Element 1: Ensuring the effective beginning of the mediation procedure by requiring an initial mediation session. A required initial mediation information session with a mediator is the key element of this mediation model. Whether required by law as a pre-filing requirement or ordered by a judge in a pending case, this session is a unique opportunity for the parties and their legal counsels to meet with a professional mediator in a neutral place and learn about the mediation process if they are not familiar with it, talk about the actual dispute and explore opportunities of whose existence the parties and their legal representatives may not be aware. Often, the conflict has escalated into a legal dispute because the parties and their lawyers have never taken the opportunity to start discussing the true merits of the case, let alone in a neutral environment.

At this initial session, the mediator clarifies the function of and the process for conducting the mediation and asks the parties and their lawyers to comment on the possibility of continuing with a mediation effort in the dispute at hand. If the parties are amenable, mediation can often start right away. If the parties, however, decide not to proceed with mediation, they may decline to go on with the procedure and will have fulfilled the requirements of the law or the judge’s order.

The first session is extremely important in that it helps to resolve two of the main barriers inherent in the voluntary mediation model. The first is the natural human-reaction paradigm in a heated dispute—the fight or flight response. When suing, or being sued, the immediate,

⁸ Under Italian law, the requirement to have at least one initial mediation session before litigants can access the court systems applies in selected kind of disputes, such as banking and insurance contracts, real estate and other types of disputes specified in the law. Over the last few years, the total amount of these disputes is around 8% of all civil cases started each year.

natural instinct of parties is typically not to mediate and try to achieve consensus but rather to fight and take the dispute to court. The second main barrier is the location of the parties. Unless parties are physically in the same place, as they are in an initial mediation session, the difficulty for a mediator to secure the signatures of all parties to a mediation agreement often precludes mediation altogether. For these reasons, it is very important that this initial session be held in person.

To avoid concerns about access to justice, the initial mediation session should be held within a reasonably brief period of time—for example, 60 days or less from the submission of a request from a party—and its cost should either be covered by the State (and consequently free for the parties) or be set at a minimal fee.

The requirement of an initial mediation session should come with meaningful consequences for parties failing to participate. This may be in the form of a fine established in the law/regulations or set by the referring judge. The fine should be meaningful in relation to the size of the conflict to discourage parties from ignoring the requirement. Other potential consequences could be procedural determinations that work against the non-compliant party, such as reduced or extended time frames, without violating basic rights. It is important that the consequences bear a reasonable relationship to the nature of the breach and that neither party is denied access to justice through heavy penalties. Unduly heavy consequences could severely damage confidence in the mediation process and undermine its inherently voluntary nature.

Element 2: Ensuring the quality of the procedure by having the initial mediation session administered by a professional mediator and/or a dedicated mediation service provider. The requirement of meeting with a certified professional mediator is critical to this process. Some Member State systems require an information meeting where the parties may be advised about mediation and its benefits but which is not conducted by an experienced mediator. Court clerks or other civil servants sometimes function as a mediation counsellor in these sessions. This kind of meeting may be useful to the parties in an informational sense but it lacks the benefit of the skills of an experienced mediator in identifying typical communication obstacles and potential dispute resolution strategies and tactics.

A professional mediator is able to assuage the initial, natural tendency to refuse mediation, and to provide reassurance to the parties that mediation is not only a faster method of resolving the dispute, but that proceeding with mediation will also be beneficial to them. The same results will not be achieved if the parties are required only to state that they tried to solve the dispute themselves or if the parties are required only to meet with a mediation counsellor or if at the session, the attorneys are present but the parties themselves are not. These sessions should be conducted by a certified, professional mediator who has met the requirements established in the Member State for mediators.

Element 3: Ensuring the possibility of easily declining to proceed with the mediation process at the end of the initial mediation session without any subsequent sanctions or other negative consequences at trial. The third key element is the ability of one or both parties to easily decline to proceed during (but not before) the initial session without the imposition of sanctions. In other words, parties are not required to go through a full mediation process (and pay its full cost); rather, they are obliged only to participate in a session with a qualified mediator. Some legal systems may place a minimum time duration for this session but the sine qua non is the ability of one or both parties to decide, without fear of penalty, at the initial session, not to proceed with a mediation process. Upon

satisfaction of this requirement, the mediator usually issues a certification that the parties have satisfied the requirement of an initial session.

2.4. Full Mandatory Mediation

The terms "mandatory" and "compulsory" have often stoked opposition when applied to mediation because the concept of mandatory mediation seems to contradict a central tenet of the mediation process—that mediation is a voluntary process. Moreover, some cases are inappropriate for mediation and are recognized as such by judges. Those cases are, however, less common than most people imagine.⁹ In this context, it is extremely important to emphasise that a requirement to attend a mediation session is not a requirement to resolve a case through mediation. Reaching a mediation settlement is always on a voluntary basis. The main problem of the full mandatory mediation model is that the parties are obliged to participate in good faith in a full mediation proceeding, and normally to agree to pay mediation fees in full even when it is clear that the dispute will not be resolved.

The main aspect of the top-down mandatory model, imposed either by law or by court order, is that parties are required to attend and participate in a complete mediation process. Self-determination is one of the cornerstones of mediation and many critics of mandatory mediation argue that this model violates that very principle.

Furthermore, critics of the model argue that the full mandatory mediation model may act as an obstacle to justice owing to its lower success rate. This appears to be particularly the case when parties are obliged to attempt mediation even when they have no intention whatsoever to settle their dispute, and yet are required to pay for the costs of mediation. While it could be possible for the State to assume a portion of the cost by paying the mediation fee, this may place a significant burden on the State budget and could have the further disadvantage of lowering the quality of services.

The full mediation model was used in Italy as a prerequisite to access to court for some civil and commercial dispute matters for almost two years – with fierce opposition from the legal community – between the beginning of 2011 and the end of 2012.¹⁰ However, a good example of this model remains in use in Italy for small claims disputes between consumers and telecom operators. These mediations, free for consumers, have been proven to reach a stunning mediation success rate.¹¹

2.5. The Four Mediation Models used in the Member States

With the caveat that deeper analysis is needed and national legislations change rapidly, below is a tentative ordering of the mediation legislations in civil and commercial, family and labour disputes, based on the proposed classifications of the four main models of mediation legislations and in the three main fields of disputes. It is worth noting that most Member States have two or three models in place at the same time, depending on the kind of dispute.

⁹ The classic discussion is Frank E.A. Sander & Stephen B. Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure," 10 *Negotiation Journal* 49 (1994); see also "Fitting the Forum to the Fuss: Factors to Consider When Selecting an ADR Procedure," 12 *Alternatives* 48 (April 1994).

¹⁰ On 21 October 2012, the Italian Constitutional Court declared unconstitutional the full mandatory mediation model, but simply because the mediation requirement was introduced via a governmental decree, not via a parliamentary statute. Hence, the court did not address the issue of whether or not the full mandatory mediation model, *per se*, was compatible with the principle of access to justice in Italy.

¹¹ In 2015 the numbers of mediations administrated by Corecoms were more than 100,000 with a success rate of 80%.

Table 1: Commercial and Civil Law Disputes

Mediation Model	Member State
Full voluntary	Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Netherlands Portugal, Romania, Spain, Sweden, United Kingdom
Voluntary with incentives and/or sanctions	Croatia, Estonia, Greece, Hungary, Ireland, Italy (in 92% of civil and commercial dispute matters), Malta, Poland Slovakia, Slovenia
Required initial mediation session	Czech Republic, Italy (in 8% of civil and commercial dispute matters)
Full mandatory mediation	NONE

Table 2: Family Law Disputes

Mediation Model	Member State
Full voluntary	Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Spain, Sweden
Voluntary with incentives and/or sanctions	Slovakia, Slovenia
Required initial mediation session	Lithuania, Luxembourg, United Kingdom
Full mandatory mediation	Croatia, Hungary

Table 3: Labour Law Disputes

Mediation Model	Member State
Full voluntary	Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom
Voluntary with incentives and/or sanctions	Greece
Required initial mediation session	NONE
Full mandatory mediation	Austria, Croatia, Lithuania, Malta

2.6. Conclusion

Member States have transposed the Mediation Directive in very differing ways and for different kinds of disputes.¹²

¹² Some Member States have not implemented the 2008 Directive in family and labour matters (included in the definition of civil and commercial disputes, according to EU law).

3. THE NEED TO MEASURE THE BALANCED RELATIONSHIP BETWEEN MEDIATION AND COURT PROCEEDINGS

KEY FINDINGS

- To measure the effectiveness of the success of a mediation model in a given jurisdiction, both the numbers of mediations and their success rate must be taken into consideration.
- The goal of an effective balanced relationship should be to have concurrently: more than one mediation for every two cases in court (the index would be above 50%) and more than a 50% success rate for mediations.
- The balanced relationships present in a given Member State can be visualized with the proposed matrix.

In order to achieve the main goal of this briefing note, we need to find and propose a method to measure the balanced relationship between mediation and judicial proceedings.

While a lot of data could be collected regarding factors relating to mediation systems, we believe that just two data points can serve as effective performance indicators of a national mediation system. Considered together in a visual matrix format, these two data points generate a powerful indicator to help evaluate whether a particular system serves, and to what extent, any public mediation policy.

Indicator 1: Balance Relationship Index (Mediations / Cases in Court). In a given mediation model, it is suggested that one index of effectiveness can be the ratio between the number of mediations and the number of judicial proceedings in court.

$$\text{Balanced Relationship Index} = \frac{\text{Number of Mediations}}{\text{Number of Judicial Proceedings}} \times 100 \%$$

In an ideal effective model, this ratio might be at least 50% with one mediation every two cases in court. We note, however, that a more effective public policy goal could aim to have a majority of disputes resolved out of court with this index counting more than 100% in order to ensure that the scarce resources of judges and courts are dedicated only to disputes needing a court decision.

Indicator 2: Success Mediation Rate. Numbers of mediations are not, alone, sufficient to evaluate a system. On a system-wide level, an effective mediation policy should also take into account that unsuccessful mediations are a burden on the parties and delay them from accessing the courts.

$$\text{Success Mediation Index} = \frac{\text{Number of Successful Mediations}}{\text{Number of Mediations}} \times 100 \%$$

As a result, any public policy seeking to increase the number of mediations should also make sure that an enabling environment for mediation exists so that the chances are that a good percentage of them will result in an amicable settlement. At an individual level, the index - widely known as the mediation success rate - is typically applied by mediation professionals as a personal performance indicator. Full-time professional mediators frequently have a

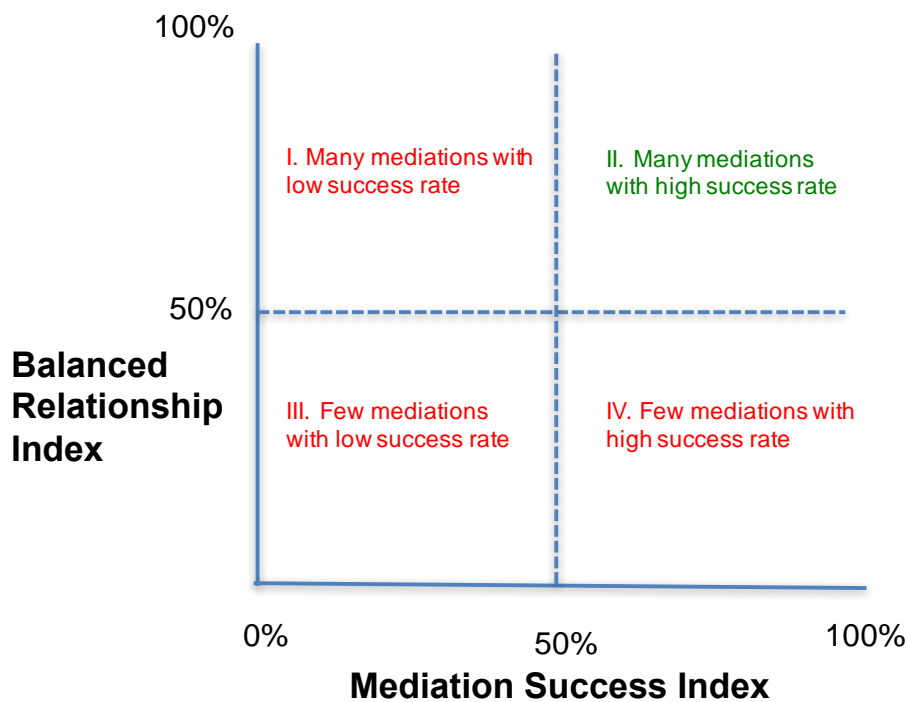
personal index above 70%. However, apart from the personal skills and capabilities of the mediators, this rate also depends on the willingness of the parties to start a mediation procedure and their decision that a settlement is better than the alternative of risking a drawn-out court proceeding.

3.1. The Matrix as a Tool to Measure the Effectiveness of a Mediation Model

A system’s performance according to these two indicators can be assembled in matrix form in order to evaluate the effectiveness of the system—both in terms of how many cases are generated by the system and how successful these cases are.

In presenting the mediation matrix visualization tool in this note, some target performances are suggested for each of the indicators (balance index and success index) to serve as “high/low” minimum performance dividing lines. These targets are not arbitrary, but rather should reflect what is realistically possible in mediation systems today. As systems improve, policymakers may choose to set more ambitious targets. When viewed in graphic form, these dividing lines comprise a matrix with four performance quadrants. Considering the current low use of mediation and being conservative, we suggest that an effective mediation model should be positioned in the second quadrant with at least 50 mediations for every 100 court proceedings and at the same time a success rate of at least 50% of mediated cases. The visualization is set out in the figure below:

Figure 1: The Mediation Effectiveness Matrix



The matrix provides a useful visual tool for understanding mediation performance. The “X” axis represents the Mediation Success Index, while the “Y” axis sets out the Balanced Relationship Index of Mediations to Court Cases. The matrix thus generates four performance quadrants:

Quadrant I: Many mediations with low success rate. This quadrant visually represents the main concerns about full mandatory mediation systems. The concern is that mandatory systems may seek to generate high numbers of mediations through compulsion without sufficient attention being paid to providing effective, high-quality services, and without filtering to avoid mediating inappropriate cases. This may be the result when the focus is purely on increasing the number of mediated cases without investing in quality control. In addition, systems that fall into this category may indeed not be adequately balancing mediation with access to justice.

Quadrant II: Many mediations with high success rate. This quadrant represents peak performance: a high number of mediations, a large percentage of which is successful. High scores in this quadrant can be expected to go hand in hand with a noticeable decrease of cases in court, relieving the court system of unnecessary caseloads. In an ideal jurisdiction, the two indexes should be above 100% (more than one mediation for each case in court) with a conservative average success rate above 50%.

Quadrant III: Few mediations with low success rate. Performance in this quadrant represents the lowest effectiveness. Low numbers of mediations suggest low levels of awareness among parties, while low success rates suggest very low capacity to deliver effective services. In these systems, we would expect to see that there has been very little investment in the mediation infrastructure on either the supply or the demand side.

Quadrant IV: Few mediations with high success rate. This is a typical result of a completely voluntary mediation system or an "opt-in" system, which achieves a high mediation success rate—above 70%—but with a very low number of mediations. The 2014 "rebooting" study of the European Parliament unveiled a surprising, disappointingly low number of mediations in the EU Member States as compared with cases in court: mediations did not even reach 1%. We can conclude from the findings of the "rebooting" study that, in the absence of public policy measures to strongly encourage or require parties to at least attempt mediation, low numbers of mediations will result. Furthermore, they are essentially spontaneous mediations, which statistically have high success rates owing to the high level of engagement of voluntary participants and their confidence in the success of mediation.

3.2. Applying the Indexes to New Cases, Pending Cases and Different Types of Disputes

There are currently no comprehensive, comparable data on mediations, either domestic or cross-border, for the European Union as whole. Additionally, almost no Member State has an official count of mediations; as a result, it is difficult to obtain reliable data on the impact of mediation in the EU. However, as part of the 2014 "rebooting" study, a total of 816 EU experts responded to a questionnaire, in which respondents were asked to estimate the number of mediations in their country. The estimates provided by the respondents (which were in fact rather consistent) were averaged for each Member State, with results varying greatly across the EU. In 2014, only four countries – Germany, Italy, The Netherlands and United Kingdom – reported more than 10,000 mediation cases per year. The majority of the Member States reported less than 500 cases per year.

Three years later, there is no sign that the numbers of mediations throughout the EU have significantly increased. The fact that the impact of mediation remains low eight years after the approval of the Mediation Directive, and five years after the deadline for its

implementation, is of great concern. Only Italy has consistently registered high numbers of mediations, close to 200,000 in recent years.

As a step towards developing effective use of mediation models, the authors of this briefing note present below the application of the indexes described in the preceding paragraphs in three Member States. National policymakers, legislators and experts in the ADR field may wish to consider this approach as a practical method of measuring the effectiveness of mediation models, with the ultimate goal of achieving the balanced relationship mentioned in Article 1 of the 2008 Mediation Directive.

Italy: As noted above, Italy is adopting two models at the same time in commercial and civil cases: the required initial mediation model in 8% of the cases, and the voluntary mediation model with incentives and sanctions in the remaining 92% of the cases. No specific mediation requirement was introduced in labour and family disputes.

Table 4: Italian Example

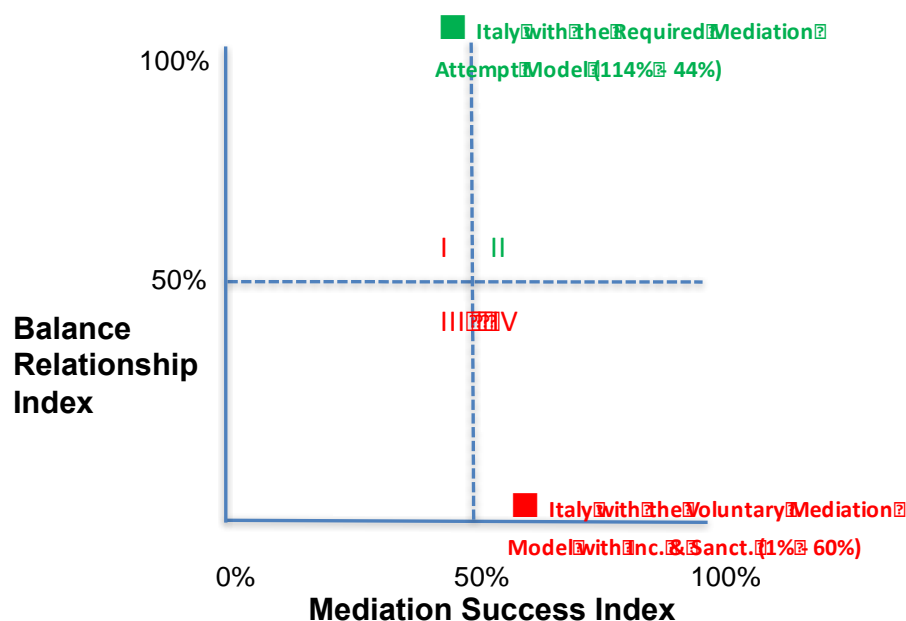
Model used and field of application	New cases	Pending cases
Required mediation information session in 8% of civil and commercial cases	Balanced rate: 114% Success rate: 44%	
Voluntary with incentives and sanctions in 92% of commercial and civil cases	Balanced rate: 1% Success rate: 60%	Balanced rate: 0.04% Success rate: 32%
Labour	Mediation not applied	
Family	Mediation not applied	

In 2015, the total of the new civil and commercial cases filed in first instance courts was 1,748,384,¹³ where 8% of these new cases filed (139,870 cases) are subject to the required attempt to mediate and the remaining 92% (1,608,513 cases) are subject to voluntary mediation. In 2015, there were 196,247¹⁴ mediations, 81.6% due to the required attempt (160,137 required mediations) with an average success rate of 44% and 8.3% voluntary mediations (16,288 voluntary mediations) with an average success rate of 60%. Thus, the balance rate in new disputes where it is required to attempt mediation is 114% (160,137 mediations/139,870 cases) while the balance rate in the cases where mediation is voluntary is 1% (16,288/1,608,513). In cases already pending in courts in 2015 when mediation is first attempted, the balance rate is even lower, at 0.04%: 18,062 mediation referrals against some 4,500,000 pending cases in courts, and a success rate of 32%.

¹³ From slide 14 of a presentation of the Minister of Justice, Mr. Andrea Orlando <https://www.giustizia.it/giustizia/protected/1214925/0/def/ref/NOL1214730/>

¹⁴ From slide 2 and 3 of a presentation of the Statistical Department of the Italian Minister of Justice [https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%202015%20\(ENG\).pdf](https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%202015%20(ENG).pdf)

Figure 2: The Mediation Effectiveness Matrix applied to the two Mediation Models adopted in Italy for civil and commercial cases



The figure above gives a clear illustration of the extremely different results of two mediation models in place in the same jurisdiction with the same citizens, same companies, same lawyers, same mediators and when the same mediation rules are in play. It is evident that almost all EU Member States are placed in quadrant IV, as we will briefly illustrate with the following examples in Romania and Greece.

Romania:¹⁵ Romania has currently adopted a voluntary mediation model with incentives and sanctions, following a legislation model based on mandatory information sessions for the plaintiff, with a related sanction of case inadmissibility, which was found unconstitutional by the Romanian Constitutional Court in 2014.¹⁶ The only statistics relating to the number of cases that were mediated in relation with the courts system can be found in the reports of the Superior Council of the Judiciary on the "State of Justice".¹⁷ The 2013 report was the latest report that actually looked into this, finding a total of 1,749 civil, labour and family cases that were settled by means of mediation. Considering an estimated overall 50% settlement rate,¹⁸ there were 3,498 cases being mediated in 2013 in relation to a judicial system that processed 2,266,090 new cases of a pending total of 3,337,426 cases. Interestingly, the Romanian Mediation Council, established by law in 2006, has not yet developed a statistics mechanism relating to the use of mediation, success rates and user satisfaction.

¹⁵ This section was completed by Constantin Adi Gavrilă, General Manager of Craiova Mediation Center, established as a pilot mediation centre by the Romanian Minister of Justice's Order no. 1391/C/2003

¹⁶ See Romanian Constitutional Court's Decision no 266/2014

¹⁷ See Romanian Council of Magistracy, "2013 State of Justice Report", http://www.csm1909.ro/csm/linkuri/08_05_2014__67235_ro.pdf

¹⁸ This is our estimate; it could have been between 25% and 75%

Table 5: Romanian Example

Model used and field of application	New cases	Pending cases
Voluntary with incentives and sanctions in commercial, civil, family and labour cases	Balanced rate: 0.0015% Success rate: estimated 50%	Balanced rate: 0.001% Success rate: estimated 50%

Greece:¹⁹ Greece has adopted a voluntary mediation model with incentives only, but no sanctions. It is quite well known that the Greek judicial system suffers from a backlog problem²⁰, which, apart from the inconvenience caused to citizens, also has broader financial consequences. According to data from the World Bank²¹, Greek courts take an average of 1,580 days or 52.7 months to reach a final ruling in a case. This places Greece in the 155th position in the world among countries as regards the length of trials. At the same time, the practice of mediation is extremely weak despite the fact that apart from law 3898/2010, which transposed the EU Directive into the Greek legal system, the choice to opt for a mediation process was later included in the latest amendment of the Civil Procedural Code - but once again, on a purely voluntary basis.

There is no official statistical record or system that gives a clear view of the number of mediations conducted on a yearly basis other than some sporadic data coming from the Registries of the Regional Courts of First Instance, where mediation agreements are filed upon successful conclusion²². A rough estimate of the cases mediated in Greece for 2016 would not exceed the total number of 100 mediations for the year 2015 (judicial mediations included).

According to the 2016 EU Justice Scoreboard²³, which gives a comparative overview of the efficiency of Member States' justice systems for 2015, Greece is second to last with an average of 6.2 new cases / 100 inhabitants for incoming civil and commercial cases²⁴.

¹⁹ This section was drafted by Dr. Elena Koltsaki, Co-Founder of the Greek Mediation Institute, Member of the Mediators' Accreditation Committee of the Greek Ministry of Justice.

²⁰ Data from the MoJ project an increase in the pending cases in the peace courts (for the period from 2012 to 2015) reaching 73.35% in Athens courts and 83.87% in the rest of the country.

