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**Quantifying the cost of  
not using mediation – a  
data analysis**

NOTE





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

**LEGAL AFFAIRS**

**Quantifying the cost of not using  
mediation – a data analysis**

**NOTE**

**Abstract**

This is a special moment for alternative dispute resolution in Europe. In recent years, the mediation law landscape, in particular, has undergone substantial changes in large part due to the 2008 "European Union Directive on Certain Aspects of Mediation in Civil and Commercial Matters". Despite the fact that mediation saves both time and costs, mediation is far from being solidly established in Europe. In order to explore and quantify the impact that litigation has on the time and costs to the 26 Member States' judicial systems, ADR Center implemented a study in the context of the European Commission-funded project "The Cost of Non ADR-Surveying and Showing the actual costs of Intra-Community Commercial Litigation". The study measures the financial and time costs of not using mediation. This paper will focus on the final results of this study and suggest possible ways to make mediation happen in EU, namely through the discussion of various incentives and regulations which would make mass mediation implementation easier.

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## Executive Summary

The term Alternative Dispute Resolution (ADR) is commonly used to refer to a variety of dispute resolution processes where a neutral party assists the disputing parties in resolving their dispute. Mediation is an ADR technique in which an independent neutral third party, the mediator, assists the disputants by helping them create a mutually-acceptable solution to their conflict. These are extraordinary times for mediation in the EU due to the *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 (2008 Mediation Directive)*. The *2008 Mediation Directive* aims to address the availability of mediation services and improve the awareness and the use of mediation by ensuring a “balanced relationship between mediation and judicial proceedings”. The *2008 Mediation Directive* has been both a ground-breaking and standard-setting benchmark in the field of mediation legislation as some Member States, such as Italy, not only have adopted the *2008 Mediation Directive* but also went beyond the *2008 Mediation Directive* and applied many of its principles to the domestic civil dispute arena. Now, in order to successfully implement the *2008 Mediation Directive*, the benefits of mediation must be publicized and promoted by various stakeholders.

Mediation is a cost-effective tool that provides increased access to justice and alleviates the burdens on over-crowded court systems. However, the benefits derived from mediation use are not well known. ADR is far from being solidly established in Europe and, despite the increasingly well-documented economic and social value of using mediation, the demand for ADR services and mediation in Europe currently only represents a small niche. Accordingly, because mediation is not inherent in traditional dispute resolution, it needs to be incentivized and it is important to demonstrate the advantages of using mediation and implementing the *2008 Mediation Directive*.

There is currently a mediation paradox across many EU jurisdictions. There is a well-documented high success rate in specific cases where the disputants engaged in mediation, but these successes are extremely limited in number. The paradox is that while the use of mediation yields highly successful results, mediation is rarely used in a systematic way by disputants and lawyers. Given this continuing pattern of highly successful but also highly limited mediation use, there should be an extensive publicity campaign to broaden the public’s awareness about the values of mediation. It follows that the promotion of mediation throughout the EU will help to further increase mediation usage. Awareness and training to promote mediation are useful, however an effective EC-sponsored public policy campaign would be an extremely effective way to show the public that mediation is a good thing. Additionally, initiating a successful publicity campaign about the benefits of mediation would complement an extensive public policy campaign.

An examination of the actual costs and time that mediation saves is necessary and important in promoting the values of mediation. Filling the void in public knowledge about the cost and time-saving benefits of mediation was an important motivation for the study *The cost of non ADR- Survey Data Report. The cost of non ADR- Survey Data Report* is a study implemented by ADR Center, in collaboration with the European Company Lawyers Association (ECLA) and the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), in the context of the EC-funded project *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation. The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* (EC-funded “Specific Programme Civil Justice 2007- 2013.)”

The study surveyed legal experts – companies, lawyers, and legal researchers – in 26 EU Member States (excluding Denmark), to ascertain the true cost of relying solely upon traditional adjudicative processes. The main goal of the research was to answer the

question: "What is the cost of not using a Two-step 'mediation then court' procedure in Europe?" To evaluate the impact of mediation, the study first uses a One-step approach as the basis of comparison (Word Bank Data on time and costs required to resolve a dispute in 26 Member States). A One-step approach is a system where the disputants have only one choice on how to resolve their dispute: to litigate in court. On the contrary the *2008 Mediation Directive* promotes the use of a multi-step approach (mediation then court or arbitration). Consequently, the Two-step approach envisions mediation as an integral part of the dispute resolution solution because disputants need to go first to a mediator or a mediation-provider organization (step one), and then only if the mediation fails do the disputants and the dispute proceed onto court (step two). This approach can be mandated by law, required by a court program, or required by contract if one party has filed a mediation request within the duration of the dispute.

The commencement of a Two-step approach dispute – a failed mediation attempt and then a subsequent initiation of court action – , begins the day the mediation is requested by a party. Accordingly, the number of days saved using the Two-step approach is calculated as a weighted average of the estimated duration of the mediation process and the duration of the subsequent court case in disputes where mediation has failed. The study calculated mediation's impact on length and cost of the resolution of the dispute in correlation with the estimated mediation success rate. This calculation showed that, in fact, the higher the success rate of mediation, the shorter the duration of the dispute resolution proceedings and the greater amount of time saved.

While the time and cost figures correlating with a high mediation success rate (75% or 50%) are quite impressive (e.g. a 75% mediation success rate in Belgium can save approximately 330 days and 5.000 € per dispute; a 75% success rate in Italy can save 860 days --more than two years!--and over 7.000 € per dispute), questions about the viability of reaching this level of implementation still remain. Achieving a 50-75% success rate in mediation results is a very high mark to set for all of the Member States. However, according to the study, mediation is a cost and time-effective dispute resolution mechanism at almost every level of success rate. This begs the question: is there a percentage success rate at which mediation is not a financially viable or a time-saving option?

Using progressively lower mediation success rates in order to find the break-even point – the lowest possible threshold in which mediation can be successfully implemented – the data shows that it is necessary to achieve only a marginally average percentage of success for mediation to save time and that, even at a very low success rate, mediation is a choice that still save time and costs.

In this paper once analyzed the break-even figures for Belgium and Italy, we used a macro-level perspective to understand what level of mediation implementation is required to save time and costs for the entire European Union. According to our calculations, the EU break-even point for time is 19% mediation success rate, and the break-even point for costs is 24%. Additionally, it is important to note that the study found the average cost to litigate in the European Union is €10.449 while the average cost to mediate is €2.497. Therefore, when mediation is successful, European citizens can save over €7500 per dispute.

A cost and time examination that takes into account the break-even point is an important tool to help address the implementation of the Directive because the break-even point analysis shows the importance of implementing mediation. Simply put, mediation in most instances saves time and money and can relieve crowded courts.