²¹ <http://www.worldbank.org/en/about/annual-report>

²² According to the statistical data in the Court of First Instance in Athens and with regard to judicial mediation, which was introduced in May 2012, there were 31 cases in 2012 (14 settled); 94 cases in 2013 (42 settled); 82 cases in 2014 (35 settled); 63 cases in 2015 (35 settled); and just a handful of cases in 2016 owing to the prolonged strike of lawyers. Settlement rates therefore give an estimate of 50%. Based on unofficial statistical data, the number of settlement agreements reached through voluntary (private - not judicial) mediation and filed by the court were 4 in 2013, 14 in 2014 and 25 in 2015.

²³ http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf

²⁴ It is estimated that the long strike by the Greek lawyers in 2016 has created a 10-year backlog in court cases, adding 320,000 new cases to the previous 700,000 - for a total of 1.12 million cases yet to be heard.

Table 6: Greek Example

Model used and field of application	New cases	Pending cases
Voluntary with incentives and sanctions in commercial and civil cases (labour and family included)	Balanced rate: 0.0014 Success rate: 50%	Balanced rate: N/A Success rate: N/A

3.3. Conclusions

In order to measure the effectiveness of different mediation models, both the number of mediations in relation to the number of cases in court and the total success rate must be considered. With the proposed methodology, the aim of the authors is to both measure and visualize – in a scientific and statistically sound manner – how far most Member States are from achieving the balanced relationship between mediation and court proceedings and, at the same time, provide a methodology for mediation researchers when more data is available.

At the present time, only Italy has official data on mediations. With the few data available, a first tentative attempt to apply these indexes has been proposed also for Romania and Greece. Further analysis is necessary to cover the remaining EU Member States.

4. EIGHT YEARS AFTER THE MEDIATION DIRECTIVE

KEY FINDINGS

- The 2008 Directive was instrumental in fostering the “ADR movement” in Europe.
- Member States have not implemented the Directive in a homogeneous manner, adopting different models and regulatory frameworks.
- Not all Member States have implemented the Directive in cross-border family and labour matters, even in cases where the rights are at the parties’ disposal.
- Despite the lack of consistent statistics, in the five years of implementation of the Directive several best practices (together with ineffective ones) have clearly emerged.
- After eight years, the 2008 Directive seems to have exhausted its capacity to foster the use of mediation and to have a continuing impact on national legislations.

Mediation relieves overburdened courts and enhances citizens’ access to justice by helping them resolve disputes without the enormous costs and prolonged trials and appeals that characterise court procedures. It has also been shown that the savings across the EU for increasing numbers of mediations would be significant, in the tens of billions of euros every year.²⁵

There is no doubt that the 2008 Mediation Directive has been a key milestone in the European mediation movement. There is also no doubt, however, that the key goals of the Directive remain far from being achieved. Indeed, the intention behind the Directive was to encourage more people and businesses to use mediation and to establish a balanced relationship between mediation and judicial proceedings. Eight and half years after the Directive, as all available statistics confirm, mediation is on average still used in less than 1% of the cases in court.

The “rebooting” study, conducted in 2014, showed that ensuring quality, confidentiality and enforceability in mediation are necessary but not sufficient conditions. These legal features are in any case already in the Directive and need no revision. The legal mechanism capable of increasing the number of mediations is also already in the Directive, but so far most Member States have not used it: it is Article 5(2), allowing national legislation to require the use of mediation, provided that the right of the parties to access the judicial system is preserved.

The Member State that has made greater use of Article 5(2) today is Italy, where 8% of all civil cases must go through mediation first. That means over 200,000 mediations per year, or 20 times more mediations than any other country in the EU.

Six years ago, the Court of Justice of the European Union clarified how to make the mediation requirement compatible with the right of access to the judicial system.²⁶ According to the CJEU, the process must be non-binding and fast, it must suspend the statute of limitations and be inexpensive. The Court further wrote that mediation efforts not only can, but should be required for a dispute resolution system to be efficient.

²⁵ Eurochambres, based on the survey data of the 2014 study on “Rebooting” the Mediation Directive, estimated potential savings in the 15-40 billion Euros range, per year. See: http://www.eurochambres.eu/custom/Position_Paper_B2B_mediation_2014_V1.0_2-2014-00240-01.pdf

²⁶ Judgment of the Court (Fourth Chamber) of 18 March 2010, in joined cases [C-317/08](#), C-318/08, C-319/08 and C-320/08.

In light of all this, it is surprising that some people still appear to consider a required mediation effort to be in conflict with Article 47 of the Charter of Fundamental Rights. This mistaken view appears to be losing supporters, however, as a growing number of countries now require some efforts at mediation before litigation begins. In fact, a recent study conducted for the Commission recommends the introduction of "an obligatory preliminary court procedure whereby a mediator assesses whether the dispute could be better dealt with in the context of mediation rather than judicial proceedings" (*Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive'*).²⁷ This recommendation is worthy of endorsement because it correctly distinguishes between the perfectly legitimate obligation of the parties to meet with the mediator, in order to assess the suitability of mediation, and any obligation to settle the dispute through mediation, which would be a legal monstrosity.

The recommendation also suggests that the assessment as to whether or not mediation can resolve a particular case is best done together by the parties and their mediator. It should not be carried out by somebody else, in the context of a separate and generic "mediation information session", to be possibly followed by the actual mediation.

In essence, this mediation model represents a "mediated solution" between two competing principles: on the one hand, the absolute freedom of the parties to decide whether or not to settle a case and, on the other hand, the demonstrated necessity to require a concrete mediation effort, which is nonetheless inexpensive in terms of time and money. Some argue that introducing any kind of mediation requirement will generate opposition from the legal profession. Five years ago, for example, lawyers in Italy went on strike against that requirement. Today, virtually nobody there challenges it.²⁸ In fact, less than two months ago, the Italian Bar Association devoted its national congress to alternative dispute resolution and, in the final motions, formally asked the Italian Parliament to further incentivize and strengthen mediation.

There is no guarantee that the same U-turn will happen in other Member States, once mediation will be required and, as a result, practiced on a larger scale. Still, Italy is not the first country where lawyers have gone from being at first the strongest opponents, to later among the strongest supporters of mediation.

This leads to the issue of the absence of a "culture of mediation" in the EU. A large number of people argue that this is the key reason why mediation is not being used enough. Consequently, they recommend greater investments in awareness and education as the key solution to generate more mediations.

Obviously, beneficial behaviours, such as mediating more legal disputes, should be publicly promoted and incentivized. The main issue, however, is whether promotion and incentives are enough, and how fast they can produce tangible results. Certain behaviours are so important that, when promotion and incentives prove not to accomplish results, the legislator has the power – actually, the duty – to require those behaviours. To illustrate further, nobody

²⁷ Available at <http://bookshop.europa.eu/en/study-for-an-evaluation-and-implementation-of-directive-2008-52-ec-the-mediation-directive--pbDS0114825/>. The study was updated in 2016 and the updated study is available at <http://bookshop.europa.eu/sl/study-for-an-evaluation-and-implementation-of-directive-2008-52-ec-the-mediation-directive--pbDS0216335/>.

²⁸ Mediation appears to have been embraced by the vast majority of the legal profession for essentially three reasons. The first is that experience has shown that the settlement rate is high even when parties are required to engage in mediation. The second is that the law has mitigated the cost of mediation, allowing the parties to abandon the procedure at the initial session, in cases where a positive outcome appears unlikely. The third is that the role of lawyers in mediation, and as mediators, has been strengthened.

would imagine that public campaigns for health, safety and education, for example, would be enough to prevent the majority of people from smoking in public places, or would make them use seatbelts in cars, or send their children to school or get them vaccinated.

For people in a dispute, the decision as to whether or not to mediate is a very difficult one. Among other disciplines, neuroscience has recently contributed to our better understanding of why humans tend not to make smart decisions when involved in a dispute. An important factor to consider here is that litigants in the EU pay on average only 24% of the court budget costs through their tax and court fees.²⁹ The balance, 76%, is paid by those who do not go to court. The majority of the people have the right to require that the minority use judicial resources smartly.

A useful illustration of the relationship between mediation culture and mediation legislation comes from Italy. As noted, almost 200,000 disputes are mediated there every year. Still, 81.6% of those come from cases where the law requires mediation (such as in banking and insurance disputes, for example). Voluntary mediations account for only 8.3% of the cases. Nevertheless, the same citizens, same companies, same lawyers, same mediators and the same mediation rules are in play. With time, the practice of mediation will support the culture of amicable settlement of disputes – not the opposite. However, the culture of mediation will still have to be started, and be sustained, by effective mediation legislation.

²⁹ Figure 2.31 at page 66 of the CEPEJ Report on the Efficiency and Quality of Justice – Edition 2016 (data 2014).

5. CONCLUSIONS AND RECOMMENDATIONS

There is no doubt that the Mediation Directive has brought about significant changes in the European Union and has encouraged the debate on alternative dispute resolution; however, there is also no doubt that the fundamental goals of the Directive are far from being achieved. It has been shown many times that the current regulatory elements have no impact on the numbers of mediation, resulting in only one country even coming close to a balanced relationship – and yet still only representing 8% of cases.

The authors propose that the Mediation Directive needs to be changed, not because it is flawed in any way, but because it has exhausted its ability to bring about change. The Directive, while promoting significant progress in creating a functional environment for mediation, has not enabled Member States to achieve a balanced relationship as required by Article 1.

There appear to be two main options to reach a balanced relationship between mediation and judicial proceedings.

- The first and most effective of these options would be to strengthen Article 5(2) of the Directive by requiring, not just allowing to require, the parties to go through an initial mediation session with a mediator before a dispute can be filed with the courts in all new civil and commercial cases, including certain family and labour disputes where the parties' rights are fully disposable. This has been shown to have a significant impact in achieving a balanced relationship between mediation and judicial proceedings. The CJEU's *Alassini*³⁰ case establishes clear guidelines for required elements in ADR at the EU level.

A proposed rewrite of article 5(2) could read as follows:

"Member States shall ensure that a mediation session is integrated into the judicial process for civil and commercial cases, except for such cases as Member States shall determine are not suitable for mediation. The minimum requirements for such a mediation session are that the parties must meet together with a mediator, subject to the condition that the procedure shall be non-binding and swift, suspend the period for time-barring of claims, and be free of charge or of limited cost if any party decides to opt out at the initial session."

- As an alternative, the EU should press all Member States to use the current version of Article 5(2) to a greater extent.

In particular, in its implementation resolution, the Parliament should consider asking that the Commission send a letter to each EU Government asking them (a) to measure the balanced relationship using the indexes proposed in this briefing note and (b) to explore the reasons for the failure to achieve the balanced relationship, which is the objective of the Mediation Directive.

Failure to respond and to achieve the balanced relationship could lead to the evaluation of an infraction procedure for failing to comply with the Directive.

³⁰ On 18 March 2010, in the joined cases of *Rosalba Alassini and Others* (C-317/08 and C-320/08) the ECJ found that the Italian requirement to undertake ADR before court proceedings was a legitimate objective of Italian law, and that it was in the general interest, for parties to pursue less expensive methods of dispute resolution and to reduce the burden on the court system.

In December 2014, Commissioner Jourová defined as “impressive” the results of the Parliament’s “rebooting” study.³¹ In particular, she focused on the striking difference, in average cost and time, between mediation and litigation. Further in-depth economic research would show that achieving a balanced relationship between mediation and court proceedings might save billions of euros and millions of days from unnecessary litigation, every year. The proposals presented in this briefing note appear to be in line with those of the experts’ report submitted to the Commission. This apparent consensus, and the extraordinary potential of requiring reasonable efforts at mediation, require the EU institutions to act on these recommendations, and to make the Member States act. If they do so, one year from now, perhaps in this very venue, the EU could start counting, and celebrating, the social and financial benefits of a greater use of mediation.

³¹ See: <https://www.youtube.com/watch?v=bmNgdFT0IsI>.

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The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution (ADR)

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IN-DEPTH ANALYSIS

Abstract

The ENCJ and ELI are considering concerns that have arisen in Europe as a result of the exponential growth of numerous different forms of alternative dispute resolution (ADR). This paper, requested by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs upon request by the JURI Committee, asks: How should courts and judges behave when requiring or recommending ADR? How should ADR providers behave when requiring or recommending court-based dispute resolution processes (DRPs)? What is the best model or models for DRPs, acknowledging the diversity of solutions adopted across Europe? The paper looks towards the preparation of statements of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes, and vice versa, and makes recommendations as to the best European models of ADR processes for different types of disputes that can be developed and applied, and towards which Member States may wish to progress.

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INTRODUCTION

A joint project was established in early 2016 between the European Network of Councils for the Judiciary (“ENCJ”) and the European Law Institute (“ELI”) to consider the concerns that have arisen in Europe as a result of the exponential growth of numerous different forms of alternative dispute resolution (“ADR”). Even the terminology is confusing. It includes various types of mediation, early neutral evaluation, arbitration, online dispute resolution (“ODR”), and ombudsman determinations.

The term ADR is used in this paper generically and for simplicity. In some contexts, it will, viewed strictly, be inaccurately used.

This paper focuses on the interface between court-based dispute resolution processes (“DRPs”) and ADR processes. In short:

- How should courts and judges behave when requiring or recommending ADR?
- How should ADR providers behave when requiring or recommending court-based DRPs?
- What is the best model or models for DRPs, acknowledging the diversity of solutions adopted across Europe?

There are currently three EU instruments that address the situation, but none has achieved any meaningful harmonisation of the practices adopted in EU Member States. Moreover, there are concerns about vulnerable parties, whether consumers, ordinary citizens, small businesses, or family litigants, feeling pressured to agree to ADR or to accept mediated solutions without a proper understanding of their legal rights.

The ENCJ/ELI project looks towards three main prospective outcomes:

- A statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes, to include guidelines as to the preliminaries and procedures that should be adopted in referring cases to mediation or other ADR processes, and how risks of injustice can be reduced or eliminated.
- A statement of European best practice in relation to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges, to include guidelines as to the preliminaries and procedures that should be adopted in referring cases which are the subject of an ADR process to a court, and how risks of injustice can be reduced or eliminated.
- Recommendations as to the best European models of ADR processes for different types of disputes that can be developed and applied, and towards which Member States may wish to progress.

It is beyond the scope of the project, for example, to identify difficulties in the substance of court-based dispute resolution or commercial arbitration. The intention is that the project should focus on the problems and solutions in relation to the interface between court-based and ADR processes in B2C (business to consumer), C2C (consumer to consumer), small B2B (business to business), G2B (government to business) and G2C (government to consumer) disputes.

1. THE EXISTING EU INSTRUMENTS

There are the following three existing EU instruments:

- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Directive on Consumer ADR"), OJ L 165, 18.6.2013, p. 63–79;
- Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Regulation on Consumer ODR"), OJ L 165, 18.6.2013, p. 1–12; and
- 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 ("Mediation Directive"), OJ L 136, 24.5.2008, p. 3–8.

The Directive on Consumer ADR aims to ensure that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, fast and fair ADR (see article 1). Article 8 provides for the ADR procedures to be available both online and offline, available to consumers without charge or at a nominal fee, and to provide an outcome within 90 days. Article 10 provides that an agreement between a consumer and a trader to submit complaints to an ADR entity shall not be binding if it is concluded before the dispute has materialised and has the effect of preventing the consumer from availing himself of the right to bring an action in a court. Article 9 provides that where the ADR procedure proposes a solution, the parties must be informed that they have a choice as to whether or not to agree to the solution proposed.

The Regulation on Consumer ODR provides for the European Commission to establish a user-friendly ODR platform as a single point of entry for consumers and traders seeking an out-of-court resolution of disputes by a competent ADR entity covered by the Regulation. The platform was launched in early 2016 in accordance with the provisions of the Commission Implementing Regulation (EU) 2015/1051.

The Mediation Directive encourages the use of mediation and is aimed at ensuring a balanced relationship between mediation and judicial proceedings (article 1). The Directive applies in cross-border disputes and requires Member States to encourage voluntary codes of conduct for mediators (article 4), and allows courts to invite the parties to court proceedings to use mediation to settle their disputes (article 5), and to make the outcomes enforceable if both parties consent (article 6).

2. TYPES OF DISPUTE RESOLUTION

There are numerous types of dispute resolution process, and numerous variations of each type in use across EU Member States and the wider world. The variety of their forms and usages have also undoubtedly given rise to risks and potential difficulties.

It is necessary at least to identify four particular distinctions that should be borne in mind throughout this debate:

- The distinction between court-based and non-court-based resolution processes; the distinction between a resolution process agreed *before* a dispute has arisen, and a resolution process agreed only *after* a dispute has arisen;
- The distinction between an evaluative or adjudicated process that impose a *non-consensual solution* and a facilitative process that seeks to achieve a consensual solution;
- The distinctions between commercial disputes (C2C), private family or consumer disputes (B2C or C2C), and civil or administrative disputes between government and a citizen (G2C) or between government and a business (G2B).

3. THE THINKING BEHIND THIS PROJECT

Much work has been done by academics and others on topics that relate to the subject-matter of this project. It is not, however, the intention here to re-invent the wheel. Instead, the project seeks to make the maximum use of the coming together of Councils for the Judiciary, professional judges and experts in ADR.

A number of perceived or actual problems have arisen to which statements of best practice and a preferred dispute resolution process model could be addressed. The issues that most concern the project group are listed in the next 7 sub-sections.

3.1. The Risk That Persons Will Be Denied an Independent Judicial Determination

There are a number of situations in which ADR can lead to consumers and unrepresented litigants either being deprived of their right to an independent judicial determination or having the perception that they are being so deprived.

Whenever mediation is promoted or encouraged by a court or by a more powerful party (e.g. a large corporation or state entity), there is always the risk that individual litigants will feel that they are required to settle the case. Article 9 of the Directive on Consumer ADR makes clear that parties must be informed that this is not the case, but that does not mean that that message is always either properly delivered or properly understood.

This is a risk that is not easy to measure. Judicial authorities are generally so keen to see a reduction in the workload of the courts that they regard the possibility that settlements are entered into without adequate safeguards as a risk worth taking. This risk requires more detailed consideration. It is a risk that is intimately connected with the question of available legal advice.

3.2. The Risk That Persons Will Settle Their Disputes without Having First Had Access to Independent Legal Advice

It is unrealistic to expect every citizen involved in every kind of dispute to receive independent legal advice. There are many reasons why they might not do so. First, they might not wish to seek advice, whether because they rightly regard the dispute as trivial or for other reasons. Secondly, they might make a rational decision to save the time and cost of legal advice, knowing they might benefit from it. Thirdly, they might genuinely be able themselves to evaluate their risks and legal prospects.

None of this affects the very serious risk that some individuals will settle valid claims at mediation for too little because they have not had access to an adequate and independent legal evaluation of those claims. This risk is, perhaps, greatest in family cases where emotions can run high and the desire to settle can be seen (often wrongly) as urgent for a variety of reasons. But it applies in other fields too.

It is also probably unrealistic to expect free legal aid or legal assistance to be available for every type of claim in every Member State. What, at first sight, however, does seem to be important is (a) that those recommending, requiring or conducting mediations make sure that vulnerable parties do not settle a dispute without understanding their proper legal rights; (b) that more powerful parties do not use speedy dispute resolution procedures, including

mediation, as a means of avoiding their legal obligations; and (c) that there is a level playing field between powerful and vulnerable parties to all ADR processes.

3.3. The Risk that Decision-Makers or Mediators in ADR Processes are Inadequately Qualified

Article 4 of the Mediation Directive makes provisions designed to ensure the quality of mediators and mediation. It is, however, difficult to ensure that such quality requirements are always met. Councils for the Judiciary in several countries have a reasonable fear that private mediators will not always protect the rights of citizens. The project group has received reports from Councils for the Judiciary in some countries to the effect that there is widespread public suspicion of ADR in general and mediation in particular.

3.4 The Risk that Individual Parties have an Inadequate Understanding of the Available Methods of Dispute Resolution

There are now a number of excellent online platforms providing information to individuals involved in disputes. But it might be thought that the very number of such online sites itself creates the risk of information overload and confusion. In this regard the Commission's online dispute resolution platform directing litigants to accredited dispute resolution entities is potentially a great step forward. The outcomes will perhaps take some time to become apparent.

Where courts are concerned, it is important that they accept responsibility for explaining the ramifications of dispute resolution processes required or recommended by them. Where powerful government or commercial entities are in a similar position, further regulation may well be required to ensure that a similar outcome is achieved.

3.5. Risks of the Ombudsman Process and of Decision-Making by an Unidentified Online Decision-Maker

In various ADR and ODR processes, possible solutions are suggested by an unidentified non-judicial decision-maker, whether online or offline. It is well-documented that such processes are very successful in resolving relatively minor disputes. They do, however, raise the possibility that valid claims will be settled in ignorance of their true value and that individual parties will feel obliged to settle without having had access to legal advice or an independent judicial determination.

The voluntary nature of any compromise reached by these processes requires to be emphasised at every stage. This factor is reflected in article 9 of the Directive on Consumer ADR, but again there is doubt that the choice available to individuals is always fully understood.

3.6. The Risk That Mediation is Under-Used, Because of its Voluntary Nature and an Absence of Quality Assurance

In many parts of Europe, private mediation is close to non-existent. This is probably because it is not trusted by individuals, since there is no adequate regulation and no quality assurance. Whilst it is important to acknowledge the adverse consequences of some ADR processes, it is equally important to acknowledge the positive effect that they can have in terms of speedy, economical and effective dispute resolution.

An under-use of ADR generally and mediation in particular is a serious problem that leads to backlogs in the courts in many parts of Europe. More needs to be done to encourage reliable regulated suppliers of ADR services in these countries, and to promote public confidence in ADR and ODR systems.

3.7. The Risk of Abuses of the Power of Large Governmental or Commercial Entities as the Opposing Party

This is a risk that is always very difficult to evaluate or control. The availability of accurate information advice and guidance is probably the key.

4. A PRELIMINARY CONSIDERATION OF THE OUTCOMES THAT THE PROJECT MIGHT ACHIEVE

The risks outlined above could be reduced or ameliorated if courts and judges followed a defined procedure before requiring or recommending that parties adopt an ADR process. Many of the problems are caused by the multiplicity of available DRPs, and a lack of understanding by litigants about their procedures and consequences.

The multiplicity of available processes is practically hard to avoid because of the sectoral ombudsman processes established in many Member States. These processes are swift and easy to use and deal mostly with minor disputes without the involvement of lawyers. On rare occasions, such ombudsmen refer disputes raising real legal issues to the courts. These processes are often established and managed by private providers procured by Ministries other than the Justice Ministry. Thus, consumers of telecommunications may be able to resolve a dispute with their telecom provider through a telecommunications ombudsman service established by the Communications Ministry. The same applies in disputes arising in health, employment, energy, retail, and many other sectors.

In some countries, these ombudsmen can be accessed through a central governmental portal (e.g. the BelMed online site initiated by the Belgium Finance Ministry). In other countries, ombudsmen DRPs are in their infancy or hardly exist, partly because of a lack of consumer confidence in any non-court-based DRP, and partly because of government inertia.

The citizens' lack of understanding about DRPs is widespread. It applies as much to the ombudsmen DRPs just described as it does to court-based DRPs and mediation. The lack of understanding may be partially because people simply do not read or comprehend the information they are given. But often, it is hard to deliver a proper understanding in writing, online or without human intervention. A serious problem arises, however, where courts and judges try to offload cases to private mediation providers without first ensuring that the parameters of the mediation process are fully understood and agreed.

It may be hoped that this project can deliver real outcomes by providing statements of best practices where courts and ADR processes interact. This interaction will become far more frequent.

As regards the ideal model for Member States to aspire to, the watchwords would seem to be user-friendliness, affordability and speed, alongside simplicity and ease of comprehension.

Outcome 1: a statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes, to include guidelines as to the preliminaries and procedures that should be adopted in referring cases to mediation or other ADR processes, and how risks of injustice can be reduced or eliminated

A statement of best practice might address the following aspects of the processes adopted when litigants approach a court, whether it is a normal court, an online court, or a so-called "multi-door court-house":

- The considerations that should be taken into account when Member States decide whether to make mediation or ADR a compulsory pre-requisite to court-based DR.
- The considerations that courts and judges should take into account when considering whether to require or recommend an ADR process in a particular case.

- The information that should be made available to litigants before they are required or recommended to take their case to mediation.
- The ways in which such information should be made available to litigants.
- The methods that courts and judges should employ in seeking to obtain the consent of the parties to an ADR process.

Each of these processes requires that regard be had to the risks set out above, and in particular the possibility that one party will be vulnerable and/or unaware of their legal rights.

Outcome 2: A statement of European best practice in relation to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges, to include guidelines as to the preliminaries and procedures that should be adopted in referring cases which are the subject of an ADR process to a court, and how risks of injustice can be reduced or eliminated

There are many ADR processes that take place entirely without court intervention. Ombudsmen processes solve thousands of small sectoral B2C disputes in many Member States. Other ADR processes begin and end online without any reference to any court.

A problem arises in a minority of such cases when one or the other party is dissatisfied or considers that they wish to escalate or move the dispute into a court-based DRP. In such cases, the court-based DRPs can appear to be remote and inaccessible.

The project group thinks that this problem too could be the subject of a statement of best practice applicable in effect to those providing alternative dispute resolution processes. The intention would not be to disrupt the excellent work that many ADR providers are able to do, but to ensure that a route to a court-based DRP is not denied where a party feels that the ADR process has not achieved its objective.

Outcome 3: Recommendations as to the best European models of ADR processes for different types of disputes that can be developed and applied, and towards which Member States may wish to progress

This aspect of the project is potentially vast, because it requires (at least in theory) an examination of all available DRPs and the way in which they can be combined, utilised or made to function effectively alongside one another.

In reality, however, the possibilities are not limitless. They are constrained by culture and technology. Litigants will not take a dispute to any provider they do not trust, and litigants will only use technology that is made user-friendly enough to be accessible.

Some Member States are developing ODR platforms that will aim to solve disputes that arrive on their portal by any available means including ombudsmen suggested solutions, mediation and court determination. This is known in some quarters as the "multi-door court-house model" where any disputant can arrive at the portal or the court-house and expect to be directed to the appropriate DRP provider, after a triage process that determines the most appropriate approach to the solution of the complaint.

Other Member States are adopting purely private web-based solutions that have the same effect, save that they potentially (at least) exclude ultimate judicial dispute resolution, even if other DRPs fail.

It will be hard to identify a “best” solution for all Member States and all cultural backgrounds, but a series of possible “best practice” approaches may be possible. Either way, the investigation is of great importance as it will enable the project group to say what works and what does not work from an informed position.

The likely candidates for best practice are:

- The multi-door court house model;
- The online multi-door court model;
- The Bel-Med style non-court-based ADR and ombudsman model;
- A network of regulated private ADR providers.

5.CONCLUSION

The ENCJ/ELI project group will consult widely on these issues and will put out a position paper before the end of 2016 seeking comments from interested European stakeholders.

The Relationship between Mediation and Other Forms of Alternative Dispute Resolution

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IN-DEPTH ANALYSIS

Abstract

This in-depth analysis, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, examines the relationship between mediation and other forms of alternative dispute resolution. It concludes that the Mediation Directive, the ADR Directive and the ODR Regulation have achieved relevant improvements, but that significant shortcomings persist. Three courses of action are proposed for adoption at the EU level: instruments on specific forms of dispute resolution; instruments covering the relationship between different forms of dispute resolution; and, most importantly, a framework instrument on principles for regulating dispute resolution.

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ADR	Alternative Dispute Resolution
ADR Directive	Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC
EU	European Union
GRDR	Guide for Regulating Dispute Resolution
EU Commission Mediation Report	Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 26.8.2016, COM(2016) 542 final
Mediation Directive	Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters
ODR Regulation	Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC
OJ	Official Journal

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Extended Taxonomy of Dispute Resolution Mechanisms

EXECUTIVE SUMMARY

Analysis

The last decade has seen the adoption of three milestone EU instruments on alternative dispute resolution: the Mediation Directive, the ADR Directive and the ODR Regulation. All of them have improved the forms of dispute resolution available to citizens. However, significant shortcomings persist with respect to the relationship between different forms of dispute resolution. The Mediation Directive is currently the only instrument dealing with a specific type of alternative dispute resolution. The ADR Directive and the ODR Regulation take a general approach to alternative dispute resolution and do not differentiate between the various forms of ADR that currently exist. Correspondingly, at the Member State level there are confusing terminologies, imbalanced accessibilities, unprincipled characteristics and inconsistent standards of dispute resolution with regard to all forms of dispute resolution.

Moreover, all three milestone instruments are mainly concerned with the relationship between ADR in general and judicial proceedings and contribute little to the relationship between specific forms of alternative dispute resolution. At the Member State level, this leads to confusion among citizens when initiating and transferring between different types of dispute resolution procedures. Most importantly, the lack of a principled approach to regulating dispute resolution is arguably the most relevant cause for dispute-related decision deficits of citizens. The law and practice of dispute resolution are inconsistent and fragmentary and, as a consequence, citizens do not choose the dispute resolution mechanism that best fits their dispute.

Principled Approach

To improve the inconsistent and fragmentary relationship between different forms of conflict resolution, this paper develops a principled approach to regulating dispute resolution. Such principled regulation requires, in particular, coherence and a systematic structure within forms of dispute resolution, across different forms of resolving conflicts and in cross-border conflicts. The three fundamentals of a principled approach to regulating dispute resolution are:

- A reference framework based on the reality of dispute resolution and the effects of dispute resolution on the parties (functional and party-oriented taxonomy);
- A policy based on the interests of the individuals affected by disputes and their resolution (interest-based policy);
- Innovative principles to deal with diversity of laws, practices and cultures of dispute resolution in the Member States (principles of regulation).

Firstly, a functional taxonomy of dispute resolution mechanisms and their characteristics from the perspective of the parties is developed. It reveals whether the parties have control over the initiation, procedure, result, effect, choice of the intermediary and the publicity of information concerning various forms of dispute resolution. This taxonomy reflects the effects of different types of dispute resolution on citizens and allows a neutral comparison of dispute resolution laws and practices across Member States. It has a modular structure and can be adjusted to the legislative task at hand.

Secondly, it is shown that all those individuals affected by disputes and their interests should be the starting point for evaluating and prescribing forms of dispute resolution. This is both in the tradition of modern theories of justice and corresponds with the Charter of Fundamental Rights of the European Union. This paper shows how this shared tradition of

justice and fairness relates to the regulation of the various forms of dispute resolution. A dispute resolution policy placing the citizens and their interests right at its heart avoids arbitrary procedures and results. Instead, it ensures that citizens looking for access to justice will find both just procedures and just results of dispute resolution.

Thirdly, ways of dealing with diversity in the European Union are explored. Principled regulation of dispute resolution needs to embrace different laws, practices and cultures of dispute resolution in the Member States. The paper explains a number of methods to master this task and develop principles of regulating dispute resolution:

- A functional approach that refers to the effects of dispute resolution mechanisms instead of locally differing technical approaches is able to capture diversity in a principled way.
- Open wording of regulatory principles affords the Member States room to experiment and adjust the principles to differing laws and practices.
- Dynamic referencing refers to proven approaches at the Member State level, thus integrating locally proven concepts into a coherent cross-border framework of dispute resolution.
- Optional formulation as regards the conditions and consequences of the principles for regulating dispute resolution offers flexible solutions, while keeping a principled approach.

Way Forward

Three ways to improve dispute resolution in the European Union are suggested:

- At the European Union level, further instruments on specific forms of alternative dispute resolution (such as the Mediation Directive) should be considered. At the Member State level, this would translate to developing the Codes of Civil Procedure towards Codes of Dispute Resolution.
- At the European Union level, the relationship between different forms of dispute resolution could be improved by either a horizontal instrument concentrating on the relationship between forms of dispute resolution only, or by integrating relationship issues into instruments concerning specific forms of dispute resolution.
- Most importantly, a framework instrument on principles of regulating dispute resolution could establish principles ensuring coherence within specific forms of dispute resolution, across different forms of dispute resolution and in a cross-border context. Such an instrument would also provide the framework for instruments on specific forms of dispute resolution and their relationship.

These suggested steps would require a remarkable initiative at the EU level. They would, however, promise a formidable improvement for the quality of dispute resolution available to the citizens in the European Union.

1. ANALYSIS OF THE RELATIONSHIP BETWEEN DIFFERENT FORMS OF DISPUTE RESOLUTION*

KEY FINDINGS

- The Mediation Directive, the ADR Directive and the ODR Regulation are important milestones in the young history of integrating ADR into the institutions of dispute resolution in the European Union.
- The Mediation Directive defines and regulates mediation with an emphasis on the dichotomy between mediation and judicial proceedings. The relationship between mediation and other forms of alternative dispute resolution has almost no relevance in the Mediation Directive.
- The ADR Directive deviates from standard definitions of ADR by substantially limiting the forms of alternative dispute resolution covered. Only some forms of consumer dispute resolution are covered. The ADR Directive does not define or systematically distinguish between different forms of alternative dispute resolution. As a consequence, the ADR Directive contributes to the quality of consumer ADR in general, but not to the quality of specific forms of ADR or to the relationship between such different forms of dispute resolution.
- Similar to the ADR Directive, the ODR Regulation improves online dispute resolution in a general way, but it does not differentiate between specific forms of dispute resolution or increase the quality of the relationship between various types of online dispute resolution.
- The imbalanced approach of European law to specific dispute resolution mechanisms and their relationship is mirrored by equally imbalanced terminologies, accessibilities, characteristics and standards of alternative forms of dispute resolution in the Member States. Unwelcome results are lack of availability of a variety of quality ADR mechanisms, confusion and distorted choice of procedures by citizens, waste of money and time and outcomes that miss the available potential of optimal dispute resolution.
- European and Member State laws currently contribute little to defining the relationship between different forms of dispute resolution. This distorts the choice of the citizens, both at the time when deciding which procedure to initiate and subsequently, when deciding whether to transfer from one form of dispute resolution to another.
- European and Member State dispute resolution laws are inconsistent and fragmentary and so, fall short of a principled approach to regulating dispute resolution. Principled regulation requires, in particular, coherence and a systematic structure within forms of dispute resolution, across different forms of resolving conflicts and in cross-border conflicts. The lack of principled regulation is arguably the most relevant cause for dispute-related decision deficits of the citizens. As a consequence, the citizens are not put in a position to choose the dispute resolution mechanism that best fits their dispute.

1.1. Progress Achieved

1.1.1. Mediation Directive

In terms of the relationship between mediation and other forms of alternative dispute

* The author gratefully acknowledges comments on an earlier version of this analysis by Naomi Creutzfeldt, Reinhard Greger, Christopher Hodges, Klaus J. Hopt and Felix Wendenburg.

resolution, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the "Mediation Directive")¹ focuses on the "A" in ADR. Mediation is understood as an alternative to judicial proceedings. Hence, the Mediation Directive is mainly concerned with the relationship between mediation and judicial proceedings. Following this line of thought, Art. 1(1) Mediation Directive states the aim of this milestone Directive as far as relations to other forms of dispute resolution are concerned to be as follows: "ensuring a balanced relationship between mediation and judicial proceedings."

As a consequence of this regulatory programme, mediation is defined with an emphasis on the dichotomy between mediation and judicial proceedings. "[M]ediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question" is defined as mediation in Art. 3(a) second para. "[A]ttempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question", however, are excluded from the definition in the next sentence.

Correspondingly, the parties' initiation choice between dispute resolution mechanisms is framed as a choice between mediation and judicial proceedings. Similarly, the parties' transfer choice from one type of proceeding to another concentrates on using mediation instead of judicial proceedings. Invitations to transfer to mediation or attend an information session according to Art. 5(1) Mediation Directive are only extended by a court. While opening the door for Member States to require compulsory mediation or to create incentives or sanctions in favour of mediation in Art. 5(2) Mediation Directive, it is only decision-making "before or after judicial proceedings" that is contemplated. Information initiatives according to Art. 9 Mediation Directive shall concern mediation, with no other dispute resolution instruments being mentioned.

The only other form of alternative dispute resolution mentioned in the enacting terms² of the Mediation Directive is arbitration. The confidentiality of mediation (Art. 7 Mediation Directive) and the effect of mediation on limitation and prescription periods (Art. 8 Mediation Directive) is not only protected in relation to judicial proceedings, but also in subsequent arbitration proceedings.

The positive effects of the Mediation Directive go far beyond its mere transposition. It has prompted thought, debate and countless initiatives in the Member States on the laws and practices of dispute resolution.³ Almost all Member States have transposed the Directive beyond its cross-border scope to domestic mediation and many have created innovative models to integrate mediation into their laws and institutions of dispute resolution.⁴ The legislative and professional initiatives triggered by the Mediation Directive were, however, mainly concerned with the relationship between mediation and court proceedings only.⁵

¹ OJ L 136, 24.5.2008, p. 3.

² Other forms of dispute resolution are mentioned in recital 11: pre-contractual negotiations, processes of an adjudicatory nature, such as certain judicial conciliation schemes, consumer complaint schemes, arbitration, expert determination and processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute. According to recital 11 the Mediation Directive shall not apply to these forms of dispute resolution.

³ Hopt, K. J. and Steffek, F., 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in Hopt, K. J. and Steffek, F., *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, p. 7.

⁴ For details, see the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 26.8.2016 (the "EU Commission Mediation Report"), COM(2016) 542 final.

⁵ Cf the country reports in Esplugues, C., Iglesias, J. L., Palao, G. (eds.), *Civil and Commercial Mediation in Europe, Vol. 1: National Mediation Rules and Procedures*, Intersentia, Cambridge, Antwerp, Portland, 2014; De Palo, G. and Trevor, M. B. (eds.), *EU Mediation Law and Practice*, Oxford University Press, Oxford, 2012; Hopt, K. J. and Steffek, F. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013.

1.1.2. ADR Directive

The focus of Directive 2013/11/EU on alternative dispute resolution for consumer disputes (the "ADR Directive")⁶ is on the quality of alternative dispute resolution providers and procedures offered to consumers.⁷ Art. 2(3) ADR Directive captures its essence: "This Directive establishes harmonised quality requirements for ADR entities and ADR procedures in order to ensure that, after its implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms".

This sectoral, consumer-oriented approach leads to a unique definition of ADR in Art. 4(1)(g) ADR Directive: "'ADR procedure' means a procedure, as referred to in Article 2, which complies with the requirements set out in this Directive and is carried out by an ADR entity". Art. 2(1) ADR Directive lays the groundwork by referring to "procedures for the out-of-court resolution of [...] disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader [...] and a consumer [...] through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution." Art. 2(2) ADR Directive modifies this definitional starting point by adding a number of substantial carve-outs. In the eyes of the ADR Directive, for example, the following are not ADR procedures: "procedures before consumer complaint-handling systems operated by the trader", "disputes between traders" and procedures concerning "health services provided by health professionals to patients".

The definition of ADR procedures introduced by the ADR Directive defies the standard definition of ADR in many ways. The basic definition of ADR is simply alternative dispute resolution, i.e. the resolution of disputes out of court.⁸ Hence, a whole set of forms is usually covered, such as in-house complaint procedure, mediation, conciliation, settlement conference, neutral evaluation, expert opinion, mini-trial, ombuds scheme, adjudication, arbitration and judgement proposal.⁹ The ADR Directive deviates from this multi-faceted understanding and excludes – to name just three examples – all out-of-court dispute resolution that: firstly, does not concern sales or service contracts; secondly, does not involve contractual obligations; and thirdly, does not involve consumers. These three examples show that the definition of ADR is significantly influenced by considerations without procedural relevance. Considering the aim of the ADR Directive, this limited and unusual ADR definition makes sense. According to Art. 1, sentence 1, ADR Directive, the purpose of the instrument is "to contribute to the proper functioning of the internal market" through "a high level of consumer protection".

The ADR definition chosen in the ADR Directive, however, has two substantial consequences for the relationship between different forms of dispute resolution in the legal framework of the European Union. Firstly, many practically relevant forms of alternative dispute resolution are not covered. In terms of the ADR Directive, an expert opinion concerning a constitutional dispute between the members of a company or an arbitration between traders is not an ADR procedure. This is in stark contrast to the approach of the Mediation Directive, which takes a wide definitional starting point in Art. 3, encompassing such processes as mere business related mediations, and disputes beyond sales and service contracts.

⁶ OJ L 165, 18.6.2013, p. 63.

⁷ Cf EU Commission Mediation Report, 26.8.2016, COM(2016) 542 final, p. 3.

⁸ Goldberg, S. B., Sander, F. E. A., Rogers, Nancy H., Cole, S. R., *Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes*, 6th edn., Wolters Kluwer, 2012, p. 4 (discussing alternative understandings and questions raised by this definition).

⁹ Hodges, C., Benöhr, I., Creutzfeldt, N., *Consumer ADR in Europe*, Hart, C. H. Beck, Nomos, Oxford and Portland, 2012, p. xxix-xxx; Steffek, F., 'Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics', in Steffek, F. and Unberath, H. in cooperation with Genn, H., Greger, R. and Menkel-Meadow, C. (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland, 2013, p. 41.

Secondly, the “bulk definition” employed in the ADR Directive does not mention a single word on the relationship, or even definitional boundaries, between different kinds of ADR. Just a few issues of legal priority are dealt with, in particular the priority of the ADR Directive over legal acts relating to out-of-court redress procedures and the non-prejudice of the Mediation Directive in Art. 3. However, the ADR Directive shies away from statements on specific forms of ADR for a reason. According to recital 21, the “ADR procedures are highly diverse across the Union and within Member States”.¹⁰ “Too diverse”, one might read between the lines, to prescribe quality requirements that would differentiate between different forms of ADR. The enacting part of the Directive witnesses the existence of a wide array of dispute resolution mechanisms only a few times. One of these rare examples is Art. 10(2) sentence 1 ADR Directive, which requires Member States to “ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.”

It follows that, by and large, the ADR Directive contributes to the quality of consumer ADR in general, but not to the quality of ADR in so far as the specific characteristics of or the relationship between the various forms of ADR are concerned. The ADR Directive does not improve the parties’ choice of initiating or transferring between different forms of dispute resolution similar to Art. 5 Mediation Directive. Instead, the consequence of the “bulk ADR approach” this Directive takes is to contrast the limited array of consumer ADR procedures with judicial proceedings. Art. 12(1) ADR Directive, corresponding to Art. 8(1) Mediation Directive in dealing with limitation and prescription periods, is a good example. It requires Member States to ensure “that parties who [...] have recourse to ADR procedures the outcome of which is not binding, are not subsequently prevented from initiating judicial proceedings”.

Member States were required to transpose the ADR Directive by 9 July 2015. This was a major factor for legislative activity aimed at improving the quality of consumer ADR. As expected, the EU Justice Scoreboard shows high levels of legislative activity by the Member States for 2015. Eight Member States adopted measures concerning ADR, while nine Member States announced initiatives in this area.¹¹ Following the approach taken by the Directive, Member States engaged in activities aiming at generally improving consumer dispute resolution, but did not take action towards a differentiated approach that considers specific topics of, or the relationship between, various forms of dispute resolution. A typical example is the approach taken by the German legislature. Instead of improving or adding elements to the existing rules on dispute resolution, the ADR Directive was transposed creating a new law from scratch – the Consumer Conciliation Law (*Verbraucherstreitbeilegungsgesetz*).¹² However, similar to the Mediation Directive, the ADR Directive is an important milestone in the young history of institutionalising ADR in the European Union.

1.1.3. ODR Regulation

Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the “ODR

¹⁰ Recital 21 reads in full: “Also ADR procedures are highly diverse across the Union and within Member States. They can take the form of procedures where the ADR entity brings the parties together with the aim of facilitating an amicable solution, or procedures where the ADR entity proposes a solution or procedures where the ADR entity imposes a solution. They can also take the form of a combination of two or more such procedures. This Directive should be without prejudice to the form which ADR procedures take in the Member States.”

¹¹ European Commission, *The 2016 EU Justice Scoreboard*, 11.4.2016, COM(2016) 199, p. 3.

¹² Gesetz über die alternative Streitbeilegung in Verbrauchersachen (*Verbraucherstreitbeilegungsgesetz – VSBG*), 19.2.2016, BGBl. I, p. 254.

Regulation")¹³ facilitates online dispute resolution by providing a European ODR platform (the "ODR platform"). The ODR platform is not a stand-alone form of dispute resolution. Instead, it serves as a contact point by bringing together consumers, traders and ADR entities. The ADR entities referred to by the ODR Regulation¹⁴ are only such ADR entities listed in accordance with Art. 20(2) ADR Directive, i.e. ADR entities complying with the quality requirements of the ADR Directive and listed by the competent authority. The dispute resolution procedure as such is administered by these ADR entities, not the ODR platform.

The ODR platform supports communication between the parties and the ADR entities. In particular, the ODR platform offers an electronic case management tool free of charge pursuant to Art. 5(4)(d) ODR Regulation, which enables the parties and the ADR entity to conduct the dispute resolution procedure online through the ODR platform.

The ancillary purpose of the ODR Regulation – in essence facilitating online dispute resolution involving ADR entities under the ADR Directive – leads to a similar approach in terms of defining and differentiating between different forms of ADR. To be more precise, the ODR Regulation adopts the unique definition of ADR introduced by the ADR Directive, and narrows it even further in Art. 2(1) by applying it to "contractual obligations stemming from online sales or service contracts between a consumer [...] and a trader" only. Like the ADR Directive, the ODR Regulation does not define and hardly differentiates between different types of dispute resolution falling within its narrow scope.

As a consequence, the ODR Regulation improves online dispute resolution in a general way. The Regulation does not, however, improve online dispute resolution differentiating between specific forms of dispute resolution, nor does it improve the relationship between the various types of online dispute resolution, such as online mediation, online conciliation or online ombuds procedure.

1.2. Shortcomings Remaining

1.2.1. Specific Forms of ADR

The analysis of the contribution of European Union law to creating attractive forms of dispute resolution ("vertical regulation of dispute resolution") reveals a highly imbalanced picture. Only one specific form of alternative dispute resolution has received comprehensive attention: mediation, in the Mediation Directive. Neither the ADR Directive nor the ODR Regulation are aimed at regulating specific forms of dispute resolution. Instead, both instruments address ADR in general in a "bulk ADR approach", without specifically addressing areas such as conciliation, mediation, ombuds schemes, adjudication or arbitration. It must not be forgotten, however, that this broad-brush approach is significantly limited to disputes concerning obligations based on consumer sales and service contracts. Large areas of the ADR landscape remain untouched by both instruments – for example, disputes beyond sales and service contracts and conflicts concerning traders only.

At the Member State level, this imbalanced approach to specific dispute resolution mechanisms is mirrored by equally imbalanced terminologies, accessibilities, characteristics and standards of alternative forms of dispute resolution. For mediation, the EU Commission Mediation Report found extensive legislative and non-legislative improvements of both national and international mediation law and practice in almost all Member States.¹⁵ The ADR

¹³ OJ L 165, 18.6.2013, p. 1; the ODR Regulation is supported by the Commission Implementing Regulation (EU) 2015/1051, 1.7.2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes.

¹⁴ See Art. 2(1), (3), Art. 5(4)(h)(ii), (6), Art. 8(3) ODR Regulation.

¹⁵ EU Commission Mediation Report, 26.8.2016, COM(2016) 542 final.

Directive, on the other hand, has generally not led to improvements of specific forms of dispute resolution in the Member States. Instead, Member States have followed the ADR Directive's approach and concentrated on the quality of ADR entities rather than the quality of forms of dispute resolution.¹⁶ This is witnessed by the transposition approach taken by the German Consumer Conciliation Law (Verbraucherstreitbeilegungsgesetz) mentioned previously.¹⁷ Further examples are the transpositions of the ADR Directive in France¹⁸ and the United Kingdom.¹⁹

From the perspective of the citizens, whether they are consumers or traders, the imbalanced approach to the wide array of specific forms of ADR has a number of adverse consequences. In particular, there is no availability of a variety of ADR forms with equally high quality standards. Dispute resolution mechanisms are not chosen on the basis of suitability, but for arbitrary accessibility and attractiveness. Citizens are confused about the characteristics of different forms of dispute resolution. Unnecessary costs and time are wasted due to substandard procedures or wrong choice of procedure. Last, but not least, the parties miss the available potential of optimal dispute resolution and settle instead for suboptimal outcomes. In the cross-border context, these drawbacks are intensified and multiplied.