In the face of all of the benefits to be gained from mediation, the question remains: why is mediation not a more obvious choice for Member State governments? Currently, the measures that have been used to promote mediation and train people in mediation are not expanding the reach and use of mediation as quickly or as extensively as hoped. We believe that awareness and training are clearly useful in further developing a

pre-existing mediation market, but awareness and training alone in the initial phase are not enough and need other measures to bolster their effectiveness.

One barrier to wider acceptance of mediation is that many people continue to be unaware of the mediation option, or it is not offered or provided by their governments. For this reason, we encourage court-encouraged or law-encouraged mediation. In court-encouraged mediation, judges would strongly encourage lawyers to attempt mediation without requiring it in all cases. Additionally, judges would also be strongly encouraged to suggest mediation as a viable alternative to court action during the initial dispute stages. "Pushing" mediation efforts will therefore help lead to an increase in mediation use.

Any successful mediation implementation plan should include incentives and regulations which induce stakeholders at every stage in the dispute to engage in mediation. By incentivizing the implementation of mediation, there is a greater likelihood that the adoption of mediation will last. The *2008 Mediation Directive* encourages such procedures in mediation schemes: Article 5(2) provides that Member States may offer incentives or sanctions to further the success of their national mediation program. To make mediation usage a reality in all Member States we suggested a list of incentives and regulations which will help encourage mediation use: (a) Force of Law, (b) Tax Incentives, (c) Reimbursement of Dispute Fees, and (d) Judge Incentives. Some of these approaches are currently in practice in certain Member States. It is worth noting that Italy is certainly unique in its use of three of the suggested incentives (a,b and c) and by enforcing a domestic mandatory mediation framework in EU.

Successfully implementing mediation is important in a macro-world perspective as well as on the micro-day-to-day level. An element that defines the rule of law today is a judiciary that is not only independent and transparent, but also flexible and highly efficient. This has become the reality because law is everywhere. The law and, correspondingly, the courts, touch everything we do. However, today in Europe, as in many places, the judiciary and the courts are not as flexible as they need to be in order to address the increasingly complex economic and communication demands that globalization has created. European businesses now have clients all around the world and need a method of dispute resolution that is faster and less expensive than traditional judicial adjudication. For this reason, European businesses should rally behind mediation and recognize the economic benefits that mediation can provide.

On a micro-level, Member State governments can save time and money by making mediation happen. Indeed, even low – at times, extremely low – mediation success rates alleviate significant litigation costs for governments, businesses, and citizens. Our study aims to show (through an analysis of "break-even points") just how low the mediation success rates can be and still produce results and also attempts to briefly suggest some simple regulations and incentives to induce mediation use. Some of the solutions, such as using the force of law to make mediation mandatory, are obviously not expected from every Member State. Others, like reimbursing dispute fees or giving tax credits for successful mediation use, are relatively simple ideas which might however have a big impact on increasing mediation participation rates.

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## LIST OF ABBREVIATIONS

**ADR** Alternative dispute resolution

**UEAPME** European Association of Craft, Small and Medium-Sized Enterprises

**EC** European Commission

**ECLA** European Company Lawyers Association

**EU** European Union

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# 1. ADR AND MEDIATION – A SHORT OVERVIEW

## 1.1. Introduction

The term Alternative Dispute Resolution (ADR) is commonly used to refer to a variety of dispute resolution processes where a neutral party assists the disputing parties in resolving their dispute.<sup>1</sup> ADR procedures enable people to resolve disputes quickly and cost-effectively. Mediation is an ADR technique in which an independent neutral third party, the mediator, assists the disputants by helping them create a mutually-acceptable solution to their conflict. A mediator facilitates negotiations between disputing parties and may evaluate the relative merits of the claims and defenses. A mediator does not have the power to impose a solution or a decision, as the parties retain ultimate control over the outcome. Mediation is a non-binding procedure, but once a mediation agreement has been made and documented, the agreement is binding on the parties and legally enforceable. The usefulness of mediation has been duly noted by the European Commission (EC) and since 1998, attempts have been made to evaluate and promote the use of mediation throughout the European Union (EU) by the EC. The values of mediation were formally adopted by the EU with the launch of the *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 (2008 Mediation Directive)*.

### 1.1. The current status of mediation in Europe: a paradox

These are extraordinary times for mediation in the EU due to the 2008 *Mediation Directive*. The *2008 Mediation Directive* aims to address the availability of mediation services and improve the awareness and the use of mediation by ensuring a “balanced relationship between mediation and judicial proceedings”. The *2008 Mediation Directive* has been both a ground-breaking and standard-setting benchmark in the field of mediation legislation. It is ground-breaking because it is an example for many EU legislators on mediation. Some Member States, such as Italy, not only have adopted the *2008 Mediation Directive* but also went beyond the *2008 Mediation Directive* and applied many of its principles to the domestic civil dispute arena. Implementation of the 2008 Directive requires coordinated publicity, awareness, and outreach efforts by the EC and Member State governments alike. In order to successfully implement the *2008 Mediation Directive*, the benefits of mediation must be publicized and promoted by various stakeholders.

Mediation is a cost-effective tool that provides increased access to justice and alleviates burdens on over-crowded court systems. However, the benefits derived from mediation use are not well known and for this reason it is important to demonstrate and show the advantages of using mediation and implementing the *2008 Mediation Directive*.

ADR is far from being solidly established in Europe and, despite the increasingly well-documented economic and social value of using mediation, in Europe the demand for ADR services and mediation currently only represents a small niche. If we analyze: (1) the number of Member State citizens per mediator or (2) the number of mediators to judges or mediation providers to courts, it is clear that mediation has a very small presence in the EU. A contributing factor to this fact is that “mediating” is not a natural tendency of human beings in resolving conflicts. Accordingly, because mediation is something not inherent in dispute resolution, it needs to be incentivized.

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<sup>1</sup> See JAMS, ADR Glossary, <http://www.jamsadr.com/adr-glossary/>

Across many EU jurisdictions there is a mediation paradox, as there are great success rates (documented high success rate percentages) coming from disputants who engaged in mediation in specific cases, but these successes are extremely limited in number. The paradox is that while the use of mediation yields highly successful results<sup>2</sup>, it (mediation) is rarely used in a systematic way by disputants and lawyers.<sup>3</sup> With this continuing pattern of highly successful but also highly limited mediation use, there should be an extensive publicity campaign to broaden the public's awareness about the values of mediation. The promotion of mediation throughout the EU will help further increase mediation usage. Awareness and training to promote mediation are useful, however an effective EC-sponsored public policy campaign would be an extremely effective way to show the public that mediation is a good thing. Additionally, initiating a successful publicity campaign about the benefits of mediation would complement an extensive public policy campaign.

Broad usage of mediation can have a positive impact on the public as a whole. Accordingly, the adoption of mediation should be considered good "public interest policy", in the same vein as recent public policy campaigns to improve public health or transportation. Recent successful public interest policy campaigns such as the campaign promoting the need for people to wear seat belts; the campaign to end smoking in restaurants in European countries such as Italy; and the campaign for public companies to be audited regularly, were obvious societal goals in Europe for many years. However, these policy goals received minimal compliance and promotion until specific governmental requirements were introduced making such measures mandatory. As with the need to wear seat belts or the need for annual audits of public companies, we believe that the use of mediation should be considered a sound "public interest policy". We believe that mediation use should become something that includes but also transcends market-based solutions for the larger public good.

## 2. THE SURVEY «THE COST OF NON ADR»

An examination of the actual costs and time that saves mediation is necessary and important in promoting the values of mediation. Filling the void in public knowledge about the cost and time-saving benefits of mediation was an important motivation for the study *The cost of non ADR- Survey Data Report*. *The cost of non ADR- Survey Data Report* is a study implemented by ADR Center, in collaboration with the European Company Lawyers Association (ECLA) and the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), in the context of the EC-funded project *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*. *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* is the third project awarded to ADR Center in the Framework of the EC-funded "Specific Programme Civil Justice 2007- 2013."<sup>4</sup>

### 2.1 Main goal of the research

A high-level objective of the study, *The cost of non ADR- Survey Data Report*, was to show the usefulness and cost-saving impact of mediation in commercial settings, with the ultimate goal being to ensure the growth of commercial transactions within the EU. The

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<sup>2</sup> There is typically around a 70% success rate when mediation is used in "mandatory mediation" instances where a judge or court system orders the parties to attempt mediation, and there is up to an 80% success rate for "voluntary" mediation programs (Survey Data Report, June 2010)

<sup>3</sup> One source of data that shows that mediation is not being widely used is the ratio of the total number of mediations held within each Member State, divided by the active or pending cases filed in court. As of June 2010, this ratio was still less than one-half of one percent in most Member State countries. (Survey Data Report, June 2010).

<sup>4</sup> Additional information on the ADR Center projects within the Civil Justice Programme is available at [www.adrcenter.com/civil-justice](http://www.adrcenter.com/civil-justice).

study surveyed companies, lawyers, and legal researchers in 26 EU Member States (excluding Denmark), to ascertain the true cost of relying solely upon traditional adjudicative processes.<sup>5</sup>

The main goal of the research, directed at legal experts in the 26 EU Member States, was to answer the following question: “What is the cost of not using a Two-step ‘mediation then court’ procedure in Europe?”

## 2.2 Methodology

The project format is three different surveys. The first survey was given to EU companies and the second survey was given to lawyers throughout the EU.<sup>6</sup> The third survey was given to experienced ADR experts from each of the 26 participating EU Member States. It is the last survey that is the focus of this paper.

In order to compare the Member State jurisdictions, ADR Center used the same methodology that the World Bank used in its “Doing Business” Report, focusing on the “Enforcing Contracts” index which measures the efficiency of a country’s judicial system in resolving commercial disputes. The survey created by ADR Center was based on a standardized case adapted by the World Bank<sup>7</sup> and was given to 26 ADR experts representing each participating Member State. Each expert was sent a packet entitled *The Cost of Not Using ADR in Europe- Enforcing Contracts*. Each expert was asked to populate the survey with the research they collected from information sources throughout their Member State country. ADR Center asked the experts to estimate time and cost incurred in different scenarios: litigation in court, mediation and then litigation in court, mediation and then arbitration. In each scenario the experts assessed time and costs in both cases where the disputant was a national and cases where the disputant was a non-national.

This paper will analyze the survey results in two countries: **Belgium** and **Italy**. We have chosen Belgium because it is a useful starting point for discussion. We have chosen Italy for two reasons: (1) ADR Center’s strong presence and familiarity with Italy make it a familiar and data-rich case study and (2) the Italian domestic mandatory mediation framework is an example for discussion about the cost and time savings that large-scale mediation enforcement can create.

## 2.3 The status quo: One-step (court action) in dispute resolution in Italy and Belgium

To evaluate the impact of mediation, the study first uses a One-step approach as the basis of comparison. A One-step approach is when disputants proceed directly to the courts to solve a dispute. This approach is one-step in the sense that it does not utilize mediation or any other ADR efforts to resolve the dispute before attempting to litigate. For this approach, we can take as starting point the World Bank *Doing Business* data. Table 1, below, represents the World Bank’s estimate of time in days it took to resolve the dispute and the cost to litigants to resolve the dispute in the 26 EU Member States. Time is recorded in calendar days, beginning from the moment the plaintiff files the lawsuit in court until enforcement of the judgment. Costs are recorded as a percentage of the claim, which

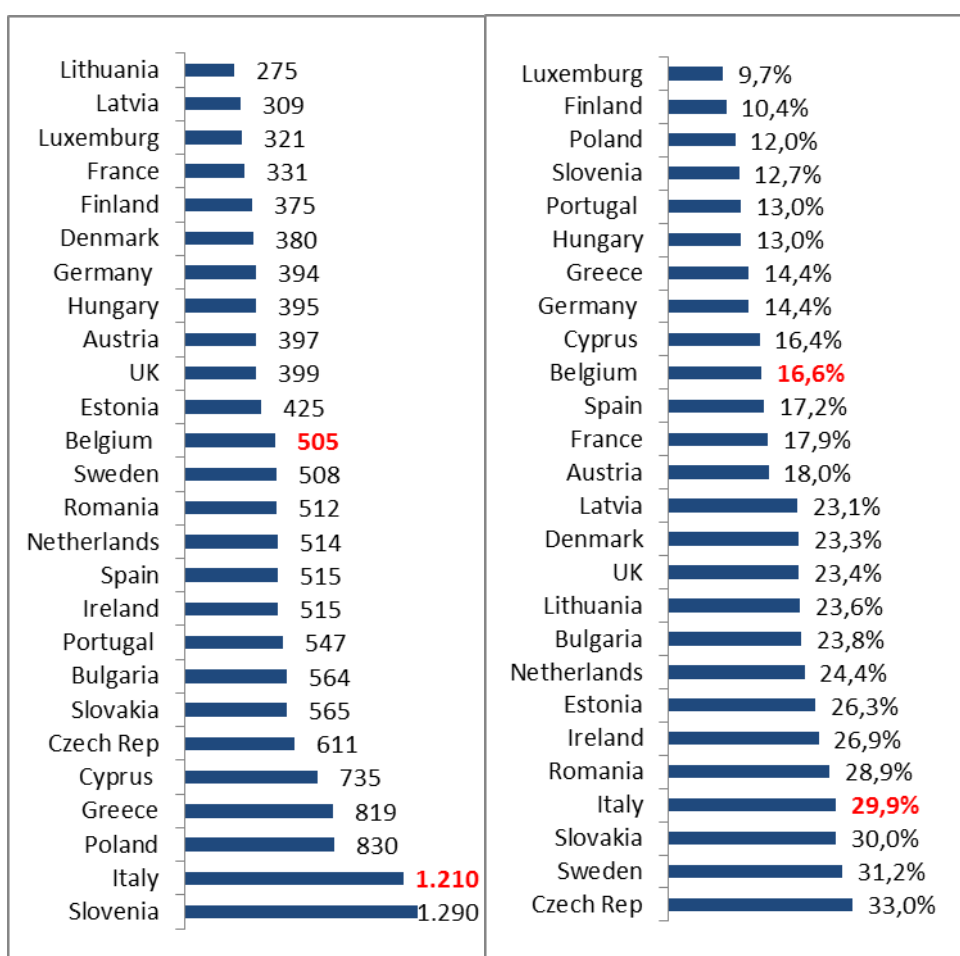
<sup>5</sup> A survey data report was compiled and it listed the final results of the study (see the full report at [http://www.adrcenter.com/jamsinternational/civil-justice/Survey\\_Data\\_Report.pdf](http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf)).