1.2.2. Relationship between Different Forms of Dispute Resolution

As seen above for the Mediation Directive,²⁰ the ADR Directive²¹ and the ODR Regulation,²² they contribute little to define and regulate the relationship between different forms of dispute resolution ("horizontal regulation of dispute resolution"). The Mediation Directive focuses on the relationship between mediation and judicial proceedings, and only mentions one other form of alternative dispute resolution by considering the relationship between mediation and arbitration. This is still more than the ADR Directive and the ODR Regulation have to offer. Both abstain from a definition and delineation of different forms of dispute resolution. Against this background, it is not surprising that both instruments only rarely address the relationship between different forms of ADR. If there are principles at all, they concern the relationship between "bulk ADR" and court proceedings.

The situation at the Member State level more or less reflects the state of the law at the European level. To give some examples: Member States have developed rules, standards and practices concerning the enforcement of mediation clauses in judicial proceedings, the relevance of limitation and prescription periods in mediation with a view to subsequent judicial proceedings, the confidentiality of mediation information in judicial proceedings, the relationship between mediation and court costs, the recognition of mediation settlements in judicial proceedings and the initiation and transfer choice between mediation and judicial proceedings. Do rules, standards and practices of similar extent, quality and clarity exist if a mediation is followed by an expert opinion or if the parties first try a conciliation and then a judgement proposal? In most Member States the answers are negative. The years since the

¹⁶ This is not to dispute, of course, the relevance of the quality of institutions for ADR procedures. But the quality of ADR goes far beyond the quality of institutions offering ADR.

¹⁷ For an in-depth treatment of the German Consumer Conciliation Law (Verbraucherstreitbeilegungsgesetz) see Greger, R., 'Verbraucherstreitbeilegungsgesetz (VSBG)', in Greger, R., Unberath, H. and Steffek, F. (eds.), *Recht der Alternativen Konfliktlösung*, 2nd edn., C. H. Beck, Munich 2016, part C.

¹⁸ Ordonnance n° 2015-1033 du 20 août 2015 relative au règlement extrajudiciaire des litiges de consommation, JORF n° 0192 du 21 août 2015, p. 14721, texte n° 43; Décret n° 2015-1382 du 30 octobre 2015 relatif à la médiation des litiges de la consommation, JORF n° 0253 du 31 octobre 2015, p. 20408, texte n° 42.

¹⁹ The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, SI 2015/542; for an overview of the implementation of the ADR Directive in the Member States see Creutzfeldt, N., 'Implementation of the Consumer ADR Directive', Issue 4 (2016) *Journal of European Consumer and Market Law (EuCML)* 169.

²⁰ At 1.1.1.

²¹ At 1.1.2.

²² At 1.1.3.

Mediation Directive have seen vertical improvements of separate "ADR silos". The horizontal dimension concerning the relationship between the separate silos has often been forgotten.

From the citizen's perspective, neglecting the relationship between the various forms of dispute resolution means neglecting the complex reality of disputes. Concurrent transfer from one dispute mechanism to the other allows to correct mistakes in the initial choice of a dispute resolution mechanism. Sequential dispute transfer to one alternative dispute mechanism after (unsuccessfully or partly successfully) concluding another allows a further chance at an autonomous solution. If such transfers are not facilitated by law and practice, damage is done not only to the potential of transfers to remedy mistakes of the initial choice. What is more, knowing that transfer is difficult may bias the parties' initial choice of an ADR mechanism against their true interests. For example, instead of agreeing on the most suitable dispute resolution mechanism, the parties might go for the one where they expect the most state support in terms of procedural cost subsidies or distributional cost transfers, i.e. the other party carrying all or the majority of the costs.

1.2.3. Principled Regulation

Finally, European dispute resolution law falls short of a principled approach to regulation. Principled regulation means a coherent, intelligible, systematic and reasoned approach to law-making and standard-setting.²³ Principled regulation requires, in particular, a coherent and systematic approach within forms of dispute resolution, across different forms of resolving conflicts and in cross-border conflicts. Such coherent and systematic structures are still largely absent in European dispute resolution law. Understandably, the first milestone Mediation Directive focussed on mediation and judicial proceedings. But beneath the focus, there were blind spots concerning the place of mediation among the various forms of dispute resolution. Even more, by taking a "bulk approach" to alternative dispute resolution, the ADR Directive and the ODR Regulation deliberately disregard regulatory differentiations between different forms of dispute resolution on a fundamental level.

Not surprisingly, the same analysis holds for the EU Member States. A good litmus test is to ask the following question: Is there a principled approach to the cost of all forms of dispute resolution in jurisdiction X, i.e. is there a coherent, intelligible, systematic and reasoned approach across all forms of dispute resolution – ranging from mediation and conciliation over ombuds schemes and arbitration to judicial proceedings – to determine the extent to which each party and/or the state carry the costs caused by a certain form of dispute resolution? A further useful test asks the same question for the extent and intensity of professional regulation and oversight of the neutrals (mediators, conciliators, ombudspersons, arbitrators, judges and others) involved.

It is submitted that the information and decision deficits in choosing the right type of dispute resolution reported by many stakeholders in the EU Commission Mediation Report²⁴ are less caused by deficiencies of mediation law and practice per se, but rather by the incoherent law and practice across all dispute resolution forms. The Report concludes that "practices to incentivise parties to use mediation [...] are not yet generally satisfactory" and that "[f]urther efforts at national level – in line with the respective mediation systems in place – should therefore be made".²⁵ It is suggested that presenting citizens with a coherent and intelligible offer across all dispute resolution mechanisms in terms of characteristics, costs and time

²³ On principled regulation of dispute resolution Steffek, F., 'Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics', in Steffek, F. and Unberath, H. in cooperation with Genn, H., Greger, R. and Menkel-Meadow, C. (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland, 2013, p. 34.

²⁴ EU Commission Mediation Report, 26.8.2016, COM(2016) 542 final, p. 4, 7, 9, 10 et seq.

²⁵ Ibid.

involved will contribute more to better decision-making in dispute resolution matters than improving mediation law and practice alone.

2. PRINCIPLED APPROACH

KEY FINDINGS

- A principled approach to regulating dispute resolution has three elements: a framework to refer to dispute resolution mechanisms and their characteristics (taxonomy), a justice theory to inform policy choices and coherent principles of regulating dispute resolution.
- The first element of principled regulation is a framework to classify dispute resolution mechanisms and their characteristics in a national and international context (a taxonomy). It requires the ability to capture the diverse dispute resolution laws, practices and cultures in the EU Member States.
- A taxonomy for the regulation of dispute resolution should take the perspective of the parties to the dispute. Also, it should reflect the reality of dispute resolution and the effects of dispute resolution on the parties (functional approach). Finally, a modular structure of the taxonomy allows adjustments to the legislative task at hand.
- The second element of principled regulation is a justice theory to inform policy choices. Both traditions of modern theories of justice and the Charter of Fundamental Rights of the European Union take the citizens and their interests to be the starting point of good regulation. It follows that citizens have a right of access to dispute resolution. This covers both access to judicial justice and access to alternative dispute resolution.
- The third element of principled regulation is the principles of regulating dispute resolution. This paper shows how such principles are developed on the basis of a taxonomy of dispute resolution and an informed policy choice. More concrete principles of regulating dispute resolution have been developed by an international group of experts: the Guide for Regulating Dispute Resolution (GRDR).
- Principles for regulating dispute resolution can deal with diversity at the European and Member State level. Useful techniques are a functional approach (referring to the reality of dispute resolution instead of a technical approach), open wording of regulatory principles (creating room to experiment and to adjust the principles to differing laws and practices), dynamic referencing (integrating locally proven concepts into a coherent cross-border framework of dispute resolution) and optional formulation (as regards the conditions and consequences of the principles).

2.1. Taxonomy

2.1.1. Perspective of the Parties

Improving the regulation of dispute resolution in general, and the relationship between the various forms of ADR in particular, requires a reference system of classification – a taxonomy. The first step towards such a reference system is the decision of which perspective to take. Since it is the parties' interests and conflicts that matter, the best perspective for a dispute resolution taxonomy is the perspective of the parties.²⁶ They are the normative starting point and focus of regulating dispute resolution.

²⁶ For the theoretical foundations of this approach, see Steffek, F., 'Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics', in Steffek, F. and Unberath, H. in cooperation with Genn, H., Greger, R. and Menkel-Meadow, C. (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland, 2013, p. 37 and 43–46; also on stakeholder oriented views on dispute resolution Alexander, N., Steffek, F., *Mediation Series: Making Mediation Law*, World Bank, Washington D.C., 2016, p. 17.

Taking the parties' perspective seriously means including all forms of dispute resolution into the taxonomy. From the perspective of a party looking to solve a dispute, the question is not "mediation or judicial proceeding?" and it is not "ADR or judicial proceeding?" either. Instead, the question is: "Which form of dispute resolution is the best for the specific conflict to be solved?"²⁷ Hence, a principled reference system for regulating dispute resolution should take a comprehensive starting point and consider all forms of dispute resolution – starting with contract and ranging from mediation, conciliation, arbitration, ombuds procedure and many more to judicial proceeding. One way to order the wide array of ADR mechanisms from the parties' perspective is to classify these procedures according to the influence the parties have on the various features of the procedure (party autonomy). More or less control does not mean better or worse. Instead, it is for the parties to decide which type of approach and what extent of autonomy fits their interests best.

From the parties' perspective, the following core features of dispute resolution mechanisms can be distinguished:²⁸

- Initiation control: whether the parties' consent is needed to initiate the procedure;
- Procedure control: whether the parties determine the procedure;
- Result-content control: whether the parties determine the content of the result (i.e. whether the procedure is non-evaluative);
- Result-effect control: whether the parties' consent is needed for the result to be binding;
- Neutral choice control: whether the parties choose the neutral acting as intermediary;
- Information control: whether the procedure and the information obtained during the procedure is private.

Applying these core features to a selection of essential dispute resolution mechanisms and their core characteristics yields the following Table 1.²⁹

²⁷ Cf. PWC/Europa-Universität Viadrina Frankfurt (Oder), *Commercial Dispute Resolution: Konfliktbearbeitungsverfahren im Vergleich*, Frankfurt am Main, Frankfurt (Oder), 2005, p. 16.

²⁸ Guide for Regulating Dispute Resolution (GRDR), principle I.C, in Steffek, F. and Unberath, H. in cooperation with Genn, H., Greger, R. and Menkel-Meadow, C. (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland, 2013, p. 5.

²⁹ The description 'Yes' or 'No' is a neutral qualification of the degree of autonomy the parties have. It does not equal 'Better' or 'Worse'. Instead, it is the parties' decision which degree of autonomy they wish.

Table 1: Core Taxonomy of Dispute Resolution Mechanisms

Parties together have...						
	Initiation control	Procedure control	Result-content control	Result-effect control	Neutral choice control	Information control
Negotiation	Yes	Yes	Yes	Yes	N/A	Yes
Mediation	Yes	Yes	Yes	Yes	Yes	Yes
Conciliation	Yes	Yes	No	Yes	Yes	Yes
Arbitration	Yes	Yes	No	No	Yes	Yes
Ombuds	Yes	No	No	No	No	Yes
Judicial proceedings	No	No	No	No	No	No

2.1.2. Functional Approach

At the taxonomy level, referencing forms of dispute resolution at a national, transnational or international level is greatly facilitated by taking a functional approach. Such an approach is primarily not concerned with local legal terminology used for dispute resolution mechanisms or with the technical legal rules applied. A functional approach reflects the effect of dispute resolution in real life. It is less concerned with doctrinal structures of law and more with events.³⁰ It is ultimately the function, the effects in reality that matter to those affected by dispute resolution. A functional view on forms of dispute resolution requires law-external yardsticks that may be based in sociology, economics, psychology or ethics.

A functional approach affects both the terminology used for dispute resolution mechanisms and the characteristics used to describe them. Hence, Table 1 refers to forms of dispute resolution in a functional way and does not claim, for example, that all mechanisms that are literally translated as “ombuds procedure” from the terminology of a certain jurisdiction show the characteristics attributed to it.³¹ An ombuds procedure as defined in Table 1 is a procedure where the parties control the initiation and the information, but where they do not control procedure, result content, result effect and the choice of the neutral intermediating. If a mechanism with these features would be called by a different name in a certain legal system, it would still be classified as ombuds procedure here (and vice versa).³²

³⁰ Michaels, R., ‘The Functional Method of Comparative Law’, in Zimmermann, R. and Reimann, M. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, p. 342.

³¹ Instead, there is a wide array of differing procedures that are referred to as ombuds procedures, see Hodges, C., Benöhr, I., Creutzfeldt, N., *Consumer ADR in Europe*, Hart, C. H. Beck, Nomos, Oxford and Portland, 2012, p. 401–402.

³² Needless to say, the taxonomy can be adjusted to functional insights. For example, if the ombuds procedure was perceived to give the parties result-effect control, the relevant field could be changed from ‘No’ to ‘Yes’.

Revealing the function of dispute resolution mechanisms helps to communicate and legislate dispute resolution matters both at the Member State and the EU level. Instead of getting lost in terminology that is still diverse and often contradictory, action can be targeted at the reality that matters. A functional approach is already part of European dispute resolution law. The Mediation Directive employs it, for example,³³ to refer to the mediator by laying down the following definition in Art. 3(b): “‘Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination”. Similarly, the ADR Directive defines ADR entity in a functional way in Art. 4(1)(h): “‘ADR entity’ means any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure”.

The core features used in Table 1 above extend the functional approach beyond the definitions of dispute resolution procedures to their characteristics. EU and Member State legal instruments can similarly apply such a functional approach when regulating the areas for which shortcomings have been identified:³⁴ creating an attractive legal and practical framework for all forms of dispute resolution, extending these improvements to the relationship between all mechanisms and applying a principled approach across all forms of dispute resolution.

2.1.3. Modular Structure

The functional taxonomy introduced has a modular structure. Further forms of dispute resolution and descriptive characteristics can be added or deleted. This facilitates using the functional characteristics as regulatory anchors. With reference to Table 1, a legal instrument could, for example, develop the rules for recognition and enforcement of the solutions developed in a dispute resolution by referring to whether the parties control the effect of the result (mediation and conciliation) or not (arbitration, ombuds procedure and judicial proceedings). Regulation can refer to the taxonomy either indirectly (at the level of designing rules and standards) or directly (by using the characteristics as part of the wording of rules and standards).

A functional view on regulating dispute resolution might be a little unfamiliar at first. However, it offers advantages considering the challenges of making dispute resolution laws identified above.³⁵ Firstly, it is an effective way of dealing with the complex reality of dispute resolution. Rather than getting tangled up in conflicting terminology and the vast array of specialised and adapted variations at the Member State level, the focus remains on the essential attributes. Secondly, it helps to avoid piecemeal approaches and inconsistencies of regulation across different forms of dispute resolution. Thirdly, it provides guidance in innovative areas of evolving dispute resolution mechanisms, and helps to identify whether the effect on the parties requires state action, or whether their autonomy should unfold unrestrictedly.

To give an example of how the taxonomy can be extended, the following characteristic will be added to the table:

- Interest procedure control: whether the parties can ensure that the procedure takes an approach that is based on their interests (and not based on their legal rights).³⁶

³³ Another example is the definition of “Mediation” in Art. 3(a) Mediation Directive.

³⁴ Under 1.2.

³⁵ Under 1.2.

³⁶ On interest- and rights-based dispute resolution Ury, W. L., Brett, J. M. and Goldberg, S. B., *Getting Disputes Resolved*, Jossey-Bass, San Francisco, 1988, pp. 3–19; whether interest-based conflict solutions take priority over legal rights is not an issue of the taxonomy but of the regulation of dispute resolution and other areas to be developed.

Also, the following forms of dispute resolution are added: settlement conference, expert opinion and judgement proposal.

These additions result in the following Table 2.

Table 2: Extended Taxonomy of Dispute Resolution Mechanisms

Parties together have...							
	Initiation control	Procedure control	Interest procedure control	Result-content control	Result-effect control	Neutral choice control	Information control
Negotiation	Yes	Yes	Yes	Yes	Yes	N/A	Yes
Mediation	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Conciliation	Yes	Yes	Yes	No	Yes	Yes	Yes
Expert opinion	Yes	Yes	No	No	Yes	Yes	Yes
Arbitration	Yes	Yes	No	No	No	Yes	Yes
Ombuds	Yes	No	No	No	No	No	Yes
Settlement conference	No	No	No	No	Yes	No	Yes
Judgement proposal	No	No	No	No	Yes	No	No
Judicial proceedings	No	No	No	No	No	No	No

2.2. Policy Choices

2.2.1. Individuals and Their Interests at the Centre of Policy

The normative foundations used to evaluate and prescribe the law of dispute resolution should take their starting point at the individuals affected by disputes. Put differently, good dispute resolution law is based on the interests of all individuals concerned. Only these individuals (might) ask for a reason to justify the law's impact on their interests. Taking individuals as the source of justice is not only the predominant view in modern justice theory,

in particular as regards European voices.³⁷ As opposed to other perceptions of justice,³⁸ it is also the foundation of the laws of the European Union as witnessed by the Charter of Fundamental Rights of the European Union.³⁹

It follows that dispute resolution mechanisms should be designed starting with the individuals concerned. Taking this approach seriously means accepting that it is the individuals who determine their interests, not a third person or the state.⁴⁰ Hence, an essential part of good law-making is listening to the stakeholders through empirical research.⁴¹ It also follows that there should not be a state-set preference for one form of dispute resolution over another. The autonomy of the individual requires the state to provide a framework which allows the parties to resolve their conflicts in an effective and self-determined way. Since different disputes and varying interests require different forms of dispute resolution, a good legal framework offers rules that facilitate interest-adequate dispute resolution. Citizens have a right of access to dispute resolution.

Access to dispute resolution covers both access to judicial dispute resolution and access to alternative dispute resolution. In this holistic view, judicial proceedings and state enforcement take on a special role as a corollary of the power monopoly of the state. Alternative dispute resolution, however, is no less important. Compared to court proceedings, it offers more party autonomy. The more autonomy the parties to a dispute exercise in developing a solution, the higher the chance of fulfilling their interests.⁴² In this sense, from a perception of justice that starts with the individuals, more autonomous (alternative) dispute resolution is preferable to less autonomous (judicial) dispute resolution. This is not to say, however, that alternative dispute resolution is better per se than judicial proceedings. This is for the legitimate interests of those affected to decide. In one case, alternative dispute resolution might offer the best solution to a conflict, in another, it is the judicial proceeding.

2.2.2. Principles of Regulation

A principled approach to regulating dispute resolution can then be developed on the basis of the individuals involved and their interests. Some of the fundamental principles that follow from this approach, such as the right of access to both private and public dispute resolution, have already been mentioned. Further high-level principles are the consensus principle and the coordination principle.⁴³ The consensus principle requires the law to offer ways in which individuals can implement consensus between their interests. One example of how legal systems implement the consensus principle is the legal institution of contract, which often takes the form of a settlement contract in ADR. The coordination principle deals with differing interests and justifies the more constraints on an individual's interest the more this interest

³⁷ Such normative individualism can be found in the works of Hobbes, T., *Leviathan*, Andrew Crooke, London, 1651; Rousseau, J., *Du Contrat Social, ou Principes du Droit Politique Amsterdam*, Marc Michel Rey, 1762; Bentham, J., *A Fragment on Government*, Payne, Elmsly and Brooks, London, 1776; Kant, I., *Die Metaphysik der Sitten, Erster Theil: Metaphysische Anfangsgründe der Rechtslehre*, 2nd edn., Friedrich Nicolovius, Königsberg, 1798; Radbruch, G., *Rechtsphilosophie*, 3rd edn., Quelle & Meyer, Leipzig, 1932; beyond the European tradition normative individualism is the foundation of Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, Massachusetts, 1977; Rawls, J., *A Theory of Justice*, Belknap Press, Cambridge, Massachusetts, revised edn. 1999.

³⁸ For an overview, see von der Pfordten, D., *Rechtsethik*, 2nd edn, C. H. Beck, Munich, 2011.

³⁹ OJ C 326, 26.10.2012, p. 391; see, for example, the following statement in the Preamble: "It places the individual at the heart of its activities".

⁴⁰ Identifying the individuals and their interests is only the first step. Later steps, such as developing principles of regulation and their transposition into rules and standards, require the distinction of legitimate and illegitimate interests; only the former will be fulfilled.

⁴¹ Recently, eg, Creutzfeldt, N., *Trusting the Middle-man: Impact and Legitimacy of Ombudsmen in Europe*, Westminster, 2016.

⁴² Menkel-Meadow, C., 'Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)', 83 *Georgetown Law Journal* 2663 (1995).

⁴³ For a detailed explanation, see Steffek, F., 'Skizzen einer Gerechtigkeitstheorie für das Privatrecht', in Arnold, S. and Lorenz, S. (eds.), *Gedächtnisschrift für Hannes Unberath*, C. H. Beck, Munich, 2015, pp. 415-442.

impairs the interest of another individual. A legal principle representing the coordination principle is the principle of proportionality, which all European laws have adopted in a similar form.⁴⁴

Developing these high-level principles of regulating dispute resolution towards more concrete principles lies right at the heart of the debate on good dispute resolution law and practice. In order to remedy the shortcomings identified as regards the relationship between forms of dispute resolution,⁴⁵ such principles should cover all forms of dispute resolution and their relationship. Together with sixteen colleagues, the author has developed a 'Guide for Regulating Dispute Resolution (GRDR)'.⁴⁶ The GRDR covers the following topics: dispute resolution mechanisms, infrastructure and framework, costs, dispute resolution clauses, choice of dispute resolution procedure, confidentiality, limitation and prescription periods, neutral, procedure, counsel, state (judicial) review of results, enforceability, transparency, consumers, rule-maker, type of rules and procedure design.

To give one example, the GRDR states the following fundamental principle for regulating the qualification of the neutral: *The less the parties control the choice of the neutral, the initiation, the result content and the result effect of a dispute resolution mechanism, the more the state needs to ensure the qualification of the neutral. Generally, however, it is recommended to opt for as little intrusive regulation as necessary.*⁴⁷ This principle is worded in a rather open language, which reflects the fact that the discussion on regulating the qualifications of mediators, conciliators, experts, ombudsperson, arbitrators, judges and others is far from settled. The principle reflects that the need to protect the parties' autonomy and interests against lowly qualified professionals increases with the influence of the neutral. Hence, the principle tries to find a clear expression for 'influence of the intermediary on the procedure and result of the conflict resolution' that still captures the essence of the various forms of dispute resolution. To achieve this aim, the principle refers to the functional characteristics of dispute resolution mechanisms of the taxonomy introduced above.⁴⁸ The characteristics that describe the influence of the intermediary on the dispute resolution are initiation control, result-content control, result-effect control and, foremost, the parties' influence on choosing the intermediary (neutral choice control). Hence, they are used as regulatory anchors.

⁴⁴ For an early reference to the principle of proportionality by the European Court of Justice, see *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgement of 17.12.1970, case 11/70.

⁴⁵ Under 1.2

⁴⁶ Guide for Regulating Dispute Resolution, in Steffek, F. and Unberath, H. in cooperation with Genn, H., Greger, R. and Menkel-Meadow, C. (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland, 2013, Chapter 1 (principles only) and Chapter 2 (principles and comments).

⁴⁷ This is just the first and fundamental principle concerning the qualification of the neutral. The full principle reads (for an explanation, see *ibid*, pp. 25–26 and 53–55):

The less the parties control the choice of the neutral, the initiation, the result content and the result effect of a dispute resolution mechanism, the more the state needs to ensure the qualification of the neutral. Generally, however, it is recommended to opt for as little intrusive regulation as necessary.

If the parties control the choice of the neutral and the initiation or the effect of the procedure, a market approach or an incentive approach may be advisable.

If the parties have neutral choice control, but do not have control over the initiation of the procedure, either the incentive approach or the authorisation approach is recommended.

If the parties neither control the choice of the neutral nor the initiation, an authorisation approach is recommended.

If the parties control neither initiation, neutral choice nor result effect, the state needs to opt for an authorisation approach.

⁴⁸ Under 2.1.

2.2.3. Diversity of Laws, Practices and Perceptions of Justice

A principled approach to regulating dispute resolution in the European Union context needs to embrace diversity. The diversity capability goes beyond the already difficult task of dealing with differing perceptions of justice and good law. Such principles also need to operate in an environment of differing legal dispute resolution frameworks and cultures in the Member States. A functional taxonomy as a reference system already goes a long way in dealing with diversity.