<sup>6</sup> The data collected through these first two questionnaires it is clear that companies, on average, are not aware of the specifics and advantages of utilizing ADR and mediation to solve cross-border commercial disputes

<sup>7</sup> The litigation case entailed the following fact pattern: Seller goods to Buyer. Buyer alleges that the goods are of inadequate quality and refuses to pay. Seller sues Buyer in the Court of the capital city to recover the amount under the contract for the sale of goods. Opinions are given on the quality of the goods (witness or independent experts). The judgment is 100% in favor of the Seller. Buyer does not appeal the judgment, which becomes final. Seller takes all required steps for prompt enforcement of the judgment. The money is collected successfully through a public sale of Buyer’s moveable assets. See World Bank, *Doing Business Report*, 2009.

is assumed to be equivalent to 200% per capita income (for this figure, three types of costs are recorded: court costs, enforcement costs, and average attorney's fees.).

**Table 1: Time and Cost to resolve a dispute in Europe**



Source: "Doing Business- Enforcement Contract 2009", World Bank

The data gathered by the World Bank is remarkable in the range of time and costs. The average length of a proceeding ranges between 275 days in Lithuania to 1.290 days in Slovenia. For Belgium, using only the One-step approach takes an average of 505 days to resolve a dispute in the Belgian courts. For Italy, using the One-step approach takes an average of 1.210 days to resolve a dispute in the Italian courts.

## 2.4 One-step vs Two-step approach

The data above represents the results in a system where the disputants have only one choice on how to resolve their dispute: to litigate in court. On the contrary, as we know, the *2008 Mediation Directive* incentivizes the use of a multi-step approach (mediation then court or arbitration). Consequently, the Two-step approach envisions mediation as a part of the dispute resolution solution. For the Two-step approach, disputants need to go first to a mediator or a mediation-provider organization (step one), and only if the mediation fails, do the disputants and the dispute proceed onto court (step two). This approach can be mandated by law, required by a court program, or required by contract if one party has filed a mediation request within the duration of the dispute.

We start from the following data regarding time (in days) (See Table 2) and costs (three type of costs: court costs, enforcement costs and average attorney's fees)(See Table 3) to resolve a dispute using only court or only mediation (or both) for Belgium and Italy:

**Table 2: Time to resolve a dispute**

<b>Time (number of days)</b>		
	<i>Belgium</i>	<i>Italy</i>
Litigation	505	1210
Mediation	45	47
Litigation + Mediation	550	1257

Source: "Doing Business Report 2009" (World Bank)

**Table 3: Costs to resolve a dispute**

<b>Cost</b>					
	<i>Attorney cost</i>	<i>Mediation Cost</i>	<i>Court Cost</i>	<i>Enforcement Cost</i>	<i>Total</i>
<b><i>Italy</i></b>					
Litigation	€1.1206,6		€1.490,80	€2.673,10	€15.370,50
Mediation*	€3.855,5	€514,00			€4.369,50
<b>Litigation + Mediation</b>					<b>€19.740,00</b>
<b><i>Belgium</i></b>					
Litigation	€10.000,00		€3.500,00	€2.500,00	€16.000,00
Mediation*	€4.000,00	€3.000,00			€7.000,00
<b>Litigation + Mediation</b>					<b>€23.000,00</b>

Source: "Doing Business Report 2009" (World Bank) and \*"The Cost of Non ADR - Survey Data Report 2010" (ADR Center)

### Calculations of the Two-step Approach

The commencement of a Two-step approach dispute, which means a failed mediation attempt and then a subsequent initiation of court action, begins the day the mediation is requested by a party. The number of days saved using the Two step approach, are calculated as a weighted average of the estimated duration of the mediation process and the duration of court cases in the disputes where mediation has failed.<sup>8</sup>

In evaluating mediation's impact on the length of the dispute resolution, it is important to note the correlation between the estimated mediation success rate and the time saved: the higher the success rate of mediation, the shorter the duration of the dispute resolution proceedings and the greater amount of time saved. As a general frame of reference, various statistics prove that the success rate of voluntary mediation administrated by professional mediators is over 85%.

<sup>8</sup>To calculate the weighted average time it takes for a Member State to resolve a dispute using the Two-step approach with a certain estimated mediation success rate, the formula is the length of time (in days) it takes to use mediation multiplied by the percentage mediation success rate, plus the length of time it takes to use mediation and then proceed to court multiplied by the percentage mediation failure rate. To calculate the weighted average expenses it costs for a Member State to resolve a dispute using a certain estimated mediation success rate, the formula is the cost (in Euros) to use mediation multiplied by the percentage mediation success rate plus the expense it costs to take to use mediation and then proceed to court multiplied by the percentage mediation failure rate.

## 2.5 Results in Belgium

If we apply the calculation described above we see that the Two-step approach results are much improved from the One-step approach results, as the additional step of attempting mediation lowers the time spent and increases the cost saved. According to data collected from our Belgian expert, when mediation is successful, disputes are resolved in 45 days and the costs are reduced to €7.000.

Using a baseline of 100 disputes, if we consider a 75% success rate of mediation (i.e. 75 disputes are settled in mediation within 45 days), and in the other 25% of the disputes mediation failed and the disputes then proceed onto to court (i.e. 25 disputes are settled in 550 days through mediation and then court<sup>9</sup>): we estimate a weighted average 171 days to resolve the disputes and €11.000 to pay for the disputes using the Two-step approach in Belgium.

However, it is easy to dismiss these results due to the very high success rate of 75%.<sup>10</sup> Now, let's see what happens when the mediation success rate is 50%. With a 50% mediation success rate, the numbers (savings in terms of cost and time) still favor implementing mediation. In Belgium, when mediation was used and was successful 50% of the time, disputes were resolved in 423 days, with a time saving of 81,25 days. (See Table 4) When mediation was used and was successful 50% of the time, the costs were reduced by €1.000 (see Table 6).

## 2.6 Results in Italy

Applying the same calculation described in Section 2.4 to Italy, the results of the Two-step approach are much improved from the results of the One-step approach, as the additional step of attempting mediation saved time and costs. In Italy when mediation is successful, disputes are resolved in 47 days and the costs are reduced to €4.369,5.

Using the baseline of 100 disputes, if we consider a 75% success rate of mediation (i.e. 75 disputes are settled in mediation within 47 days) and in the other 25% of the disputes mediation failed and the disputes then proceed onto to court (i.e. 25 disputes are settled in 1257 days through mediation and then court): we estimate a weighted average of 349 days to resolve the disputes and €8.212 to pay for the disputes using the Two-step approach in Italy.<sup>11</sup>

However let's see what happens when the mediation success rate is 50% in Italy. With a 50% mediation success rate, the numbers (savings in terms of cost and time) still favor implementing mediation in Italy. In Italy, when mediation was used and was successful 50% of the time, disputes were resolved in 652 days, with a time-savings of 558 days ( See Table 5). When mediation was used and was successful 50% of the time, the costs were reduced by €3.315,75 (See Table 7).

## 2.7 Finding the break-even point: the lowest level of mediation compliance that still yields cost and time saving benefits

While the time and cost figures at 75% or 50% mediation success rate are quite impressive, questions about the viability of implementation at these levels still remain.

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<sup>9</sup> See "The Cost of Non ADR - Survey Data Report 2010"

<sup>10</sup>The time average for mediation in Belgium at a 75% mediation success rate using the Two-step approach is 171 days. Accordingly, there is a total time savings of 334 days. The average cost for mediation in Belgium at a 75% mediation success rate is €7.000. Accordingly there is a total savings of €5.000. See "The Cost of Non ADR - Survey Data Report 2010" for specific figures.

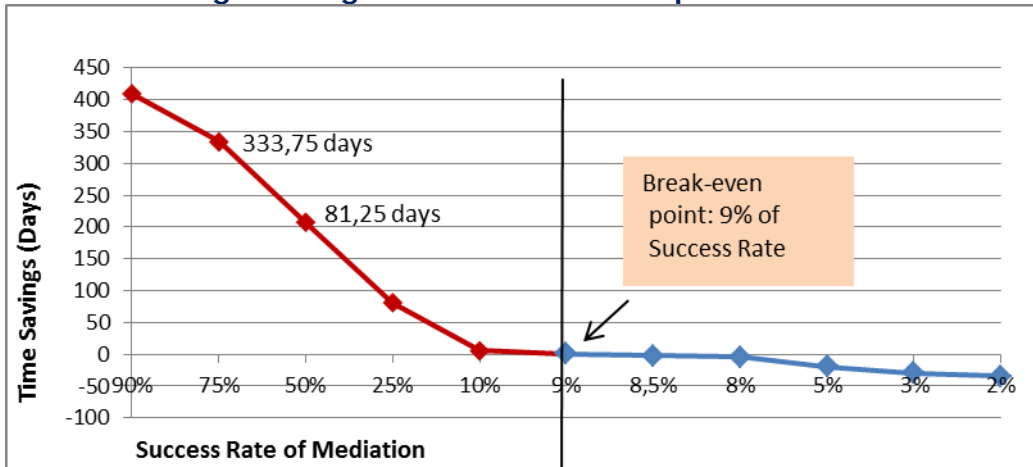
<sup>11</sup>The time average for mediation in Italy at a 75% mediation success rate using the Two-step approach is 349 days. Accordingly, there is a total time savings of 860 days. The average cost for mediation in Italy at a 75% mediation success rate is €8.212. Accordingly there is a total savings of €7.158. See "The Cost of Non ADR - Survey Data Report 2010" for specific figures.



Achieving a 75% or a 50% success rate of mediation is a very high mark to set for all of the Member States. However, it is important to note that mediation is a cost and time-effective dispute resolution mechanism at almost every level of success rate. What is the percentage success rate at which mediation is not a financially viable or a time-saving option?

Applying the calculation described above, (see Section 2.4) and using a progressively lower success rate of mediation to find the break-even point, the data shows that it is not necessary to achieve even a marginally average percentage of compliance for mediation to save time. What exactly is the lowest break-even point? For Belgium, a 9% mediation success rate is the break-even point, or the point at which using mediation does not create any time advantage. (As seen in Table 4 below, any mediation success rate below 9% in Belgium, yields no savings in time.)

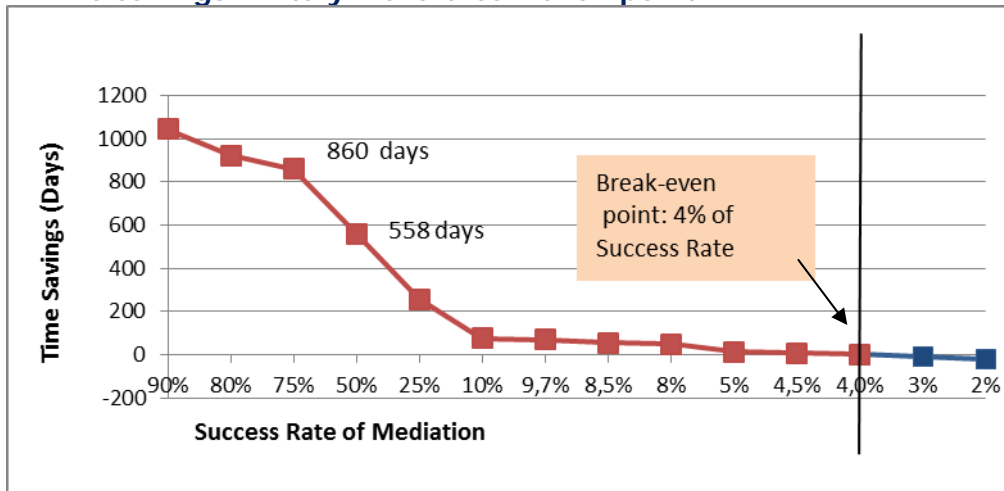
**Table 4 – Time savings in Belgium- the break-even point**



Source: ADR Center calculations

Applying the same calculations for Italy, the data shows that the break-even point is even lower. For Italy, a 4% mediation success rate is the break-even point, or the point at which using mediation does not create any time advantage. (As we see in Table 5, any mediation success rate below 4% in Italy, yields no savings in time.)