Also, more abstract, high-level principles (such as the examples mentioned above)⁴⁹ already avoid overly detailed and rigid prescriptions. Such principles leave room for variation and allow the Member States to experiment which approach works best. The regulatory space afforded can be used to appreciate and balance locally different interests. Differing political and justice theories can be understood as differing guidelines for weighing the individual interests in dispute resolution. Also, not all disagreements on how to design good dispute resolution law necessarily lead to disagreement as regards the principles of regulation. For example, a disagreement over the relevance of normative aspects that can ultimately not be traced back to the individuals affected by a legal rule, such as the relevance of functioning markets as such, need not result in different opinions on the principles relating to the qualification of the neutral.

Further, diversity at the Member State level can be respected by including options in the formulations of both conditions and consequences. Take a principle that further concretises the general principle relating to the qualification of the neutral exemplified above: *If the parties control the choice of the neutral and the initiation or the effect of the procedure, a market approach or an incentive approach may be advisable.* In terms of its conditions, the principle is flexible as to whether the parties control the initiation or the effect of a dispute resolution procedure, as long as the parties choose the neutral. In terms of the consequences, the principle creates a choice between a market approach (letting supply and demand regulate qualification) and an incentive approach (creating legal incentives for neutrals to qualify, for example, confidentiality rules that favour qualified neutrals).

A further technique is dynamic referencing. By way of example, instead of prescribing principles to deal with information and decision deficits that can affect dispute resolution clauses (such as mediation, conciliation or arbitration clauses), principles may refer to the Member States' contract laws that already deal with these issues. This dynamic reference allows for the integration of differing rules on the integrity of contractual choice into a coherent approach to regulating dispute resolution.

⁴⁹ Under 2.2.2.

3. WAY FORWARD

KEY FINDINGS

- At the EU level, a way forward is to consider the need for further specific ADR instruments similar to the Mediation Directive (vertical instruments). At the Member State level, this would translate to developing the Codes of Civil Procedure towards Codes of Dispute Resolution.
- At the EU level, the relationship between different forms of dispute resolution could be improved either by an instrument concentrating on the relationship between these forms of dispute resolution only (horizontal instrument), or by integrating relationship issues into the vertical instruments concerning specific forms of dispute resolution.
- Most importantly, a framework instrument on principles of regulating dispute resolution could establish principles concerning coherence within specific forms of dispute resolution, across different forms of dispute resolution and in a cross-border context. Such an instrument would also provide the framework for instruments for specific forms of dispute resolution and their relationship.

3.1. Specific ADR Instruments

The first shortcoming identified is the imbalanced approach of European law to specific dispute resolution mechanisms.⁵⁰ While there are many different forms of ADR, there is only one EU instrument dealing with one specific form of ADR in-depth: the Mediation Directive. Neither the ADR Directive nor the ODR Regulation target specific forms of dispute resolution. In addition, both these instruments are significantly limited in their scope of application. There is no instrument similar to the Mediation Directive for forms such as in-house complaint procedure, conciliation, settlement conference, neutral evaluation, expert opinion, mini-trial, ombuds scheme, adjudication, arbitration, judgement proposal and many more.

At the Member State level, imbalanced terminologies, accessibilities, characteristics and standards of alternative forms of dispute resolution can be found. While the ADR milestone instruments (Mediation Directive, ADR Directive and ODR Regulation) have led to legislative activity, dispute resolution at the Member States' level is still dominated by a 'judicial proceedings and the rest' approach. In the cross-border context, the ADR problems found at the Member State level are exacerbated.

At the EU level, a way forward is to consider the need for further vertical instruments on specific forms of alternative dispute resolution, following the example of the Mediation Directive. This may concern specific forms covered by the 'bulk approach' of the ADR Directive and the ODR Regulation. It may also concern the much wider field of ADR not covered by any of the three recent milestone instruments. At the Member State level, this would translate into continuing the transformation of the national Codes of Civil Procedure to Codes of Dispute Resolution.⁵¹ Such Codes of Dispute Resolution would offer citizens a clear and coherent choice between different forms of dispute resolution.

Considering specific instruments would, of course, require us to remember the lessons learned from ADR. In particular, sometimes non-regulation is better than regulation. For example, the Mediation Directive and the Member States' laws have been wise to abstain

⁵⁰ Under 1.2.1.

⁵¹ The expression 'Code' is only used to refer to the legislative and case law constituting the body of dispute resolution law.

from detailed regulation of the mediation method as such.⁵² The two guiding and opposite poles of regulating dispute resolution could be the facilitation of consensus on the one hand, and the coordination of opposing interests on the other.⁵³

3.2. Relationship between Forms of Dispute Resolution

The second shortcoming identified is the lack of clearly defined relationships between different forms of dispute resolution both at the EU and Member State level.⁵⁴ This concerns issues such as the effect of one type of procedure in another (for example, confidentiality) and the transfer from one procedure to another (for example, from mediation to expert opinion). The lack of a defined relationship currently leads to decision deficits by citizens, both when initiating and changing procedures.

Two approaches to remedy this shortcoming at the EU level can be envisaged. Firstly, a horizontal relationship instrument could concentrate on relationship issues only. This would be an instrument that does not regulate specific forms of dispute resolution, but only relationship characteristics. The advantages of a pure relationship instrument are a straightforward approach to comprehensively deal with relationship issues and the institutional facilitation to concentrate on such problems. The disadvantages are the abstractness of only regulating relationships and conflicts with Member State laws where the EU instrument would require relationship rules in instances where there are no local rules for the specific instrument to start with. Secondly, relationship issues could be integrated into specific ADR instruments. This would avoid the disadvantages mentioned previously, but would be more challenging in achieving a comprehensive and coherent framework of dispute resolution relationships.

3.3. Principled Regulation Framework Instrument

The third shortcoming at both European and Member State level is the lack of a principled approach to regulating dispute resolution.⁵⁵ Principled regulation requires, in particular, coherence and a systematic structure within forms of dispute resolution, across different forms of resolving conflicts and in cross-border conflicts. It has been argued that the absence of principled regulation might be the most relevant cause for dispute related information and decision deficits by the citizens in the European Union. This paper attempts to show how a principled approach to regulating dispute resolution can be achieved both at the EU and Member State level.⁵⁶

The imperative of a principled approach to regulating dispute resolution also applies to the way forward suggested above. Instruments on specific forms of ADR⁵⁷ and on the relationship between specific forms of ADR⁵⁸ will only be successful if developed on the basis of a principled approach. Hence, a larger initiative is needed. Developing principles of regulating dispute resolution needs to be the first step. Otherwise, instruments on specific forms of dispute resolution or on the relationship between such forms risk creating a practice of dispute resolution that does not satisfy citizens' interests.

⁵² Hopt, K. J. and Steffek, F., 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in Hopt, K. J. and Steffek, F., *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, p. 60.

⁵³ Above under 2.2.2; cf. Wagner, G. and Eidenmüller, H., 'Begriff und Formen der Mediation', in Wagner, G. and Eidenmüller, H. (eds.), *Mediationsrecht*, Verlag Dr. Otto Schmidt, Köln, 2015.

⁵⁴ Under 1.2.2.

⁵⁵ Under 1.2.3.

⁵⁶ In chapter 2.

⁵⁷ Under 3.1.

⁵⁸ Under 3.2.

A possible way forward is a framework instrument on principles of regulating dispute resolution. Such an instrument could cover principles concerning coherence within specific forms of dispute resolution, across different forms of dispute resolution and in a cross-border context. Choosing the right level of detail and innovative forms of regulating diversity would facilitate capturing the variety of dispute resolution laws, practice and culture at the Member State level. Without a doubt, such a framework instrument would require a remarkable initiative. It would, however, promise a formidable improvement for the quality of dispute resolution available to the citizens in the European Union.

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Mediation and private international law: improving free circulation of mediation agreements across the EU

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IN-DEPTH ANALYSIS

Abstract

This paper, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs upon request by the JURI Committee, examines the issues arising in the context of cross-border mediation. Cross-border litigation has increased steadily in recent years in Europe as a consequence of the consolidation of the European unification process. The enactment of Directive 2008/52/EC has certainly led to the presence of mediation legislation in the EU Member States. But many important differences can still be ascertained in relation to the legal framework developed, which affect key aspects of mediation. For mediation to obtain full endorsement by citizens in the future, at least as regards cross-border disputes, full circulation of the settlement reached in any Member State across the whole Union should be ensured. For this to be done, there should be not only a minimum set of common private international law rules on key aspects of cross-border mediation, but also quick, affordable and simple ways to achieve the enforcement of cross-border settlements throughout the Union.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Art.	Article
Arts.	Articles
Cc	Civil Code
ed.	Editor
eds.	Editors
n.	Footnote
No.	Number
LEC.	Ley de Enjuiciamiento Civil (Civil Procedure Code)
<i>supra</i>	Above
Trib.	Tribunale (Court)
UNCITRAL	United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

Cross-border litigation has steadily increased in recent years in Europe, hand-in-hand with the consolidation of the European unification process. It has been fostered by the growing harmonisation of private international law and substantive law in certain strategic areas. The enactment of the Mediation Directive should be seen as a direct consequence of this.

The final goal of the 2008 Directive is twofold. On the one hand, the Directive aims to foster recourse to mediation in the European Union in relation to civil and commercial disputes. For this objective to be achieved, a minimum common legal standard on mediation must exist throughout Europe.¹ It is obvious that promoting the use of mediation in civil and commercial disputes will directly encourage a growing number of cross-border mediation settlements. Consequently, the second goal of the Directive is to ensure the enforceability of the agreement reached in one Member State throughout the EU.

In general terms, the 2008 Directive has been successful in raising awareness of the necessity of ensuring the free circulation of settlements arising out of mediation within the EU. The institution is now in the legal arena; nevertheless, the growing attention paid to mediation has not been accompanied by the designation of a comprehensible and clear common legal framework for cross-border mediation in the Member States.

In the Mediation Directive and its implementation at the national level, important issues are left unresolved or not even dealt with, and usually it is not possible to speak of a well-developed or comprehensive system. This may finally negatively affect the achievement of the goal of ensuring the free circulation of settlements within the EU.

Actions to be taken could involve both the harmonization of choice of law rules on cross-border mediation and the enactment of rules on recognition and enforcement of foreign mediation settlements or, alternatively, be restricted to the latter sphere.

1) A first step to improve the circulation of mediation settlements in Europe could be the elaboration of a new legal instrument on mediation, setting forth a new legal framework for cross-border mediation in the EU. Two options could be explored in this respect:

- (a) Firstly, the EU legislators could draft a new legal instrument including new common general legislation on this area. This new legislation should guarantee the harmonization of the basic provisions on cross-border mediation in the EU Member States by setting forth a minimum legal standard for mediation in the EU that ensures the circulation of mediation settlements.
- (b) However, the elaboration of a new legal instrument may encounter opposition from some Member States. A more limited, and perhaps more feasible, alternative for the EU legislators would be to focus on a specific kind of dispute or category of persons involved in civil and commercial litigation, to which a special treatment should be granted –for instance, transnational consumer disputes, disputes related to small and medium enterprises or to certain areas of family law - and to enact new specific legislation only in relation to that category.

Despite their different scopes, in both cases the existence of these common harmonized rules of private international law on mediation would add certainty and predictability to cross-border mediation and, consequently, would foster the circulation of mediation settlements throughout the Union.

2) It would also be possible for the EU to focus only on the recognition and enforcement of foreign mediation settlements in other EU Member States. With some minor exceptions, in

¹ Recital 7, 2008 Directive.

the Member States, the recognition and enforcement of mediation settlements reached abroad depends on the participation of national courts and authorities. No direct enforceability is envisaged as a general rule in national legislations across the EU.

Thus, the recognition and enforcement in one Member State of a settlement reached in another will depend both on the existence of an EU legal instrument that covers the subject matter of the dispute and on the specific document in which this mediation settlement has been embodied. The mediation settlement reached by the parties on a topic covered by the existing EU legal instruments on recognition and enforcement of judgments, if formally embodied in a judgment, authentic instrument –e.g. a notarial deed- or court-settlement which are enforceable in accordance with the law of the country where these instruments have been rendered, will be subject to the flexible system designed by the EU in this area. Otherwise, reference to the national law of the Member States on recognition and enforcement should be made.

The general framework created by these instruments could be considered as satisfying the mandate of Article 6 of the 2008 Directive. Consequently, a first approach to the issue of the potential reforms to be introduced in order to foster the circulation of mediation settlements throughout the Union would be that the current situation already grants the parties a high degree of certainty while allowing, to a certain extent, the circulation of mediation settlements in the EU, and that no reform is needed in this area, at least in the short term.

Nevertheless, it could also be argued that the current situation does not fully ensure the circulation of mediation settlements in Europe and that the EU legislators should explore some new paths. Indeed, the EU system of recognition and enforcement is not comprehensive and some areas are left uncovered. Additionally, the implementation of the system generates costs (for instance, to obtain authentication) and is time-consuming for the parties involved in the settlement, thus affecting some of the principles on which mediation stands. This may negatively affect the circulation of foreign mediation settlements, especially in minor disputes.

Standing both on this premise and on the desire to promote the use of mediation as a sound, affordable and effective way to solve internal and cross-border disputes in the EU, several measures of different nature and scope, as well as difficulty, could be explored to ensure the circulation of mediation settlements reached in one EU Member State throughout the Union:

- 1) These measures could be limited to reforming the existing EU legal framework on recognition and enforcement in order to include an explicit reference to mediation. This option is fully feasible and not especially difficult to implement. However, it does not bring any real change to the current situation, insofar as the existing net of EU legal instruments on recognition and enforcement is, as previously stated, already applicable. This option would bring the advantage of making mediation settlements explicitly embodied in the scope of the existing EU instruments on recognition and enforcement, for the sake of clarity of the system.
- 2) The EU could also explore the possibility of creating an EU Mediation Settlement Certificate granted by public authorities in the country of origin. This solution is in line with the philosophy underlying certain EU legal instruments, such as Regulation 805/2004 creating a European Enforcement Order for uncontested claims, or Regulation (EU) No 650/2012 on succession and on the creation of a European Certificate of Succession.

The creation of this EU Mediation Settlement Certificate would definitely foster the circulation of foreign mediation settlements, by laying down some minimum standards to be complied with in the country where the settlement was reached and ensuring its enforceability. The certificate should clearly state, at least, the name of the parties, the fact that the agreement is reached as a consequence of a mediation (in the sense referred to by the 2008 Directive, not of purely private negotiations), the name of the mediator, the specific obligations agreed

on by the parties, the date of the settlement, and the fact that it is enforceable in the country of origin.

The Member State where enforcement is sought would still be granted certain defences to prevent enforcement in its territory, such as the public policy exception, the fact that the subject matter of the dispute could not be subjected to mediation, or the fact that the dispute to which the mediation settlement refers has now been taken before a state court in the Member State of origin.

The system could be designed for any mediation settlement reached in another EU Member State, or only as regards specific mediation settlements in relation to certain kinds of disputes or involving certain parties or categories of parties.

3) Finally, the EU could decide to modify the existing system, in line with some proposals that are currently under negotiation in other international institutions: for instance, at UNCITRAL an instrument on enforcement of international commercial settlement agreements resulting from conciliation is under preparation and will presumably be finished by spring 2017. The instrument aims to ensure that settlement agreements which are binding and enforceable in the State of origin will be enforced abroad, as a matter of principle, irrespective of their formal condition, while providing the country where enforcement is sought with certain defences in line with Article V of the 1958 New York Convention on the recognition and enforcement of foreign arbitration awards. This option would bring the advantage of making mediation settlements enforceable per se, even when not formally embodied in a judgment or authentic act.

This proposal would lead to a major change to the existing situation in the EU, even if the previous option in favour of the creation of a European Mediation Certificate were adopted. In line with the work undertaken at UNCITRAL, the 2008 Directive could be reformed - or a new legal instrument created - to support the direct enforcement in any other EU Member State of a mediation settlement entered into in a Member State without any judicial ratification and irrespective of the nature of the document which embodies the agreement, be it authentic or purely private. This option could either be limited to EU mediation settlements or refer to any mediation settlement, irrespective of the country of origin.

This solution is complex to reach, but it would ensure the circulation of mediation settlements rendered in one Member State throughout the Union. Moreover, if the work of UNCITRAL were to gain broad support worldwide, it would help if the intra-EU model regarding the enforcement of foreign mediation settlements would be similar to that which exists as regards the enforcement in Europe of mediation agreements reached outside the Union.

Whatever the option chosen, for mediation to obtain full endorsement by citizens in the future, at least as regards cross-border disputes, full circulation throughout the Union of the agreement reached in the Member States should be ensured.

1. INTRODUCTION

Cross-border litigation has steadily increased in recent years in Europe, hand-in-hand with the consolidation of the European unification process. It has been fostered by the growing harmonisation of private international law and substantive law in certain strategic areas. The enactment 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 matters² should be seen as a direct consequence of this.

The final goal of the 2008 Directive is twofold. On the one hand, the Directive aims to foster recourse to mediation in the European Union in relation to civil and commercial disputes. For this objective to be achieved, a minimum common legal standard on mediation must exist throughout Europe.³ It is obvious that promoting the use of mediation in civil and commercial disputes will directly encourage a growing number of cross-border mediation settlements. Consequently, the second goal of the Directive is to ensure the enforceability of the agreement reached in one Member State throughout the EU.⁴

According to some studies, settlement rates in international business are around 85-90%; voluntary fulfilment of settlements reached is also high.⁵ Nevertheless, as the number of mediations rises, an increase in the amount of litigation that arises from mediation seems inevitable and multiple different reasons may fuel this situation.

In a purely ideal scenario, no reference to any legal rule would be necessary, insofar as the settlement reached by the parties would be honored on a voluntary basis. Nevertheless, the Directive is more realistic than that, as it seeks to stress that mediation is not a second-class justice device, fully dependent on the will of the parties: therefore, as stated in Article 6, it is necessary to ensure that the parties to "a written agreement resulting from mediation" have the possibility to obtain its enforcement.⁶ This approach is sound, taking into account the growing litigation in relation to mediation that exists in other jurisdictions of the world.⁷

Despite its many benefits, mediation is not yet a widely used instrument in Europe in transnational disputes.⁸ According to some studies, only 0.05% of cross-border commercial disputes are referred to mediation. This is even more negative if we take into account that around 25% of all commercial disputes in the EU are allegedly left unsolved because citizens refuse to litigate.⁹

² OJ L 163, 24.5.2008, p. 3.

³ Recital 7, 2008 Directive.

⁴ Recitals 19 & 20, 2008 Directive.

⁵ Sussman, E., 'Final Step: Issues in Enforcing the Mediation Settlement Agreement', in Rovine, A.W. (ed.), *Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2008*, M. Nijhoff, Leiden, 2009, pp. 343-344.

⁶ Recital 19, 2008 Directive stresses the necessity of not considering mediation as "a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties."

⁷ Note, Coben, J. & Thompson, P., 'Disputing Irony: A Systematic Look at Litigation about Mediation', *Harvard Negotiation Law Review*, Vol. 11, 2006, p. 43 ff.

⁸ Consider, European Commission, *Business-to-Business Alternative Dispute Resolution in the EU (Flash Eurobarometer 347)*, Brussels, March-April 2012 (available at: http://ec.europa.eu/public_opinion/flash/fl_347_en.pdf, accessed 03.10.2016). Not even in purely domestic cases, consider De Palo, G., D'Urso, L., Trevor, M. et al., 'Rebooting' the Mediation Directive: *Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Brussels, 2014, pp. 6-7 & 120-121.

⁹ See Tilman, V., *Lessons Learnt From the Implementation of the EU Mediation Directive: The Business Perspective*, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Brussels, 2011, p. 4.

Despite the current situation, cross-border litigation is expected to increase in the future in the EU and the use of mediation to solve this kind of disputes will be hampered by the absence of common private international law rules on mediation in the EU. This could have negative consequences for citizens and impair the achievement of the final objectives of the Directive.¹⁰

In general terms, the Directive has been successful in raising awareness of the necessity of ensuring the free circulation of settlements arising out of mediation in the EU. The institution is now in the legal arena. Nevertheless, this growing attention to mediation has not been accompanied by the designation of a comprehensible and clear common legal framework for cross-border mediation in the Member States.

Certainly, before the enactment of the Directive, no Member State had rules on cross-border mediation, and these rules now exist in some of them. However, the final picture after its implementation in the Member States is narrow and at times unclear or even confusing. Where new rules have been enacted, the scope of the legal framework designed is usually limited and the solutions provided tend to differ from country to country. Important issues are left unresolved or not even dealt with, and usually it is not possible to speak of a well-developed or comprehensive system. This may finally negatively affect the achievement of the goal of ensuring the free circulation of settlements within the EU.

Actions to remedy this situation could include both the harmonization of choice of law rules on cross-border mediation and the enactment of rules on recognition and enforcement of foreign mediation settlements or, alternatively, be restricted to the latter sphere.

¹⁰ Note, Kramer, X., De Rooij, M., Lazić, V. *et al.*, *A European Framework for private international law: current gaps and future perspectives*, European Parliament, Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Legal Affairs, Brussels, 2012, p. 20.

2. ABSENCE OF PRIVATE INTERNATIONAL LAW RULES AS REGARDS CROSS-BORDER MEDIATION

The 2008 Directive is silent on many important issues affecting cross-border mediation. No common rules on private international law are embodied in the text; in addition, responses provided by national legislation vary from Member State to Member State.

1) EU national legal systems on mediation are habitually silent as regards the law applicable to the mediation clause or to the agreement to mediate in cases of cross-border mediation.

In any mediation, depending on the facts surrounding the specific situation, certain relationships arise out of the mediation clause or of the agreement to mediate:

- (a) Firstly, the agreement between the parties, who decide to take their prospective dispute to mediation. This decision will usually be embodied in a mediation clause.
- (b) Secondly, when the dispute has actually arisen and no mediation clause exists, the parties may decide to refer their existing conflict to mediation, either on a voluntary basis or upon the invitation of a court. An agreement between the disputing parties, the mediator or the mediation services provider may exist once the parties actually decide to initiate the mediation, after which an agreement to mediate is usually concluded.
- (c) Thirdly, when the mediation services are provided through the offices of a mediation services provider, there will be a contract between that mediation services provider and the mediator or mediators.
- (d) Finally, the mediation settlement that binds the parties to it.

If all these relationships are considered as having a purely contractual status, the law governing them will be ascertainable by way of application of the existing legal instruments determining the law applicable to contractual obligations. Unfortunately, this does not seem to be that straightforward.

As a matter of principle, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations—Rome I Regulation—¹¹ would be applicable in order to establish the legal regime. The Regulation will govern: the law applicable to the agreement to mediate, the substantive and formal validity of the agreement(s) reached, the contractual liability arising out of a breach of the obligations entered into (e.g. the obligation by the parties to submit the dispute to mediation), and any other aspect of the agreement falling under its material scope of application.¹²

Conversely, all those issues not covered or dealt with by the Rome I Regulation would be governed by the existing national private international law rules, whatever their origin, international or domestic. For instance, the capacity to enter into a mediation clause or an agreement to mediate or the regulation of a situation falling outside the scope of the Regulation would be left to be determined by national private international law rules.¹³

This is the general rule in almost all EU Member States, although doubts as to the application of the Rome I Regulation have been raised in some European countries due to the legal

¹¹ OJ L 177, 4.7.2008, p. 6. Applicable to all EU Member States but Denmark, note Recital 44.

¹² Note Esplugues, C., 'Civil and Commercial Mediation in the EU After the Transposition of Directive 2008/52/EC', in Esplugues, C. (ed.), *Civil and Commercial Mediation in Europe. Vol. II. Cross-Border Mediation*, Intersentia, Cambridge, 2014, p. 745.

¹³ See footnote 12, pp. 745-746.

nature of mediation clauses and agreements to mediate and the way they are actually implemented.¹⁴

2) In most EU national legislations, nothing is said as regards the law applicable to the agreement reached in relation to either its existence or content. As a matter of principle, the question of which law will govern the formation of the settlement (e.g. as regards the consent, or the formal requirements)-, which has the nature of an agreement entered into by the parties, should be answered by the law applicable to contractual obligations.

Additionally, the law applicable to the content of the agreement is directly dependent on the nature of the dispute at stake and the content of the settlement reached by the parties. Depending on the specific obligations agreed upon, and their nature and legal enforceability, the applicable law will vary. This law will be relevant for the determination of whether the rights upon which the claim is founded are at the parties' disposal, for the formation of the content of the settlement, and for its admissibility and effects. The law applicable to the settlement reached by the parties will be determined in accordance with the existing rules of private international law in relation to the merits of the dispute at stake, and will not necessarily be the same as that applicable to the mediation; either EU law, or national law in the absence of the former, will apply.