**Table 5 - Time savings in Italy – the break-even point**



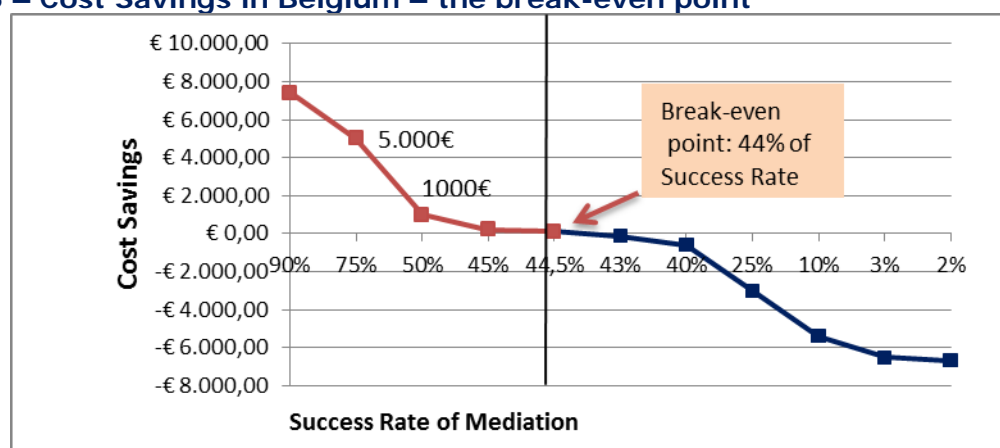
Source: ADR Center calculations

This means that mediations in Belgium must fail 89% of the time to not create any value-added (time-savings) for the Belgian government and citizens. In Italy,

mediation must fail 96% of the time to not create any value-added (time-savings) for the Italian government and citizens. With figures like these it is clear that even limited implementation of mediation will save valuable time and relieve burdens on Member States' judicial infrastructures.

Having addressed the number of days that can be saved by the implementation of mediation, next we examine the costs that can be saved. Just as in the previous section with the time savings, we have looked to implement the break-even point for cost savings.

**Table 6 – Cost Savings in Belgium – the break-even point**

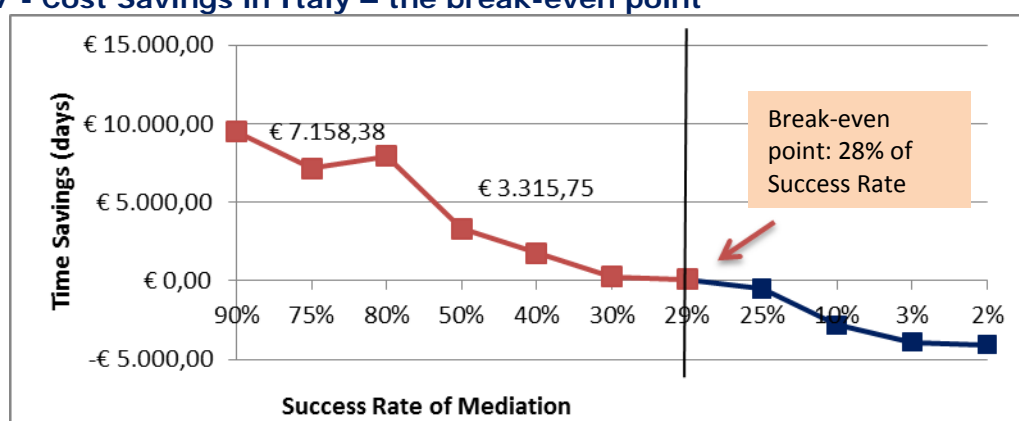


Source: ADR Center calculations

For Belgium, a 44% mediation success rate is the break-even point, or the point at which using mediation does not create any financial advantage.

Having displayed the break-even point for which mediation saves costs in Belgium we now examine the break-even point for costs in Italy.

**Table 7 - Cost Savings in Italy – the break-even point**



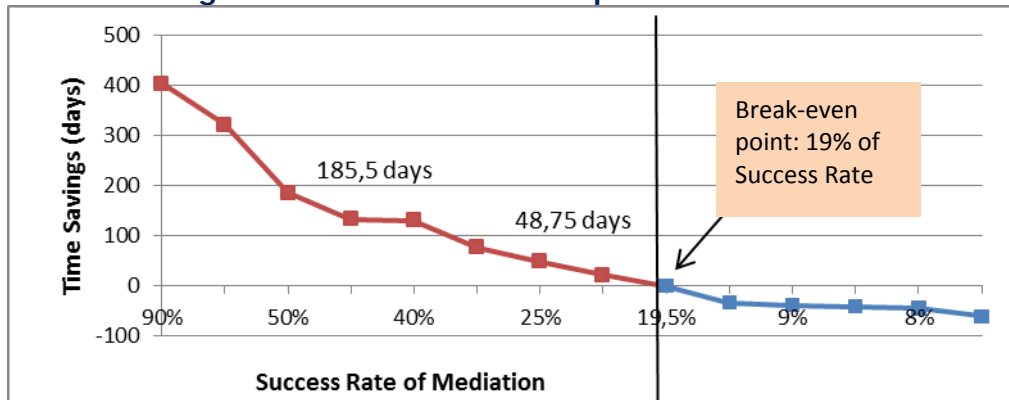
Source: ADR Center calculations

For Italy, a 28% mediation success rate is the break-even point in terms of costs, or the point at which using mediation does not create any financial advantage.

This means that mediations in Belgium must fail 56% of the time to not create any value-added (cost-savings) for the Belgian government and citizens. In Italy, mediation must fail 72% of the time to not create any value-added (cost-savings) for the Italian government and citizens. With figures like these it is clear that even limited implementation of mediation will save valuable resources and costs.

The break-even figures for Belgium and Italy are hard to ignore, however it is important to get a macro-level perspective as to what level of mediation implementation can save time and costs for the entire European Union. For this reason, we have compiled the EU break-even points for time and costs. The break-even point for time is 19% of success rate of mediation (See Table 8).

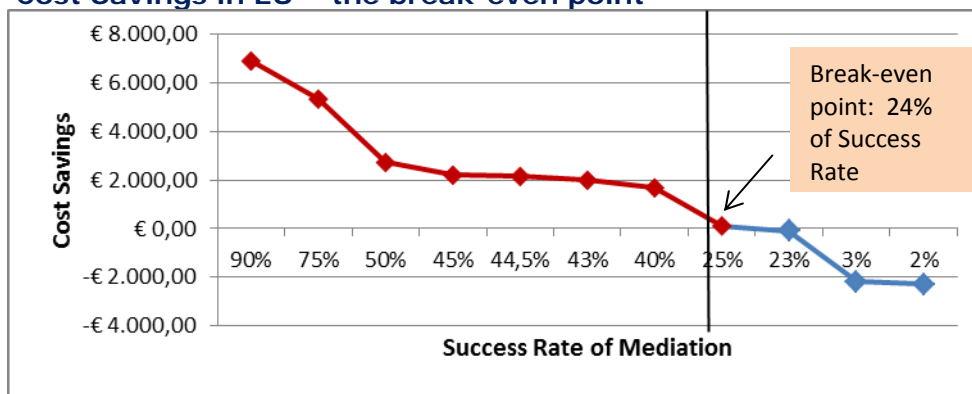
**Table 8 - Time Savings in EU – the break-even point**



Source: ADR Center calculations

The break-even point for costs is 24% (See Table 9). Additionally, it is important to note that the average cost to litigate in the European Union is €10.449 while the average cost to mediate is €2.497<sup>12</sup>. When mediation is successful European citizens can save over €7500.

**Table 9 - Cost Savings in EU – the break-even point**



Source: ADR Center calculations

### 3. TRAINING AND PROMOTION ARE NOT ENOUGH

A cost and time examination that takes into account the break-even point, (the lowest possible threshold in which mediation can be successfully implemented) is an important tool to help address the implementation of the Directive. The break-even point shows the importance of implementing mediation. Simply put, mediation in most instances saves time and money and can relieve crowded courts.

In the face of all of these benefits to be gained from mediation the question remains why is mediation not a more obvious choice for Member State governments? Why is there such limited implementation of mediation when it is so successful (see Section 1.1, Mediation Paradox)? Because the measures that have been used to promote mediation and

<sup>12</sup> "The Cost of Non ADR - Survey Data Report 2010"

train people in mediation are not expanding the reach and use of mediation as quickly or as extensively as hoped. For this reason, we will examine different ways to make mediation usage a reality in all Member States.

We have been unable to find any data or empirical research, demonstrating a single Member State's significant success in "introducing ADR" in a jurisdiction solely via promotion and training of the stakeholders (lawyers, businesses, judges, etc.). We believe that awareness and training are clearly useful in further developing a pre-existing mediation market, but awareness and training by themselves and in the launch phase, are not enough and could use some other measure accompanying them.

### **3.1 Need of compliance to “push” people to use mediation**

The term mandatory has often caused resistance when applied to mediation, because it seems to contradict a central element of the process: the notion of voluntariness. While there are some instances where it is inappropriate to mediate, many disputes are eligible for mediation. However many people are unaware of the mediation option, or their government does not offer or provide this option. For this reason, we encourage court-encouraged or law-encouraged mediation. In court-mediation, judges would strongly encourage lawyers to attempt mediation, without requiring it in all cases. Additionally, judges would also be strongly encouraged to suggest mediation as a viable alternative to court action at the initial dispute stages. “Pushing” mediation efforts will help lead to an increase in mediation use.

### **3.2 Importance of incentives**

A successful mediation implementation plan should include incentives (“carrot”) and regulations (“stick”) to induce stakeholders at every level to engage in mediation. By incentivizing the implementation of mediation, there is a greater likelihood of lasting adoption of mediation. The 2008 Mediation Directive encourages such type of incentivizing or penalizing participation in mediation schemes: Article 5(2) provides that Member States may offer incentives or sanctions to further the success of their national mediation program.<sup>13</sup> The suggested incentives (“carrots”) and regulations (“sticks”) which will help encourage mediation use are: (a) Force of Law, (b) Tax Incentives, (c) Reimbursement of Dispute Fees, and (d) Judge Incentives. Some of these approaches are currently in practice in certain Member States.

#### *a. Force of Law: Mandatory Law Approach*

Italy's Legislative Decree 28 (Decree 28) attempts to implement the aims of the Directive and create a mandatory mediation framework. Decree 28, which was enacted in March 2010, identified certain types of civil disputes which now require participation in mediation before their disputes may be heard before the courts. Under Decree 28, all civil disputes arising in the following areas must proceed to mediation prior to being heard by the courts: neighbor disputes (“condominio”), property rights, division of goods (“divisione”), trusts and estates, family-owned businesses, landlord/tenant disputes, loans, leasing of companies (“affitto di aziende”), disputes arising out of car and boat accidents, medical malpractice, libel, insurance, banking, and financial contracts.<sup>14</sup> The Italian

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<sup>13</sup> 2008 Mediation Directive art 5(2). Article 5(2) states « This Directive is without incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after the judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

<sup>14</sup>Decreto legislativo n. 28, Legislative Decree No. March 4, 2010, Article 5.

mandatory mediation approach acts as a “stick”, making disputants (in certain instances) attempt mediation before allowing court access.<sup>15</sup> Italy’s approach provides a road map on how to achieve full-scale implementation of mediation. Hopefully with the first wave of mediation cases and (likely successes stemming from mediation), the mediation paradox (see Section 1.1), will no longer hold true and mediation will become a dispute resolution mechanism commonly used in Italy.

#### *b. Tax Incentives*

Another successful incentive or “carrot” (which is also being implemented by Italy in Decree 28), is the granting of tax incentives for disputants who mediate. Article 20 of Decree 28 authorizes the Italian government to give a tax credit (up to €500) to every disputant who has paid the mediation registration cost (if the mediation is successful).<sup>16</sup> However, if the mediation fails, then the tax credit is reduced by half.<sup>17</sup> A tax incentive is a particularly useful way to induce disputants to initiate mediation. By encouraging a more cost-attractive dispute resolution option, Italy has increased the likelihood that people will want to participate in mediation. Tax incentives should be seriously examined by Member States as a possible, incentive or “carrot” to encourage mediation participation.

#### *c. Reimbursement of Dispute Fees*

Another incentive that some Member States are already employing is the reimbursement of mediation or court expense fees upon the successful completion of mediation or other ADR methods. Bulgaria, Romania, Poland and Hungary all offer mediation reimbursement elements in their domestic mediation laws.