This is broadly understood as meaning that, in those cases falling fully or partially within the scope of the "Rome I" Regulation, this Regulation will be applicable to those issues to be settled that are covered by it.¹⁵ In the case of disputes over family matters or successions, relevant EU instruments on private international law should also be taken into account. Otherwise, national private international law rules will apply as regards the determination of the law governing the merits of the settlement, if any such a law exists or is necessary, taking into account the specific settlement reached by the parties. In the case of a settlement embodying a plurality of obligations, this could lead to different private international law rules being referred to and several national systems being applied.

This situation, in combination with the absence of a legal framework specifically designed to enforce foreign mediation settlements, can harm the circulation of these settlements in the EU. A first step to improve the circulation of mediation settlements in Europe could be the elaboration of a new legal instrument on mediation embodying a general legal framework for the institution in Europe. Two options could be explored to this respect:

1) Firstly, the EU legislators could draft a new legal instrument including new common general legislation on this area. This instrument should be broader in scope and provide a more developed legal framework than the current Mediation Directive, including clear, sound and balanced choice of law rules on certain relevant issues of cross-border mediation, as well as some rules on the jurisdiction and enforcement of mediation settlements reached in other EU Member States.¹⁶

This new legislation should guarantee the harmonization of the basic provisions on cross-border mediation in the Member States, by setting forth a minimum legal standard for mediation in the EU while ensuring the circulation of mediation settlements in the Union.

2) However, the elaboration of a new legal instrument may encounter opposition from some Member States. A more limited, and perhaps more feasible, alternative for the EU legislators

¹⁴ For instance, in countries like Spain some authors grant a non-contractual condition to the mediation clause. Consider to this respect, Iglesias Buhigues, J.L., Palao Moreno, G., Espinosa Calabuig, R. *et al*, 'Spain', in Esplugues, C. (ed.) (2014), p. 428 ff. Other authors, on the contrary, grant a fully contractual condition to it, note Esplugues, C., 'El régimen jurídico de la mediación civil y mercantil en conflictos transfronterizos en España tras la Ley 5/2012, de 6 de julio', *Boletín Mexicano de Derecho Comparado*, Vol. XLVI, No. 136, 2013, p. 181 ff.

¹⁵ Some isolated national case law upholds this possibility: in France, note Cour de cassation, Soc., 29.1.2013, n°11-28041 (<http://legimobile.fr/fr/jp/j/c/civ/soc/2013/1/29/11-28041/>, accessed 4.10.2016).

¹⁶ See 3.2. *infra*.

would be to focus on a specific kind of dispute or category of persons involved in civil and commercial litigation, to which a special treatment should be granted: for instance, they could focus on transnational consumer disputes or disputes related to small and medium enterprises or to certain areas of family law. New specific legislation in relation to the aforementioned categories should be enacted by the EU.

This approach would depend on the previous determination by the EU of those areas, persons or categories of disputes to be covered by the new legal framework. It would encourage the circulation of mediation settlements in certain key areas of society throughout the EU.

Despite their different scopes, in both cases the existence of these common harmonized rules of private international law on mediation would add certainty and predictability to cross-border mediation and, consequently, would foster the circulation of mediation settlements throughout the Union.

3. CIRCULATION OF MEDIATION SETTLEMENTS THROUGHOUT THE EU

3.1. Current situation

As stated, the 2008 Directive is silent on many important issues affecting cross-border mediation. It focuses on ensuring the enforcement of settlements reached in a foreign mediation. Nevertheless, the rules provided in this respect are very limited, and basically consist of its Article 6. Certainly, the already existing EU legal instruments on recognition and enforcement can be useful for accomplishing the goals of the Directive in relation to cross-border disputes and the circulation of foreign settlements reached in the framework of mediation proceedings. However, the existing legal instruments are limited in scope and do not always provide for a flexible and comprehensive response to the questions raised.

3.1.1. Absence of direct enforceability of mediation settlements in the EU

Enforceability of the settlement constitutes one of the most relevant issues in relation to mediation, and it gains even further relevance as regards cross-border mediations, in which the settlement agreed upon by the parties must circulate across the EU. Certainly, the fact that the parties have entered the agreement in a fully voluntary manner and have realised that it is the best possible solution to their dispute should ensure a high level of voluntary enforceability; however, for mediation to be fully effective, the enforceability of the settlement must be ensured even beyond voluntary enforcement.

In accordance with Article 6(1) of the 2008 Directive, enforcement should be the general rule and could only be rejected on certain specific and limited grounds: if the content of the agreement is contrary to the law of the country where enforcement is sought, including its private international law rules, "or if its law does not provide for enforceability of the content of the specific agreement".¹⁷ Enforceability must be ensured as regards agreements reached in cross-border disputes.¹⁸

Article 6(2) of the 2008 Directive goes further in asserting this principle and states that the enforceability of the content of the agreement reached by the parties: "*may be made [...] by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made*". This rule sets forth a sort of minimum standard as to this issue that can be freely broadened by every Member State.

Nevertheless, the analysis of the variety of legal solutions adopted in Europe shows the existence of a number of different solutions to the enforceability of the settlement. In almost all of the Member States, direct enforceability is not possible.¹⁹ The settlement reached by the parties within a mediation proceeding is considered as a contract and is therefore expected to be voluntarily honoured by them. In domestic cases, in the event of a lack of voluntary fulfilment by the parties, the settlement is unanimously considered in all the Member States to be a contract that binds the parties and will have to be enforced through

¹⁷ Recital 19 and Article 6(1) *in fine*, 2008 Directive.

¹⁸ Note Recital 20, 2008 Directive.

¹⁹ Hopt, K.J. & Steffek, F., "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues", in Hopt, K.J. & Steffek, F. (ed.), *Mediation Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, p. 46.

court action or, where applicable, arbitration. Leaving aside certain specific situations existing in some Member States,²⁰ no direct enforceability is provided as a general rule.

The enforceability of the settlement reached by the parties within a mediation proceeding usually depends on its homologation by a public authority in the place where it was reached. Differences exist between the EU Member States regarding the conditions required to grant enforceability to these settlements and as to the role played by the authority in charge of the homologation of the settlement. In certain cases, enforceability is possible only upon ratification of the settlement by the court, whereas in other cases, the notary is granted an important role in turning the agreement into an enforceable title.²¹ In addition, the public authority's grounds to refuse to homologate the agreement vary throughout Europe.

Additionally, in the framework of an arbitration procedure, the possibility of having the agreement embodied in an arbitral award is also available.

A rather positive attitude towards the enforcement of domestic mediation settlements seems to exist in several EU Member States.²² Nevertheless, the situation as regards the circulation of mediation settlements throughout the EU generates different and more complex concerns.

3.1.2. Circulation (recognition and enforcement) of foreign mediation settlements in the EU

A further layer of complexity exists as regards the enforcement of the mediation settlement outside the country where it was reached. The legal regime applicable to its recognition and enforcement will vary if they are sought in another EU Member State or outside the EU. Moreover, of course, a different situation will exist when recognition of settlements reached outside the EU is sought in a specific EU Member State. Additionally, a different legal regime will exist in relation to those settlements that are embodied in an arbitral award.

In line with the current position regarding the enforcement of domestic mediation settlements not voluntarily honoured by the parties in the EU Member States, the recognition and enforcement of mediation settlements abroad is broadly dependent on the participation of national courts and authorities. No direct enforceability is envisaged as a general rule in national legislations across the EU. An isolated exception to this position may be found in Portugal, where Article 9(4) of Act 29/2013²³ recognises direct enforceability – “without the necessity of homologation by the court”²⁴ - of the settlement reached via mediation in another EU Member State, if it is enforceable according to the country of origin and “respects letters a) and d) of paragraph 1 of this Article”.²⁵ The provision is fully in line with Article 6 of the 2008 Directive.

Leaving aside this unique case, the recognition and enforcement in one Member State of a settlement reached in another will depend both on the existence of an EU legal instrument that covers the subject matter of the dispute and on the specific document in which this mediation settlement is embodied.²⁶

²⁰ Basically in Hungary, Croatia or Portugal, note Esplugues, C. (2014), pp. 719-720.

²¹ Esplugues, C. (2014), 720-727; European Commission, *Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive'*, Publications Office of the European Union, Luxembourg, 2014, p. 27.

²² European Commission (2014), pp. I & 27.

²³ Act No. 29/2013, of 19.4, Princípios gerais aplicáveis à mediação - mediação civil e comercial, *Diário da República*, 1.ª série — N.º 77 — 19.4.2013.

²⁴ Article 9(1) Act No. 29/2013.

²⁵ Note Lopes, D., 'Portugal', in Esplugues, C. (ed.) (2014), p. 333.

²⁶ Consider Recital 22, 2008 Directive.

3.1.2.1. Existence of an EU legal instrument

The inclusion of a reference to mediation is habitual in the EU legal instruments on recognition and enforcement, although the way it is done varies considerably among them.

1) Within the various EU legal instruments on recognition and enforcement, a single reference to the enforcement of settlements reached in the framework of a mediation proceeding may be found in Article 46 of the so-called Brussels IIa Regulation.²⁷ Also Article 55(e) includes a facilitative rule as regards settlement of disputes in matters of parental responsibility. In relation to the cooperation between central authorities, the latter provision states that central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate in specific cases to achieve the purposes of the Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: "facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end."

2) This facilitative position towards settlement of disputes (not necessarily settlements reached via mediation) is also found in other EU Regulations, although no reference to the direct enforceability of settlements is made:

(a) Article 51(2) of Council Regulation No 4/2009 on maintenance obligations²⁸ clearly endorses the obligation of the central authorities to take all necessary measures in order "to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes". Article 45(a) allows the provision of legal aid in order to cover "pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings".

(b) Article 8 of Regulation (EU) 650/2012 on successions²⁹ also includes the obligation of the court which has started succession proceedings of its own motion under Articles 4 or 10 to close them "if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22". The Regulation cannot be a reason to prevent the parties from settling the succession amicably outside court, "for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State."³⁰

(c) Similar reference to a "friendly settlement" is found in Article 42(4) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version).³¹

However, reference to the circulation of these agreements in other EU Member States is only made in Article 46 of Regulation 2201/2003, which explicitly states that "agreements

²⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 19.

²⁸ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

²⁹ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4.7.2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107.

³⁰ Recital 29, Regulation 650/12. Note Recital 36 regarding parallel out-of-court settlements developed in different EU Member States.

³¹ OJ L 78, 24.3.2009, p. 1.

between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.”

Leaving aside these explicit references to mediation, if enforcement of a settlement reached in a certain EU Member State is sought in another Member State, the object and content of the settlement will be decisive in determining the applicability of any of the existing EU instruments on recognition and enforcement of foreign judgments.³² Recital 20 of the 2008 Mediation Directive explicitly refers to some of them as instruments that can ensure that the content of an agreement resulting from mediation and which has been made enforceable in a Member State will be recognised and declared enforceable in the other EU Member States.

This means that the settlement reached by the parties on a topic covered by existing EU legal instruments for the recognition and enforcement of judgments, if embodied in a judgment, an authentic instrument –e.g. a notarial deed- or a court-settlement which are enforceable in accordance with the law of the country where these instruments have been rendered, will be subject to the flexible system designed by the EU in this area. These regulations are essentially:

1) Council Regulation (EC) No 2201/2003, referred to in Recital 20 of the Mediation Directive, whose previously mentioned articles 55(e) and 46 make a direct reference to this issue.³³

2) Regulation (EU) No 1215/2012 (so called Brussels I a Regulation),³⁴ to which the Mediation Directive itself also refers,³⁵ which however does not make any explicit reference to foreign mediation settlements entered into in an EU Member State and for which enforcement is sought abroad.

3) In addition to these two Regulations, some other EU legal instruments are relevant to ensure the circulation of mediation settlements declared enforceable in their country of origin and which are embodied in a judgment, an authentic document or a court transaction:

- (a) Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,³⁶
- (b) the abovementioned Regulation 4/2009 on maintenance obligations,³⁷
- (c) the abovementioned Regulation 650/2012 on succession and on the creation of a European Certificate of Succession,³⁸
- (d) Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes;³⁹ and
- (e) Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property consequences of registered partnerships.⁴⁰

³² Indirect reference to these instruments and to any existing international convention is made in some EU Member States, e.g. Portugal, Art. 9(4) Act No. 29/2013 and Spain, Art. 27(1) Act 5/2012, of 6.7, de mediación en asuntos civiles, *Boletín Oficial del Estado* of 7.7.2012.

³³ Also consider Recital 21, 2008 Directive.

³⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

³⁵ Recital 20, 2008 Directive includes a reference to Council Regulation (EC) No 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1), the predecessor of Regulation 1215/2012.

³⁶ *OJ L 143, 30.4.2004, p. 15.*

³⁷ *OJ L 7, 10.1.2009, p. 1.*

³⁸ See footnote 28.

³⁹ *OJ L 183, 8.7.2016, p. 1.*

⁴⁰ *OJ L 183, 8.7.2016, p. 30.*

These last two Regulations implement enhanced cooperation in certain areas of the law in which mediation has a potentially powerful role to play.

- (f) In addition to these EU legal instruments, some other texts concerning recognition and enforcement in other areas may also be applicable: for instance, the previously mentioned Regulation 207/2009 on the Community trade mark⁴¹ and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs,⁴² which makes reference to the recognition and enforcement of certain decisions in this area based on some legal precedents of the current Regulation 1215/2012.⁴³

As previously stated, the domestic enforceability of an agreement reached by the parties in the EU Member States is, as a general rule, subject to homologation by a public authority: namely, judges and notaries. Consequently, the settlement whose intra-EU enforcement is sought will in most cases already be embodied in a judgement, a court settlement or an authentic document. Moreover, given the existing broad net of EU legal instruments concerning recognition and enforcement, if the settlement refers to matters covered by the scope of the existing Regulations, it will then be able to circulate throughout the EU in accordance with them.

It could thus be concluded that the general framework created by these instruments would satisfy the mandate of Article 6 of the Mediation Directive.⁴⁴ In fact, enforceability would be granted in more flexible and broader terms than those foreseen in Article 6(1) *in fine*. The reference in this provision to a ground to reject enforcement if an agreement is “contrary to the law of the Member State where the request is made” is restricted by the abovementioned Regulations insofar as they combine a general reference to the manifest contradiction with “public policy” with a rule prohibiting review of the substance,⁴⁵ thus favouring the circulation of these agreements throughout the EU. Reference to the existing net of Regulations on recognition and enforcement would also help to overcome certain doubts existing in some EU Member States as regards the possibility for the parties to dispose of their rights in some legal areas; e.g., family law, a field especially important for mediation.⁴⁶

However, this general statement is subject to certain clarifications:

- 1) Firstly, for the mediation settlement to benefit from the current EU legal framework on recognition and enforcement, the settlement must be covered by one of the existing Regulations. Although their scope is broad, there are still areas of the law that are likely to be taken to mediation but may fall outside their scope. Moreover, some of the Regulations are not applicable in all EU Member States; for instance, the two Regulations on matrimonial property regimes and property consequences of registered partnerships, two topics usually referable to mediation, were adopted through enhanced cooperation.

⁴¹ See, Recital 16, Regulation 207/2009.

⁴² OJ L 3, 5.1.2002, p.1, Arts. 79 & 90.

⁴³ Conversely, this would not be the case in relation to cross-border insolvency proceedings, insofar as Council Regulation (EC) No 1346/2000 of 29.5.2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1), and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20.5.2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19) refer only to judgments.

⁴⁴ A special situation exists for settlements reached in mediations in Denmark. Although the 2008 Directive does not apply to Denmark, settlements that fulfil the conditions set forth in Regulation 1215/2012 will be able to circulate in other EU Member States in accordance with this Regulation. Note Agreement between the European Community and the Kingdom of Denmark on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters of 2005, OJ L 299, 16.11.2005, p. 62 and reference made to it by OJ L 79, 21.3.2013, p. 4.

⁴⁵ Regulation 1215/2012 (Articles 45(1)(a) & 52); Regulation 2201/2003 (Arts. 22(a), 23(a), 25 & 26) or Regulation 650/2012 (Arts. 40(a) & 41). Because of their own nature, solutions provided by Regulations 4/2009 (Arts. 24(a) & 48) and 805/2004 (Art. 21(2)) are even more flexible.

⁴⁶ Note as regards Italy, Queirolo, I., Carpaneto, L. & Dominelli, S., ‘Italy’, in Esplugues, C., Iglesias Buhigues, J.L. & Palao Moreno, G. (eds.), *Civil and Commercial Mediation in Europe, vol. I National Mediation Rules and Procedures*, intersentia, Cambridge, 2012, p. 259. Also consider Judgment of Trib. Varese, of 9 April 2010, *Il foro italiano*, 2010, p. 2225.

2) Secondly, in order to be recognised, the settlement must be embodied in a judgment, an authentic document or a court settlement. Since some of the existing Regulations on recognition and enforcement only foresee the recognition and enforcement of certain judgments, this limits even further the possibility of mediation settlements not embodied in a judgment circulating in the EU. This is the case for instance for settlements reached in the area of insolvency, when allowed by the law of the country where they were agreed on.

3) Thirdly, the settlement must be enforceable in the country of origin. As previously stated, the settlement reached by the parties is considered as a binding contract. In the event that the parties do not voluntarily comply with a settlement reached in cross-border mediation (carried out within or outside the EU), any of the parties may at any time lodge a claim for breach of contract before the competent court of any EU Member State and ask for its compulsory enforcement. The jurisdiction of that court will be determined in accordance with the existing EU Regulations on international jurisdiction or, as the case may be, following national rules.

In any case, if the settlement reached by the parties is fully or partially covered by any of the EU Regulations, they will be applied and a full or partial recognition of the settlement will be granted. Otherwise, reference to the national law of the Member States on recognition and enforcement should be made.

3.1.2.2. Absence of an EU legal instrument

If the settlement fully or partially falls outside the scope of any of the existing EU Regulations, international conventions and national rules on recognition and enforcement of foreign judgments and decrees existing in every EU Member State would be applicable. In most cases, not only judgments but also other authentic documents are covered by these provisions.⁴⁷

3.1.2.3. Settlements embodied in an arbitration award

Mediation settlements reached within an arbitration procedure may be embodied in an arbitral award. In this case, irrespective of the seat of the arbitration, and due to the absence of legislative action by the EU in this area, the New York Convention on the recognition and enforcement of foreign arbitration awards of 1958 will be applicable.⁴⁸ Alternatively, Article VII of the New York Convention provides for the applicability of any other convention that may be more favourable to the recognition of foreign arbitration awards in the EU Member State where enforcement is sought.

3.1.2.4. Recognition and enforcement of settlements reached outside the EU in an **EU** Member State

Finally, recognition and enforcement of settlements reached outside the EU and falling outside the scope of application of the Lugano Convention of 30 October 2007⁴⁹ would be governed by the international or national legislation applicable in every Member State in the specific area of the law at stake.

⁴⁷ See Esplugues, C. (2014), p. 766.

⁴⁸ Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> (accessed 5.10.2016).

⁴⁹ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30.10.2007 (OJ L 339, 21.12.2007, p. 3).

The existing EU legal framework on recognition and enforcement of foreign judgments, authentic documents and court settlements is broad in scope and flexible as to the solutions provided. Despite the existence of different systems and solutions in each of the Member States, its application to the circulation of mediation settlements rendered in a Member State throughout the EU is feasible and in line both with Article 6(1) of the Mediation Directive, according to which settlements that circulate abroad must be enforceable in their country of origin, and with the requirement of homologation of the mediation settlement for it to gain enforceability in many EU Member States.

3.2. Some prospective positions (and measures) to be adopted

As stated, the national legislation of the Member States usually links the enforceability of the mediation settlement in their territories to its homologation by national authorities. Thus, a judgment, an authentic document or a court transaction embodying a mediation settlement could be enforceable in the territory of other EU Member States in accordance with existing EU Regulations on recognition and enforcement in cases in which the settlement falls within their scope. On the other hand, mediation settlements on matters that the parties can dispose of and that are not covered by EU legal instruments would be left to national law. Below we will examine some possible solutions to this issue and put forward proposals for future reforms to foster the circulation of mediation settlements throughout the Union.

3.2.1. First option: Status quo

A first approach would be to conclude that the current situation already ensures a high degree of certainty to the parties while allowing, to a certain extent, the circulation of mediation settlements in the EU, and that, consequently, no reform should be introduced, at least in the short term.

3.2.2. Second option: Reform of the status quo

However, it can also be argued that the current situation does not fully ensure the circulation of mediation settlements in Europe and that some new paths should be explored by the EU legislator.

The EU system of recognition and enforcement is not comprehensive and, as previously stated, some areas are left uncovered. Additionally, the implementation of the system generates costs⁵⁰ and is time-consuming for the parties to the settlement, thus affecting some of the principles on which mediation stands. This may negatively affect the circulation of foreign mediation settlements, especially in cases of small disputes, therefore harming one of the basic principles on which the Mediation Directive stands.

Based on this premise, and on the desire to promote the use of mediation as a sound, affordable and effective way to solve conflicts in internal and cross-border disputes in the EU, several measures of different nature and scope could be explored to ensure the circulation throughout the EU of mediation settlements reached in a given EU Member State.

⁵⁰ In particular, direct costs (such as the cost of obtaining recognition of the settlement in a judgment or notary deed) and indirect costs (such as the cost of obtaining legal advice as regards cross-border enforceability of the agreement, which will indirectly arise out of the uncertainty of the applicable legal regime). An indirect cost of the current complex regime could also be that of not resorting to mediation given the difficulties in ensuring cross-border enforcement of the settlement, with all related court costs and fees.

As previously stated, these measures could be included in a reform of the existing Directive or in a new legal instrument on mediation, whatever its nature may be, thus providing a broader and more elaborate private international legal framework for cross-border mediations and new rules specifically devoted to the circulation of mediation settlements throughout the EU. Alternatively, if the creation of new legislation on cross-border mediation by the EU is considered too complex or potentially troublesome, it could be restricted to the field of the recognition and enforcement of mediation settlements throughout the Union.

This latter option would appear to be easier to articulate by the EU and to accept by the Member States; however, it does not lack risks, as it could lead to several different approaches of a varying nature and impact.

3.2.2.1. A very limited reform: Embodying an explicit reference to mediation in the **existing** EU legal framework on recognition and enforcement

The EU could firstly consider the possibility of modifying the existing EU legal framework on recognition and enforcement to include:

- 1) An explicit reference to the recognition and enforcement of mediation settlements reached in other EU Member States in the provisions that establish the scope of the EU legal instruments on recognition and enforcement, or only in some of them.
- 2) The inclusion of a new Chapter in the existing Regulations –or at least some of them- on recognition and enforcement of mediation settlements, in parallel with the already existing Chapters on public documents and court settlements.

Even if no other reform is made, it would become explicit that the existing EU legal framework on recognition and enforcement is also applicable to mediation settlements. This would lead to a situation of increased legal certainty and would ensure that no doubts can arise as to the application of the current EU regime to mediation settlements.

These two options are feasible and not especially difficult to implement. Either of them would generate certainty and foster the circulation throughout the EU of those mediation settlements embodied in a judgment, an authentic document or a court-settlement in relation to matters covered by the existing Regulations on recognition and enforcement. However, they do not suppose any real change with respect to the current situation, insofar that the existing net of EU legal instruments on recognition and enforcement is, indeed, already applicable to them.

3.2.2.2. A step further: Towards the creation of an EU Mediation Settlement Certificate

The EU could also explore the possibility of creating an EU Mediation Settlement Certificate, to be granted by certain public authorities in the country of origin. This solution is more ambitious than the previous one. Yet, although it is in line with existing solutions already adopted in Union law, it may generate some opposition in some Member States.

The creation of this EU Mediation Settlement Certificate would be in line with the philosophy underlying some existing EU legal instruments: for instance⁵¹ the abovementioned Regulation 805/2004 creating a European Enforcement Order for uncontested claims, and Regulation (EU) No 650/2012 on succession and on the creation of a European Certificate of Succession. This EU Mediation Settlement Certificate would definitely foster the circulation of foreign

⁵¹ And, also, of Regulation (EC) No 1896/2006 of the European Parliament and the Council of 12.12.2006 creating a European order for payment procedure (OJ L 399, 30.12.2006, p. 1).

mediation settlements by laying down some minimum standards to be complied with in the country where the settlement was reached and would therefore ensure its enforceability.

This certificate should clearly state, at least, the name of the parties, the fact that the agreement is the consequence of a mediation in the sense of the 2008 Directive (not of purely private negotiations), the name of the mediator, the specific obligations agreed upon by the parties, the date of the settlement, and the fact that it is enforceable in the country of origin.

This certificate would ensure that certain standards as regards the subject matter of the dispute and the participation of a mediator, and his or her accredited condition as the case may be, are complied with during the mediation and that, consequently, the agreement is reliable and can be enforced in other Member States.

The Member State where enforcement is sought would still be granted certain defences to prevent enforcement in its territory, such as a contradiction with public policy, the fact that the subject matter of the dispute could not be subjected to mediation in the Member State where enforcement is sought or the fact that the dispute to which the mediation settlement refers has been taken before a state court.

The system would stand on the idea of confidence in EU legal practitioners –not only judges or other public authorities- and because of that, it may need additional actions to be implemented by Member States as regards, for instance, the quality and formation of mediators.

This solution would entail a major step forward in the circulation of mediation settlements in Europe, although some problems would still remain for this option to be adapted to the area of mediation and successfully implemented. The scope of Regulations 805/2004 and 650/2012 is limited and they refer to particular areas of the law, but at the same time they mark the way forward in relation to the circulation of mediation settlements throughout the Union; particularly in the case of Regulation 650/2012, which covers situations not limited to pecuniary obligations and creates a new optional European Certificate of Succession.

In the event that the creation of this EU Mediation Settlement Certificate is further explored, it would be necessary to specify: which mediation settlements would be covered and as regards what kind of disputes, which authorities would be competent to render this certificate in the country of origin, on what grounds it would be rendered, and how enforcement would be ensured in other EU Member States. Moreover, its optional or compulsory nature should be analysed.

The creation of such a Certificate would also require the previous determination of whether it would be granted only to those mediation settlements that are homologated by public authorities in the country of origin and, consequently, embodied in any of the three categories already covered by the existing EU legal instruments on recognition and enforcement: judgments, authentic documents and court-settlements. In this case, the added value compared to the current regime would be that the Certificate could cover mediations concerning any subject matter, and therefore would no longer be limited to the areas where the EU has adopted specific Regulations. Alternatively, purely private mediation settlements lacking homologation by any authority in the country of origin could be covered by this prospective certificate: this would constitute a much more radical measure, but it would also have a much higher added value.

In any case, the creation of this EU Mediation Settlement Certificate would imply that its issuance by an authority of the country of origin of a mediation settlement which is enforceable in that country and fulfils certain formal and substantive conditions would be granted direct enforcement in another EU Member State, subject to the control of the competent authority of that country.

Two options for policy reform would then be possible: the EU Mediation Settlement Certificate could either be limited to mediation settlements homologated by a public authority in their country of origin and thus embodied in a judgment, an authentic document or a court settlement, or extend also to purely private mediation settlements.

1) Given the public nature of the document that embodies the mediation settlement and is to be enforced in another Member State, and the already mentioned parallelism with the existing EU legal framework on recognition and enforcement of foreign judgments, the first option would certainly generate less opposition in Member States and would be easier to implement.

Nevertheless, the issue of the scope covered by the future instrument could still generate some debate. The added value of the EU Mediation Settlement Certificate is linked to the broader scope of this new instrument in comparison with the existing EU net of Regulations on recognition and enforcement. It is the creation of a common model for the enforcement of mediation settlements related to as many matters as possible that really provides an added value to the proposal.

2) On the contrary, the choice of a system also referring to mediation settlements embodied in purely private documents would presumably give rise to greater controversy and opposition in some EU Member States due to the significant changes that it would entail with respect to the existing situation. The creation of the EU Mediation Certificate would radically alter this situation and could allow a foreign mediation agreement that is documented in a purely private document and which is enforceable in the country of origin to gain enforceability abroad, at least in certain specified circumstances.

However, the requirement of enforceability in the country of origin may still affect the viability of the system, as the enforceability of mediation settlements in Europe is usually linked to prior homologation by a public authority, and this finally implies that enforceable mediation settlements in the country of origin will habitually be embodied in a judgment, an authentic document or a court transaction, not in purely private documents. Consequently, the application of the prospective EU Mediation Certificate to both public and purely private documents embodying a mediation settlement would be more theoretical than real.

The only way to overcome this situation would be to create the new system as an optional one (like the European Certificate of Successions) and to dissociate the condition of enforceability of the mediation settlement with a view to its circulation throughout the EU from the compulsory prior homologation by the public authority of the country of origin, linking it instead to its compliance with certain objective conditions set forth by the new EU legislation. This would presuppose the creation of a double system: a general one linked to the previous homologation of the mediation agreement by a public authority in the Member State of origin of the settlement; and a privileged - but optional - one, applicable to mediation settlements which are embodied in a private document that fulfils certain objective conditions set forth by the new EU instrument. This is not an easy goal to achieve.

In addition to this, certain problems of a different kind should be stressed. In many European countries, the mediation settlement has not *res judicata* effects. Conversely, in other Member States, such as Spain, the agreement is granted *res iudicata*⁵² value, although its enforcement depends on its inclusion in a public document.⁵³ In this case, the settlement is not final and the dispute can still be taken to state courts.

In any case, when the mediation settlement has been homologated, it has *res judicata* effects because of this homologation, even if it is not final and the possibility of appeal exists.

⁵² Art. 1816 Cc.

⁵³ Art. 517(1)(2) LEC.

In addition to this issue, it is necessary to ensure that the certificate does not breach the principle of confidentiality on which mediation is based.

3.2.2.3. An additional option: The creation of a limited EU Mediation Settlement Certificate

If the previous solution is considered too difficult to develop or troublesome for Member States, the EU legislators could still support a European Mediation Settlement Certificate but design it only as regards mediation settlements in relation to certain kinds of disputes or involving certain parties or categories of parties; for instance, disputes involving consumers or small and middle size enterprises.⁵⁴ Solutions provided by the existing EU legal instruments on recognition and enforcement are a basis for further exploration of this issue, and the specific nature of the dispute or of the parties involved in it would support this possibility.

3.2.2.4. Turning point: Circulation of mediation settlements embodied in purely private documents

Finally, the EU could decide to modify the existing system in line with some proposals that are currently being negotiated in other international institutions, such as UNCITRAL, where an instrument on enforcement of international commercial settlement agreements resulting from conciliation is under preparation and will presumably be finished by Spring 2017.⁵⁵ This instrument aims to ensure that settlement agreements of a purely private nature which are binding and enforceable will be enforced abroad, as a matter of principle, at the same time as providing the country where enforcement is sought with certain defences to prevent this enforcement, in line with Article V of the New York Convention on the recognition and enforcement of foreign arbitration awards of 1958.⁵⁶

The proposal constitutes a major change with regard to the existing situation in the EU, even with respect to the previous option in favour of the creation of a European Mediation Certificate. In line with the work undertaken at UNCITRAL, the Mediation Directive could be reformed, or a new legal instrument enacted, to support the direct enforcement in any other EU Member State of a mediation settlement entered into in another Member State without any judicial ratification and irrespective of the nature of the document which embodies the agreement –either authentic or purely private. This option could be limited to EU mediation settlements or even refer to any mediation settlement, irrespective of the country of origin.

This solution would ensure the circulation of mediation settlements rendered in one Member State throughout the Union. Moreover, in case the works of UNCITRAL gain broad support worldwide, it would ensure that the intra-EU model regarding the enforcement of foreign mediation settlements would be similar to that existing as regards the enforcement in Europe of mediation agreements reached outside the Union.⁵⁷

The proposal under debate at UNCITRAL is not completely foreign to the EU legal reality. Article 9(4) of Law No. 29/2013, in Portugal, constitutes an example in line with this solution

⁵⁴ The use of ADR tools for solving disputes between consumer and traders is expected to rise in the near future in the EU. Note European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions – The 2016 EU Justice Scoreboard*, COM(2016) 199 final, Luxembourg, 2016, p. 33.

⁵⁵ Note, UNCITRAL, *Draft Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, 12-23 September 2016)*, Internet: http://www.uncitral.org/pdf/english/workinggroups/wg_arb/acn9-896_draft_report_as_submitted.pdf (accessed 9.10.2016).

⁵⁶ See footnote 55, paragraphs 79 and 84ff.

⁵⁷ Note that depending on the nature of the instrument enacted by UNCITRAL, the issue of the competence of the EU or of the Member States to ratify it will arise.

that could be taken into account when designing the new system. Article 9(4) allows a mediation settlement reached in another EU Member States to be enforceable in Portugal without judicial ratification when the settlement is enforceable in the country of origin, if the dispute could be subjected to mediation without any need of judicial ratification, and if no violation of Portuguese public policy exists and the law of the country of origin also grants enforceability to the settlement.⁵⁸

Drafting a rule in these terms would allow EU mediation agreements to circulate throughout the EU irrespective of the nature of the document in which they are embodied and of the existence of any EU legal instrument on recognition and enforcement. This could constitute an important step in the direction of favouring the circulation of EU settlements around Europe, while at the same time giving a powerful signal in favour of mediation as an effective, affordable and rapid tool to solve civil and commercial disputes in Europe. The double control of foreign mediation settlements through reference to public policy and to the right of the parties to dispose of the subject matter of the dispute through mediation provides the country where enforcement is sought with two essential defences. Additional controls for the authorities of the Member State where enforcement is sought as regards the enforcement of foreign mediation settlements could also be explored in order to ensure that they meet a minimum formal and procedural standard.

The possibility of a document other than a judgment, an authentic document or a court settlement circulating in Europe is not unrealistic, if we take into account that foreign arbitral awards are recognized in most EU Member States without being authenticated by a public notary. Certainly, some relevant differences exist with arbitration, insofar as no negative effect is habitually granted to the agreement to submit a dispute to mediation. Additionally, as already mentioned, mediation settlements usually lack *res judicata* effects in many EU Member States; this means that when the settlement is reached, it can still be challenged in court and court proceedings as regards the subject matter of the dispute can be initiated.

Nevertheless, the EU has adopted a clear position in favour of mediation and of the circulation of mediation settlements throughout the EU and the work undertaken by UNCITRAL issues a powerful call in this regard.

⁵⁸ Lopes, D., p. 335.

4. FINAL REMARKS

The analysis of the situation in the EU after the implementation of the 2008 Directive on Mediation generates mixed feelings. The Directive has certainly led to the adoption of legislation on mediation in several Member States. The institution is now on the legal agenda in all Member States. But many important differences can still be ascertained in relation to the legal framework developed, which affect key aspects of mediation.

The Directive aims to establish a minimum common legal framework for mediation in the Member States, with the goal of ensuring circulation of settlements across the EU. Article 6 of the Directive is clear in this respect. However, the general and broad, but explicit, rule embodied in the provision has been made dependent on the homologation of the agreement by national public authorities. This may be understandable insofar as many kinds of effects with several levels of legal relevance may arise from the settlement, and some of these may affect rights that are subject to a certain degree of legal control; for example, property rights or access to public registers. However, when this option is projected onto cross-border disputes (and/or a future E-mediation scenario), it implies that the enforcement of settlements reached in another EU Member State is now done by way of referring to the existing EU legal instruments for recognition and enforcement of foreign resolutions. The 2008 Directive explicitly refers to this fact in Recitals 20 and 21.

Certainly, as a matter of principle, this may favour the circulation of settlements reached in one Member State across Europe. However, as stated, settlements may exist that fall outside the scope of the existing Regulations on recognition and enforcement – making a reference to national law necessary – while there are settlements that, even if within the scope of these Regulations, are not really designed in such a way that their application is satisfactory; for example, those embodying an obligation not to do something or behave in a certain way. Moreover, even when the settlement is covered by the Regulations, the cost in money and time of making use of these instruments should be considered in order to ascertain whether mediation really is a valid device to achieve a “quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties”, in accordance with Recital 6 of the 2008 Directive.

For mediation to obtain full endorsement by citizens in the future, at least as regards cross-border disputes, full circulation of the settlement reached in one of the Member States across the whole Union should be ensured. To achieve this goal, there needs to be a minimum set of basic common private international law rules on key aspects of cross-border mediation, and citizens should also be ensured quick, affordable and simple ways to achieve the enforcement of cross-border settlements throughout the Union.

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Online Mediation and Dispute Resolution: Legal and Practical Issues

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IN-DEPTH ANALYSIS

Abstract

This in-depth analysis, commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs upon request by the JURI Committee, summarises experiences with a unique online dispute resolution platform for divorce that is implemented in The Netherlands. It describes how the platform functions and details some challenges that emerge from practice, which result from the hybrid nature of the platform, the new skill sets it requires from professionals, the regulatory frameworks under which it has to operate and its position in the justice system. The report further includes policy recommendations to foster access to justice innovations like these.

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ANNEX I: PRINT-OUTS OF RECHTWIJZER DIVORCE PLATFORM

EXECUTIVE SUMMARY

Current developments in online mediation and ODR have resulted in innovative platforms for dispute resolution. Whereas early ODR platforms focused on relatively easy transactional disputes (e-commerce, small claims), innovations like the Rechtwijzer Divorce platform make ODR work for difficult relational disputes like divorce (but also rent, problematic debts and employment).

These platforms host hybrid processes combining elements from negotiation, mediation, adjudication, legal review, and work with automated features as well as (online and offline) interventions by human professionals. Performance and user data indicate that ODR is very promising when it comes to delivering high quality justice, providing people with a sense of control and ownership as well as the advantage of affordable costs.

Online mediation and ODR platforms like these require new ways of working on the part of professionals. Working online in a non-linear process that puts citizens much more in the lead requires adaptations. In particular, what is needed are skills adaptations as well as adaptations in the regulatory framework, with regard to mediation agreements, adjudication engagements, rules that govern the legal profession and the way in which alternative processes are connected to the courts.

Regulation that creates space for innovation, so that new experimental justice processes like online mediation and ODR can be tested, as well as more agile rule-making in general can foster better justice experiences for people. Additionally, more flexible positioning of courts and adjudication that allow for plugging in adjudication interventions in online mediation and ODR processes will stimulate the impact of access to justice innovations on peoples' lives.

1. ONLINE ACCESS TO JUSTICE INNOVATIONS

1.1. Online Innovations in Access to Justice

In the past decade, access to justice innovations increasingly incorporate online information and communication technology. Specifically in the area of dispute resolution between individuals and the organisations they create, we have seen a number of online processes emerge. Companies like E-Bay championed online dispute resolution for e-commerce and several ODR dispute resolution processes followed swiftly. Nowadays, a major e-commerce company like Ali Baba claims to resolve online about 1 million disputes each day, about 70% of which without any human intervention.¹ The recently launched ODR platform of the EU has similar potential for cross-border consumer disputes in the EU.

ODR innovations continue to grow even in other domains. Outside the EU, in British Columbia (Canada), the Ministry of Justice recently launched its Civil Resolution Tribunal which provides full ODR for disputes between people who live in the same condominium.² In the same province, the Legal Services Society of British Columbia launched MyLawBC,³ a platform providing guidance through a series of guided pathways that direct people to the information and tools they need for their legal problems. It also provides an online self-help tool for making agreements for divorce and separation.⁴

The judiciary of England and Wales has also announced a major move of courts to ODR.⁵ Their ambitious program seeks to build online courts for criminal justice,⁶ civil money claims,⁷ and possibly divorce.⁸ This move is not unique. For example the KEI ("Quality and Innovation") program of the Dutch courts also seeks to introduce online courts.⁹ Initial experiences with online divorce in England have been gained through a pilot project of the English charity Relate.¹⁰

Most of these initiatives innovate justice procedures by bringing them online. The aim mostly is to replicate the existing justice procedures in an online environment, thus creating improved access. Online mediation and ODR, however, offer many possibilities to innovate at a much deeper level. Rather than replicating existing processes in a smart way, these processes themselves can be redesigned using the extra tools an online environment offers.¹¹

One example of an ODR process that has been innovated at a deep level is the Dutch Rechtwijzer Divorce platform. This platform was designed and developed by the Hague Institute for the Innovation of Law (HiiL) in partnership with the Dutch Legal Aid Board with the support of the Dutch Ministry of Security and Justice.¹² It provides an integrated online process that supports people throughout their divorce and separation, not by creating an

¹ This claim was made during the 16th ODR conference in Beijing in September 2016 by the Vice President Legal of Ali Baba (<http://odr.info/odr2016-in-beijing/>).

² See <http://www.civilresolutionbc.ca>.

³ See <http://mylawbc.com>.

⁴ This dialogue tool is built on the same technology as the Dutch Rechtwijzer Divorce platform.

⁵ Also see the reports of Professor Susskind and Lord Justice Briggs (www.judiciary.gov.uk/reviews/online-dispute-resolution and www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf).

⁶ See <https://www.lawgazette.co.uk/news/digital-courts-get-green-light-in-1bn-initiative/5057639.fullarticle>.

⁷ See <http://www.legalfutures.co.uk/latest-news/government-judges-urge-lawyers-innovate-era-online-justice-fixed-fees-approaches>.

⁸ See <https://www.lawgazette.co.uk/practice/divorce-to-move-online-in-2017-says-munby/5053929.fullarticle>.

⁹ See <https://www.rechtspraak.nl/kei>.

¹⁰ See <http://www.legalfutures.co.uk/latest-news/exclusive-relate-to-launch-uks-first-divorce-odr-system>.

¹¹ Which sometimes also is acknowledged by the courts as a way forward. See, for example, <https://www.lawgazette.co.uk/law/briggs-online-court-will-take-the-a-out-of-adr/5057914.article>

¹² The author of this report was the lead justice technology architect of the platform and later the director of the company behind the platform (HiiL Rechtijzer Technology). He currently works for DAS Legal Services and is responsible for the development of online legal services and an online legal platform.

online tool merely for the implementation of existing processes, but rather by developing a new, more hybrid process that is supported by an online platform. Currently, the experimental phase of a Rechtwijzer Rent platform for disputes concerning rents started, and a version of the online platform dedicated to debt restructuring for individuals and a limited scope version for employment issues have also been launched.

These new kinds of ODR processes are designed to deliver better justice to citizens. They are developed by combining expertise on law, dispute system design,¹³ expertise with designing user-friendly interfaces of websites and optimizing user experiences, conflict studies, negotiation theory, institutional economy, microeconomics, comparative law, and build on the best available research evidence.¹⁴ Such innovative processes, however, are faced with the problem that much of the regulations governing the justice system do not anticipate them.

This paper analyses and identifies practical and legal challenges of online mediation and online dispute resolution. It specifically focuses on the challenges and bottlenecks that the experiences with the Dutch Rechtwijzer Divorce platform brought to light, and additionally also explores the broader and more general challenges for online mediation and ODR.

1.2. Approach and Structure

This paper starts with a description of the process¹⁵ on the Rechtwijzer Divorce platform in Chapter 2. The process (section 2.2), service delivery and support (2.3) and payment model (section 2.4) all incorporate innovations and features that are new to a divorce process. Since its launch in 2015, Dutch citizens used the platform to work towards their divorce and separation. Section 2.5 presents some of the user data that were collected thus far.

Next, Chapter 3 discusses some of the challenges that this kind of ODR faces in practice. This report combines three sources for identifying these challenges. First, some of these challenges emerged from the day to day operation of the Rechtwijzer Divorce platform. Second, user data (from citizens, service providers, platform administrators and stakeholders) suggest that certain elements can be further optimised as well. Third, in June 2016 the author of this report hosted the 15th International ODR Conference¹⁶ in the Peace Palace in the Hague, bringing together over 200 ODR practitioners and specialists, legal services specialists, court professionals, policy makers and academics. During the conference, these experts identified challenges for further integrating ODR in the legal system.¹⁷

The hybridity of innovations like the Rechtwijzer Divorce platform, specifically the hybrid nature of the process (section 3.2) and of the professional roles (section 3.3) are new and challenging to operate in the current settings. Additionally, the opt-in nature of these

¹³ This is the relatively new discipline that focuses on the architecture of procedures and justice systems as to optimise their impact on dispute resolution. Also see <http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=68729>.

¹⁴ See <http://www.hiil.org/data/sitemanagement/media/Rechtwijzer%200%20Online%20Problem-Solving%20Dispute%20Resolution%20for%20Divorce%20Evidence%20Base.pdf>.

¹⁵ In this paper I use the term process to refer to the substantive norms and procedures that govern a specific dispute.

¹⁶ This yearly event is hosted by the National Centre for Technology and Dispute Resolution of the University of Massachusetts Amherst. The author of this report is a fellow at this institute.

¹⁷ The author of this report co-authored a report that bundles these results. See J.M. Barendrecht, J.H. Verdonchot et al, ODR and the courts: the promise of 100% access to justice?, Hiil Innovating Justice 2016. The report can be downloaded at <http://www.hiil.org/data/sitemanagement/media/Hiil%20Online%20Dispute%20Resolution%20Trend%20Report.pdf>.

processes (section 3.4) as well as the existing regulatory framework for legal service delivery by professionals (section 3.5) pose challenges.

Chapter 4 concludes with a number of policy recommendations that would help to ensure online mediation and ODR further grow in the direction where they can have an increased impact on access to justice.

2. ODR FOR RELATIONAL DISPUTES

2.1 An Online Interest-Based Divorce Process

The Dutch Legal Aid Board is one of the justice innovation leaders in The Netherlands. Already in 2006, they launched an interactive website (www.rechtwijzer.nl) where citizens would find guided pathways for a broad range of legal problems, including in the fields of consumer rights, employment, housing, debt, administration, and family. Since its launch, user testing took place and the lessons learned were translated into updates and enhancements to the system. Independent reviews by Twente University confirmed the impact on access to justice.¹⁸

In 2015, together with HiiL, the Dutch Legal Aid Board took this innovation some important steps forward. Learning from the ODR experiences of E-Bay, the many online mediation initiatives around the globe, and the vast experience of HiiL with integrating technology in justice processes, the Rechtwijzer Divorce platform was created and, for the first time, introduced a fully integrated ODR platform for one of the most challenging relational disputes: divorce and separation.

Rather than starting from dispute resolution processes like negotiation, mediation, adjudication, etc., the design started from the justice journeys as citizens tend to experience them. From this perspective, the distinction between ADR and formal processes becomes less meaningful, as legal needs surveys across the globe show that people tend to try different things at the same time.¹⁹ They look for information online while they may talk with a relative, negotiate with the other party and visit a citizens' advice bureau. They may engage in mediation while they consult a lawyer and open a litigation procedure. Consequently, the Rechtwijzer divorce platform entails an innovative process that builds on the behaviour of people and keeps them away from polarisation.

2.2 Basic Steps to Justice

The Rechtwijzer Divorce platform is structured around a step by step process, which follows the justice journey that people typically travel. The process thus is optimised for the user experience and user interaction. All language is non-legalistic so the platform enables people to share their own views, concerns and ideas in their own language, at their own pace and from their own homes.

As a first step, the platform supports people in mapping their situation. Through a guided pathway approach on an interactive website, people can answer multiple choice questions that ultimately guide them to information that is specifically relevant for their situation. They learn about the legal framework that applies, some basic rights and obligations they have, as well as some of the expected outcomes they can look forward to. Especially this latter element helps to manage expectations at an early stage. Users further receive information about the processes and support people that can help them and get informed about how the Rechtwijzer Divorce platform would work for them in their situation. Throughout the guided pathway, the platform monitors for special circumstances (like for example, domestic violence, international aspects of the marriage and the risk of parental child abduction,

¹⁸ A. Bickel, M.A.J. van Dijk & E. Giebels, *Online legal advice and conflict support: a Dutch experience*, University of Twente 2015.

¹⁹ See, for example, LSB & TLS, *Online survey of individuals' handling of legal issues in England and Wales 2015, 2016*; M.J. ter Voert & C.M Klein Haarhuis, *Geschillenbeslechtingdelta 2014 Netherlands, WODC 2015*, M.A. Gramatikov, *Legal needs in Bulgaria: a study of justiciable events*, Open Society Institute 2010.

addictions, complex financial situations, etc.) and raises red flags so people get triaged to the special assistance they may need.