- In Bulgaria, in pending court cases where the parties reach a settlement agreement through mediation, they may present the settlement agreement to the court and request its implementation in a court settlement agreement. The court settlement agreement has the legal effect of an enforceable court decision. When this occurs the parties enjoy a refund a 50% of the state fee paid for the entire court action.<sup>18</sup>
- In Romania, parties who settle a pending dispute using mediation receive full reimbursement of the fee initially paid to the court.<sup>19</sup>
- Poland offers a 75% reimbursement of the court fees already paid for disputants who reach a settlement through with court-annexed processes.<sup>20</sup>
- Hungary offers incentives depending on the type of case and at what point in the preceding the parties turn to mediation. As codified in the Act on Duties and the Code of Civil Procedure,<sup>21</sup> the parties may receive a reduction in

<sup>15</sup>Id.

<sup>16</sup> Id. article 20(1)

<sup>17</sup> Id.

<sup>18</sup> Giuseppe De Palo and Mary Trevor, Bulgaria’s Major Mediation Steps Include Cash Back on State Filing Fees, Alternative to High Costs of Litigation: Worldly Perspectives, 155, 156 Vol. 28 No. 8, September 2010.

<sup>19</sup> See Romanian Civil Procedure Code 271, Law 192/2006, Articles 62, 63.

<sup>20</sup> The mediation law refers to court-annexed arbitration. However, the provision is a good example of incentive that can be extended to mediation. See Poland, Law of July 28, 2005, Journal of Laws, No. 172, item 1438 (2005), Sylwester Pieckowski, Using Mediation in Poland to Resolve Civil Disputes: A Short Assessment of Mediation Usage from 2005-2008, Dispute Resolution Journal, 82, 84, November 2009/ January 2010, available at: [http://www.chadbourn.com/files/Publication/f113216c-8a28-4bfa-8f96-01cb003e0bf2/Presentation/PublicationAttachment/28698749-c9f6-43e4-acdc-72b8f6356007/Dispute%20Resolution%20Journal\\_Pieckowski%2012-033.pdf](http://www.chadbourn.com/files/Publication/f113216c-8a28-4bfa-8f96-01cb003e0bf2/Presentation/PublicationAttachment/28698749-c9f6-43e4-acdc-72b8f6356007/Dispute%20Resolution%20Journal_Pieckowski%2012-033.pdf)

<sup>21</sup> See Hungarian Act on Duties (az illetékekről szóló törvény), Hungarian Code of Civil Procedure (polgári perrendtartás). Further information is available at E-Justice Europa website, “Mediation in Member States, Country Mediation Profiles, <https://e-justice.europa.eu/contentPresentation.do?planq=en&idCountry=hu&idTaxonomy=64&member=1&vmac=2q->

court fees and pay a reduced fee to the mediator. If the parties participate in mediation after the first hearing and the agreement reached is ratified by the presiding judge, half of the applicable duties are discounted. If the parties participate in mediation prior to a civil proceeding, the parties are reimbursed more. However, cost reimbursements do not apply when the parties go to court in spite of the settlement reached in mediation.

#### *d. Judge Incentives*

Encouraging judges to promote mediation is another ADR strategy. Enlisting judges' support is a very important and necessary goal in promoting the adoption of mediation throughout the EU.

In Bulgaria, Article 321(2)(3) of the Bulgarian Civil Procedure Code<sup>22</sup>, has been promulgated to address this very issue. With the enactment of the Bulgarian Mediation Act in 2004 and 2007, Bulgarian judges had the right to assign cases to mediation. Article 11(2) of the Mediation Act gave courts the right to refer a matter to mediation.<sup>23</sup> Prior to Article 321, there were no extensive legal measures enacted to oversee the judge-referred mediation system, and accordingly, judges infrequently used Article 11(2) to promote mediation. Under Article 321, Bulgarian judges are now required to explain their reasoning when they choose not to send a case to mediation. Article 321 illustrates a way to help promote mediation through strongly encouraging judges' participation in promoting mediation through their roles and relationships with lawyers, the larger legal community.

## **4. Conclusion**

Successfully implementing mediation is important in a macro-world perspective and it is important on the micro-day-to-day level. An element that defines the rule of law today is a judiciary not only independent and transparent, but also flexible and highly efficient. This is so because law is everywhere. The law and correspondingly, the courts, touch everything we do. But today in Europe, as in many places, the judiciary and the courts are not as flexible as they need to be to address the increasingly complex economic and communication demands that globalization has created. European businesses now have clients all around the world and need a method of dispute resolution that is faster and less expensive than traditional judicial adjudication. For this reason, European businesses should rally behind mediation and see the economic benefits that mediation can provide.

On a micro-level, Member State governments can save time and money by making mediation happen. Indeed, even low -- at times, extremely low -- rates of mediation success free significant litigation costs for governments, businesses, and citizens. This study has aimed to show just how low the mediation success rates can be and still see results. These "break-even points" are valuable in showing the benefits to be derived from low success rates. Additionally, this study also has attempted to briefly suggest some simple regulations and incentives to induce mediation use. Some of the solutions, such as using the force of law to make mediation mandatory, are obviously not expected from every Member State. Others like reimbursing dispute fees or giving tax credits for successful mediation use are relatively simple ideas which might however have a big impact on increasing mediation participation rates.

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(Last updated on 01/05/2010)

<sup>22</sup> Article 321( 2) 321(3) of the Civil Procedure Code, Bulgaria, in force since March 1, 2008. Please note that this provision applies to divorce proceedings in the family law/domestic relations area of law. However, the advent of the law is a good starting point and example of inducing judge participation in mediation.

<sup>23</sup>Bulgarian Mediation Act SGN 86/24.10 2006, Article 11, p. 2, see also Lynn H. Cole, Bilyana Gyaurova-Wegertseeder, A JOURNEY IN MEDIATION: THE BULGARIAN PATH, 53-AUG Fed. Law. 29,31 (2006).





DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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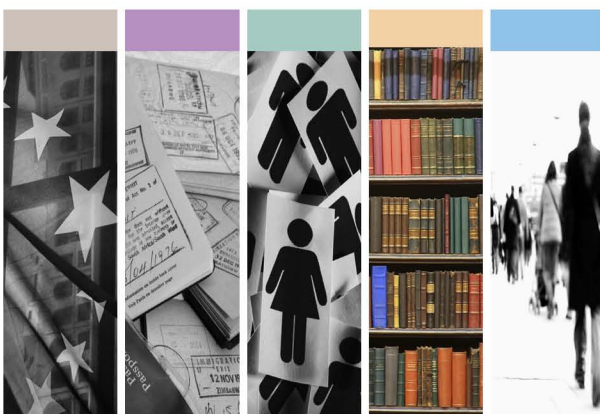
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