When people decide to proceed with divorce and separation, they can continue to an online intake on Rechtwijzer. This requires them to log in with their DigiD authentication key, which is the e-identification mechanism that is issued by the Dutch government to its citizens. Then they can complete their intake. The intake questions are categorised as "communication and personal details", if applicable "children", "family home", "debts and properties" and "income and alimony". Each category is composed of questions on facts about the divorcees and their situation. Further, there are some questions concerning the interests that are involved, which help all to stay in a problem-solving mindset. A third and final category of questions asks users for their initial ideas for agreements and solutions, building on their shared interests. These are multiple choice questions and framed in a way that does not give users the idea they are giving away their position in a strategic negotiation by sharing them. After finalisation of intake, it is the other person's turn to complete the intake. This second person does not see the information shared by the first, so as to encourage everyone to share their own story: confidentiality of the information shared is therefore ensured.

After intake, people enter into an online dialogue where they find a clearly structured interface that shows them all the things they have to do and agreements they have to make to get to a completed divorce and separation. It has gamification elements that clarify how far they are from finishing the process and how much they still have to work and provide encouraging incentives. This online dialogue is enriched with legal information, tools and functionalities that enable the parties to make fair and sustainable agreements. People have modern cooperation and communication support available to them and can work using tools they are used to (the platform, for example, integrates features that resemble mainstream chats and other communication tools, collaborative document text editing in the cloud with common gamification elements). This positively impacts the level of self-efficacy so people can do more things themselves.

2.3 Tools and Professional Support

The platform provides several types of support, both automated and human. This support is tailored to the situation of the people involved. For example, people find building block texts and model solution texts for all agreements they have to draft. These vary according to the factual situation, and the interests and preferences of both parties, as shared during intake. Some basic algorithms tailor these models to the parties. These model texts are developed on the basis of what we know are effective and fair agreements in the current Dutch divorce practice: thus, they help people build on the best evidence that is available. They further help them draft good agreements by showing them, in a natural manner, the level of specificity and matters that should be included.

The platform further provides a large collection of automated support tools. These vary from collections of model solutions they can use, to planning tools that people can use to specify visiting arrangements for the year, to calculation tools that enable users to determine fair ranges for child support and partner alimony. Throughout the platform, people also have access to plain-language legal information.

The Rechtwijzer Divorce platform also provides support in the form of professional human interventions. When parties get stuck during their online dialogue or otherwise feel they could use some communication support, they can call in the online assistance of a professional. The Dutch Legal Aid Board selected, trained and certified a group of family law experts (lawyers and mediators), who have built experience in working online with clients, where communications take a different shape and form. When people get stuck, they find a button

for communication and mediation assistance as well as for a neutral binding decision. These are limited scope interventions: mediation or adjudication support is only provided for the issues that parties indicate. In practice, this means that people might have found agreement for 12 out of 20 issues and only call in assistance for the remaining 8 issues. Practice further shows that these professionals typically follow a hybrid process where they combine online work with parties with offline work. A mediator might communicate and mediate with parties remotely, using the dialogue features and video conferencing, but also occasionally hold a more traditional face to face mediation where they use the platform to centrally process all information shared and to report.

When users have completed their divorce and separation plan, through their online dialogue and perhaps with mediation or adjudication support, there is one final check built in into the platform. A neutral reviewer (a specialised family law expert) goes through all agreements to evaluate their legitimacy, sustainability, completeness and overall fairness. The task of the reviewer is also to make sure that parties can prove their identity (i.e. authenticate themselves), that there is informed consent from both of them and that all documentation is complete. The Netherlands has the requirement for each divorce and separation agreement to be formalised by the court, and also the option to have one lawyer do this on behalf of both parties.²⁰ After the reviewer has fully approved the plan, he or she submits it to court, where the divorce is formalised by a court judgment.

2.4 Pay As You Go, On Demand Fees, Unbundled Services

Rechtwijzer Divorce is not a free service and users have to pay a fee. The fee is paid on a "pay as you go" basis, which means that people only pay a fee for things they need and use, when they use them. The platform provides several paid added value services that users may use on demand.

When they start working on Rechtwijzer, the initiating person pays a fee of 50 euros. This fee enables both parties to use all tools and features of the platform that support them in making agreements. Although the fee is paid by one person, these costs in The Netherlands are split by both parties, as part of the division of assets.

When people need mediation or adjudication services, they pay a fee of 360 euro or 240 euro respectively. These are costs per couple and are paid through an online transaction.²¹ Parties who are eligible for legal aid receive a subsidised discount of 90% of these fees, thus paying 36 euro and 24 euro respectively for mediation and adjudication.

The costs for the neutral review is 480 euro, which also includes the costs of the submission of the approved plan to a family court. Again, people eligible for legal aid receive a subsidised discount of 90% and thus pay 48 euro per couple. The court fees of 288 euro are excluded and have to be paid separately. If both parties are eligible for legal aid, they only pay 79 euro court fees per couple.

This payment model ensures that people eligible for legal aid pay a minimum of 177 euro and a maximum of 237 euro per couple for their full and formalised divorce. People who are not eligible for legal aid pay a minimum of 818 euro and a maximum of 1.418 euro per

²⁰ In Dutch this is called "gezamenlijk verzoek" which translates to "joint request".

²¹ The Legal Aid Board also has the option of offline billing for people who are not accustomed to using such services online. It is not surprising that users of Rechtwijzer typically know their way in online banking and this options is never used.

couple for their full and formalised divorce. It is estimated that a traditional divorce procedure typically costs couples between 3.000 and 10.000 euros.²²

2.5 Basic Performance Data

Since its launch in 2015, almost 1.150 people got their divorce online using the Rechtwijzer platform, while another 1.402 persons are currently working on their divorce. About 35% of the users are eligible for legal aid: this reflects the proportion of the Dutch population that is eligible.

The feedback surveys show that people rate their divorce process with Rechtwijzer an average 7.3 on a 10-points scale. Six months after their divorce, this rating even goes up a bit, indicating that the longer term effects of the process are good. Keeping in mind that divorce is a negative experience, this seems to be a relatively high score. Studies indicate that the typical divorce process in the Netherlands gets a 5.6 rating on a 10-points scale.²³

The user data further indicate that it takes people less than 3 months on average to get from the first steps on the platform to a fully reviewed divorce and separation plan. During these three months, people on average spend less than 600 euro.

²² See <http://www.hiil.org/data/sitemanagement/media/Rechtwijzer%2020%20Online%20Problem-Solving%20Dispute%20Resolution%20for%20Divorce%20Evidence%20Base.pdf>.

²³ J.M. Barendrecht, J.J. Piest, M.A Gramatikov, The justice of separation procedures, HiIL Innovating Justice 2015.

3. CHALLENGES IN ONLINE MEDIATION AND DISPUTE RESOLUTION

3.1 Re-Engineering Procedures

Rechtwijzer designed the platform procedures by looking at the bundle of tasks they support people with, rather than by moving from existing process concepts. Although this approach allows for a more user-centred design, it does pose several challenges to its development and implementation. Existing regulatory frameworks, roles, skills and knowledge are typically designed for fixed, more or less rigorous concepts and processes like negotiation, mediation, arbitration, legal review, litigation, etc. These all provide solid knowledge bases and rich sources of data, knowledge and effective practices. To some extent, these also are a sticky form of legacy that may hamper innovation that increases access to justice for citizens. In the following paragraphs, some of the challenges that emerged from the experiences with Rechtwijzer are presented.

3.2 Hybridity

A user-centric process inevitably creates hybridity that does not fit in current regulatory frameworks. People are in the lead, with support from all sides. They determine the pace, communicate in their own language, and thus are empowered to take more control and responsibility for working out their issues. Interventions, information, tools and process structure are organised around this concept, so as to facilitate this empowerment.

Consequently, legal professionals deliver their services on a limited scope basis. This means that when people request mediation, it typically is for a limited number of issues and not for their entire case. For example, people might have been able to develop agreements on all issues concerning the children and their family home, but are stuck on dividing the assets and the amount of partner alimony. The mediator does not take over the full process between them, but limits her services to the issues indicated by parties.²⁴ Moreover, people can call in the assistance of professionals more or less on demand. This can result in a non-linear process, where people start from negotiations and find agreement on all issues. Next they move to a neutral review where they get feedback and hear they have to make some adjustments. They thus start negotiating again, but get stuck, so they call in mediation assistance. This does not help, so they ask an adjudicator to take a neutral decision, after which their plan gets approved by a reviewer. Although this is effective and optimised for people from a dispute system design perspective, it poses several challenges for professionals.

A hybrid, non-linear process requires professionals to stay focused on a limited number of issues and find a balance between letting people stay in the lead of the process and its outcome, whilst upholding their role as guardians of fair and legitimate results. They have to learn to work in a broader framework and with a margin of reasonableness where they accept the freedom of parties whilst still remaining focused on signalling non-legitimate, non-fair and non-sustainable agreements. The practice of Rechtwijzer Divorce platform shows that this skill can be acquired, but does not come natural and automatic, and professionals have to learn how to utilise their existing expertise and experience in a different setting.

From a more regulatory perspective, this non-linear process poses challenges as regards privileged information and privacy. The fact that professionals intervene in a case gradually,

²⁴ The mediator of course monitors what the implications of mediated agreements for certain issues are and takes the initiative to update them if needed.

step by step, possibly several times but always on a limited scope basis, introduces the concern that privileged information spills over. Further, working in an online setting where different professionals join the process at different moments in different roles confirms the importance of privacy of data of each of the persons involved in the process. Currently, the roles of professionals involved in the platform are all neutral, which reduces or actually eliminates the risk of spilling over privileged information. However, if lawyers working for one party would get involved, this would become an important matter. Building Chinese Walls in the platform would then be necessary.

3.3 Online Skills

Parties, and the professionals who help them, combine online and offline working methods to develop the divorce and separation plan. The Rechtwijzer Divorce platform integrates several communication tools that allow for both synchronous and a-synchronous communication. Additionally, people use several videoconferencing tools they have available. However, they also use the platform in their offline, face to face communication. Many users said that they have the platform on their computer when they have a kitchen table conversation, or are in a dialogue on their sofa. For these settings, the platform proves its function as a centralised place for information processing and storage.

Unsurprisingly, this mixture of online and offline usage also plays a role in the service-delivery by professionals. Mediators and adjudicators combine online communication (using the same tools to ask questions, hand out tasks, organise hearings) with offline meetings and communication through additional channels. They also use the platform to process information in a central place where all stakeholders always have access to updated information, statuses, and a history of events. This way of working is challenging for professionals since they have to explore new ways to be effective through different channels. For example, a mediator who asks interest-based questions finds that asking these questions through a chat function – which is far more flat as a way of communication than a face to face conversation – requires a different approach.

3.4 Submission Problem

One crucial element of every dispute resolution process is that of creating a breakthrough for when things get stuck. The basic technology for this is a binding decision by a court, which can be imposed on parties and enforced by the state. The simple availability of this option facilitates dispute resolution through other processes. But this only works when access to such neutral binding intervention is timely and affordably accessible. It should be a credible threat of a neutral intervention. The completely voluntary nature of ADR, without a connection to such a credible threat of a neutral intervention, may very well be the reason why different forms of ADR (and different ODR initiatives) never reached their full potential. “Without the credible threat of judicial determination [mediation] is the sound of one hand clapping.”²⁵

The Rechtwijzer Divorce platform works with a conditional and upfront commitment to cooperate to a mediation process at the stage of intake. This means that as part of the conditions to start working on the platform, both parties commit to engaging in mediation if it will be needed later on in the process. The mediator who would join the parties later on in their case is not specified or known at this stage (people can choose from a limited selection of certified mediators when they opt for mediation). People thus commit to a potential

²⁵ Hazel Genn, *Judging Civil Justice*, Cambridge University Press 2009, p. 125.

mediation, for issues that might arise, with a mediator who is in the platform but not yet linked to their specific case. This mitigates the risk that when they are stuck and might find it difficult to agree on anything, they will have to agree on mediation. Adjudication in the form of a binding decision works similarly. When people start on the platform, they accept to submit themselves to an adjudicator, if needed later on in the process, for issues they would then have identified. This creates the possibility to proceed when things get stuck and removes the power to block or frustrate the process from either of the parties. Upfront agreements and commitments of this kind are an innovation in how people engage with mediators and adjudicators and, as said, their inclusion is informed by dispute system design optimisation. This new type of contracting needs to be further developed to see how they can be optimised, also from a legal perspective.

3.5 Rules and Regulations

For many good reasons, the legal profession - as well as many professions involved in ADR - is subject to the application of many rules and regulations that safeguard parties' interests as well as the upholding of Rule of Law values. Online technology often can provide safeguards that are as effective as (or even more effective than) the current practices reflected in the rules and regulation, without however complying with them. In these events, rules easily stifle innovation and in fact rather work against people instead of for them.

One example from the Rechtwijzer Divorce platform is the issue of authentication. According to the rules of the Dutch Bar Association, a lawyer always has to ask for her clients' identity documents at the beginning of every face to face engagement. This is partly due to the fact that they may not keep a copy of - for example - a passport in the file due to privacy security regulation, but do have the duty to make sure that they actually are talking to their client and that their client is who she says she is.

On the Rechtwijzer Divorce platform, the government-issued e-identity is required. In the Netherlands, Dutch citizens can use this so-called DigiD for authentication before every online interaction with the government. For example, people use DigiD when they fill in their tax forms online, or when they apply for a drivers' license online. The DigiD code is issued to each citizen and requires a personal identification key that people have to fill in. When they do so, they receive another key by text message that they also have to submit before they get access. This method for authentication in fact is more waterproof than the traditional identity document. Its use for purposes of identifying oneself vis-a-vis a lawyer, however, is controversial due to the rule that requires passport identification.

There are several additional examples that show how the interests that the current rules seek to protect can be protected more effectively when using online technology in the process. The pace of regulatory change as well as the innovation space in this area is problematic from the perspective of ODR.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 Summary

Online mediation and ODR platforms like the Rechtwijzer Divorce platform go beyond replication of existing processes in an online environment, but innovate them at a deeper level. The data show that this is a very promising approach from the perspective of access to justice and the quality and costs that people experience. Current knowledge from the domains of dispute system design, negotiation theory, microeconomics, institutional economics, law and sociology and conflict theory guide the designs of new processes that are online, hybrid and innovated at a deep level. The current justice system with its regulations, roles, and structure is not designed for optimised online mediation and ODR, which poses some challenges that prevent it from reaching its full potential for citizens. Policy makers can, however, stimulate and facilitate the further advancement of online mediation and ODR.

4.2 Create Innovation Space

Within existing regulatory frameworks, it is very difficult for specialists in procedural design (judges, court staff, mediators, legal professionals, ODR services providers, ODR platform designers) to innovate and experiment with new processes, new roles, new interventions. Policy makers can stimulate access to justice innovations by catalysing and funding innovation research and by broadening the conversation so that also non-lawyers join in.²⁶ An important aspect is to create a regulatory framework that enables and stimulates more experimental initiatives so that online mediation and ODR innovations can be tested in practice, in a controlled environment and on a small scale so that its impact can be evaluated quickly and successful innovations can be scaled up.

4.3 Agile and Responsive Regulations

One of the big pitfalls for keeping innovative online mediation and ODR processes successful and impactful is to focus on heavy regulations. The underlying technology rapidly develops and creates new opportunities. Moreover, performance data and user data enable ongoing iterations and improvements, much like popular platforms like Google, Facebook, Whatsapp and many others that continuously introduce more features that better serve their purpose. Professor Klaus Schwab, Founder and Executive Chairman of the World Economic Forum, emphasises that the ramifications of the latest technological revolution will be more profound than any prior period of human history and thus call for agile lawmaking.²⁷ Indeed, any regulation for online mediation and ODR is ideally crafted in a way that makes it responsive to change.

4.4 Courts as an App

The shadow of the law is hugely important, also for facilitating the success of ADR, online mediation and ODR because of the submission problem (as explained in section 3.4). One of

²⁶ G. Hadfield, *Rules for a Flat World, Why Humans Invented Law and How to Reinvent it for a Complex Global Economy*, Oxford University Press 2016.

²⁷ K. Schwab, *The fourth industrial revolution*, World Economic Forum 2016. See <http://eng.scourt.go.kr/eboard/ExchangeViewAction.work?gubun=26&seqnum=205> for a specific call on the justice system.

the leading judges in England and Wales when it comes to online mediation and ODR, Lord Justice Briggs, recently called for bringing “the courts to a much closer partnership with the ADR community”,²⁸ expressing the view that the skill sets from different processes can be truly complementary if brought into one process.

ODR platforms like the Rechtwijzer Divorce platform are designed for court interventions, i.e. the current adjudication functionalities and flow could be perfectly used by family judges who would organise their hearing and share their decision aided by the platform. These kind of developments thus make it possible for courts to “plug in” their adjudication interventions in existing online mediation and ODR platforms, thus combining it with other - ADR - processes, finally creating Court Apps.

²⁸ See www.lawgazette.co.uk/law/briggs-online-court-will-take-the-a-out-of-adr/5057914.fullarticle.

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ANNEX I: SOME PRINT-OUTS OF RECHTWIJZER DIVORCE PLATFORM

Rechtwijzer Login Create a plan

Separate together

Effective solutions that are fair for you and your partner

Map your situation

Step by step Rechtwijzer guides you through the issues associated with separation. What do you feel is important? How can both you and your partner build a new future? You can explore your personal situation without any costs involved.

Develop a separation plan

Together with your partner you can work on your separation plan at your own pace. A variety of high-quality support and tools provide support. Even when emotions run high. Sometimes, a neutral decision of an independent expert offers a way out.

Join a separation plan

If you received an invitation from your partner, you can first explore Rechtwijzer or directly join your partner and start working on your separation plan. Rechtwijzer helps you to separate in a good and fair manner.

Login Create a plan

Contribution to costs when you are eligible for subsidized legal aid.

Rechtwijzer Home Help ? Nicholas Peterson

Diagnosis

What happens when you are going to separate?

Use your initial questions to walk through (step-by-step) all the topics relating to separation. Explore what you find important and how you and your partner can build a new future. This step does not cost you anything. At the end, you can quit or create an account. You must make an account to get a separation with Rechtwijzer.

Which situation applies to you?

- I worry about my relationship; what can I do?
- I consider ending our relationship. Is separation a good option?
- My partner wants to end our relationship. I don't know what to do or expect.
- We have decided to separate and want to start making arrangements.

Continue Back

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Rechtwijzer 🏠 🗂️ ? Nicholas Peterson 🇳🇱 ▼

Diagnosis

Separation and work and income

Maintenance
 Maintenance is one partner's contribution to another partner's cost of living. Those entitled to maintenance can be the partner (partner maintenance) or the children (child support).

⊖ **Child support**

⊖ **How is child support calculated?**
 When calculating child support, three aspects are important. You can calculate this together with your partner:

- Household income;
- The children's expenses;
- The paying partner's capacity to pay.

You and your partner need to agree on how costs of upbringing and child care are divided. The parenting plan should include how much the child support will be and who is going to pay for this. What each partner paid for the children's expenses during your relationship can be a starting point. Also, identify children's expenses such as the cost of clothing, grooming (hair stylist), hobbies, sports, school and so on.

Rechtwijzer provides a calculation tool you may use to calculate the amount of child support. The calculator is based on the same standards that the court uses when determining child support.

⊖ **Obligation and duration of child support**

⊖ **Partner maintenance**


⊖ **More information**

Rechtwijzer Intake 🏠 🗂️ ? 🇳🇱 ▼

Your details — Communication — Children — Family home — Properties — Income

DigiD identification

Before you start your separation plan, we ask you to identify yourself. You can use DigiD, the authentication system of the Dutch government. If you continue, you are redirected to the DigiD website where you find further instructions.

[To DigiD](#) 

Rechtwijzer Intake 🏠 🔍 ? 🗑️

Your details — Communication — Children — Family home — Properties — Income

DETAILS

My details

Details partner

Marital status

Fill in your details

Surname: Last name:

Date of birth: 📅

Address: Suffix:

Postal code: City:

E-mail address: Confirm E-mailaddress:

Rechtwijzer Intake 🏠 🔍 ? 🗑️

Your details — Communication 4/4 — Children 0/17 — Family home 0/6 — Properties 0/4 — Income 1/4

CHILDREN

Visitation 0/4

Belongings 0/5

Information 0/3

Decisions 0/3

Costs 0/2

Details 0/4

What do you think your children will need in the coming years to be stable and happy?

To be stable and happy in the coming years I think my children will need... 🗨️

Oops! Something went wrong, please fill in the input fields

Rechtwijzer Intake

Home Settings Help Profile

Your details 4/4 Communication 0/4 Children 0/17 Family home 0/6 Properties 0/4 Income 1/4

CHILDREN

- Visitation 0/4
- Belongings 0/5
- Information 0/3
- Decisions 0/3
- Costs 0/2
- Details 0/4

You have one child who is younger than 18 years

For your child you are going to make agreements regarding when he/she will stay at which parents place.

What are your initial ideas for this?

At father's place
Children habitually live at their father's place and visit the mother regularly.

At mother's place
Children habitually live at their mother's place and visit the father regularly.

Co-parenting
Children stay at their mother's and father's place equally.

Other
My initial idea is not featured.

You have not made a decision! Select one of the two options

Rechtwijzer Dialogue

Home Settings Help Profile Nicholas Peterson

Communication Children Family home Properties Income Your Separation Plan 65% View

CHILDREN

- Interests
- Details
- Visitation
- Information
- Belongings
- Decisions
- Costs

Current **During intake** online (2)

WORK TOGETHER ON A GOOD & STABLE FUTURE FOR YOU CHILDREN

We find it is important that our children have a stable living situation. That is why we agree that our children...

Will live at [redacted]. She will visit [redacted] once every 14 days. This takes place in the [redacted] weeks. The weekend starts on Friday afternoon at [redacted] and ends on Sunday afternoon at [redacted].

Agreed Mediation Decision

Dialogue

NICHOLAS: I find it of importance that Kimberly does not have to travel too much. How do you see that?

Rachel has joined your separation plan

Client contact centre
0800 - 2124124
Visit help page

x² Calculator tool
View

School holidays
View

Rechtwijzer Dialogue Nicholas Peterson

Communication

Children

Family home

Properties

Income

Your Separation Plan

65% [View](#)

CHILDREN

- Interests
- Details
- Visitation
- Belongings
- Information
- Decisions
- Costs

Child Alimony Calculator Tool

You are about to leave this webpage

If you continue, you are redirected to the website of the child alimony calculator tool. There, you can use the child alimony calculator tool.

[Open the Calculator Tool](#)

[Back to dialogue](#)

Client contact centre

0800 - 2124124

[Visit help page](#)

x² Calculator tool view

School holidays view

DIALOGUE

NICHOLAS

I find it of importance that Kimberly does not have to travel too much. How do you see that?

Rechtwijzer Separation plan CJ Menon

Communication

Children

Family home

Properties

Income

Separation plan of Nicholas and Rachel

A GOOD FUTURE FOR KIMBERLY

54% Done

Visiting arrangements and living situation for our children

Kimberly will go to Nicholas during the weekend once every fourteen days, in the even weeks. The weekend starts on Friday afternoon at 16:00 and ends on Sunday evening at 19:00. The parent who the children stayed with last, takes the children to the other parent when a switch has to be made.

[View](#) N AGREED R AGREED

[Legal version](#)

Housing registration

Kimberly will be registered at her mothers address.

[Decision](#) N AGREED R DECISION

Division of belongings

The belongings of Kimberly will go to her room at Rachel's place. For Kimberly's room at Nicholas' place, both her parents will buy new belongings, including at least a bed, toys and some basic sets of clothing.

[View](#) N AGREED R AGREED

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

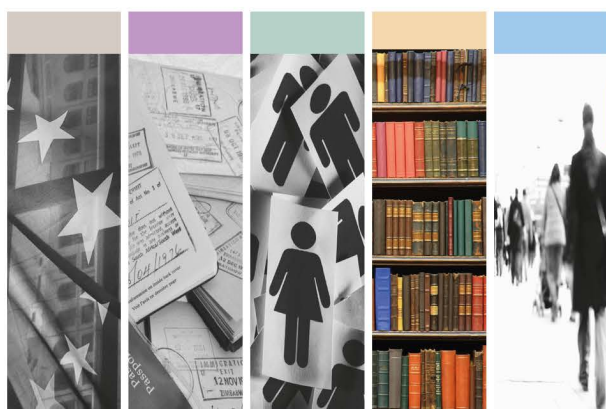
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- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website:
<http://www.europarl.europa.eu/supporting-analyses>

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