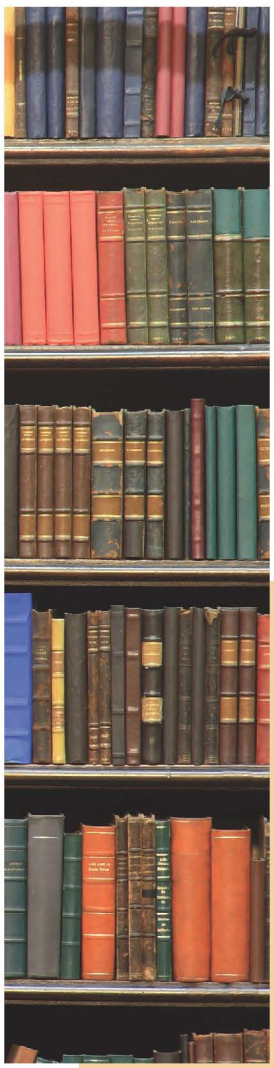
EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

Gender Equality

Legal and Parliamentary Affairs

Petitions

'REBOOTING' THE MEDIATION DIRECTIVE: ASSESSING THE LIMITED IMPACT OF ITS IMPLEMENTATION AND PROPOSING MEASURES TO INCREASE THE NUMBER OF MEDIATIONS IN THE EU

STUDY

EN

2014

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

'REBOOTING' THE MEDIATION DIRECTIVE: ASSESSING THE LIMITED IMPACT OF ITS IMPLEMENTATION AND PROPOSING MEASURES TO INCREASE THE NUMBER OF MEDIATIONS IN THE EU

STUDY

Abstract

Five and a half years since its adoption, the Mediation Directive (2008/52/EC) has not yet solved the 'EU Mediation Paradox'. Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU. This study, which solicited the views of up to 816 experts from all over Europe, clearly shows that this disappointing performance results from weak pro-mediation policies, whether legislative or promotional, in almost all of the 28 Member States. The experts strongly supported a number of proposed non-legislative measures that could promote mediation development. But more fundamentally, the majority view of these experts suggests that introducing a 'mitigated' form of mandatory mediation may be the only way to make mediation eventually happens in the EU. The study therefore proposes two ways to "reboot" the Mediation Directive: amend it, or, based on the current wording of its Article 1, request that each Member State commit to, and reach, a simple "balanced relationship target number" between civil litigation and mediation.

PE 493.042 EN

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

AUTHORS

Prof Giuseppe De Palo, ADR Center - Member of JAMS International; Hamline University School of Law
Mr Leonardo D'Urso, ADR Center - Member of JAMS International
Prof Mary Trevor, Hamline University School of Law
Mr Bryan Branon, ADR Center - Member of JAMS International
Ms Romina Canessa, ADR Center - Member of JAMS International
Ms Beverly Cawyer, ADR Center - Member of JAMS International
Ms L. Reagan Florence, ADR Center - Member of JAMS International

RESPONSIBLE ADMINISTRATOR

Udo BUX
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: udo.bux@ep.europa.eu

EDITORIAL ASSISTANCE

Marcia MAGUIRE
Policy Department C: Citizens' Rights and Constitutional Affairs

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to:

poldep-citizens@europarl.europa.eu

European Parliament, manuscript completed in January 2014

Brussels, © European Union, 2014

This document is available on the Internet at:
http://www.europarl.europa.eu/studies

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS **4**
LIST OF FIGURES **5**
EXECUTIVE SUMMARY **6**
1. INTRODUCTION **11**
1.1. Background of the Study 11
1.2. History and Impact of the Mediation Directive 12
2. METHODOLOGY **14**
3. ANALYSIS **16**
3.1. Current State of Mediation Legislation in the EU Member States 16
3.1.1. In Depth Country Analyses 16
3.1.2. Country Analyses 72
3.2. Questionnaire responses 118
3.2.1. Estimate of the Current Mediation Market (Questionnaire Part I) 118
3.2.2.Assessment of the Existing Law in EU Member States (Questionnaire Part II) 128
3.2.3.Assessment of Legislative Solutions and Non-Legislative Proposals 139
3.2.4.Opinions and suggestions received 160
CONCLUSION **162**
REFERENCES **165**
ANNEX 1: MEDIATION LEGISLATION DISCUSSED **166**
ANNEX 2: NON-LEGISLATIVE PROMOTIONAL MEASURES DISCUSSED **208**
ANNEX 3: THE STUDY QUESTIONNAIRE **226**
ANNEX 4: COST AND TIME OF MEDIATION (NEW QUESTIONNAIRE) **231**

LIST OF ABBREVIATIONS

ABA	American Bar Association
ADR	Alternative Dispute Resolution
AID	Agency for International Development
AJI	Access to Justice Initiative
CDRC	Community Dispute Resolution Center
CEPEJ	European Commission for the Efficiency of Justice
CMC	Civil Mediation Council
CMMS	Community Misdemeanour Mediation Service
CPR	International Institute for Conflict Prevention & Resolution
EC	European Commission
EU	European Union
HKMAAL	Hong Kong Mediation Accreditation Association Limited
HUD	U.S. Department of Housing and Urban Development
ICC	International Chamber of Commerce
ICMA	Irish Commercial Mediation Association
INTA	International Trademark Association
MSB	Mediator Standards Board
NMAS	National Mediator Accreditation System
NNTT	National Native Title Tribunal
ODR	Online Dispute Resolution
SJI	State Justice Institute
SMC	Singapore Mediation Centre
USAO	United States Attorney's Office
VOM	Victim-Offender Reconciliation Programme
WB	World Bank

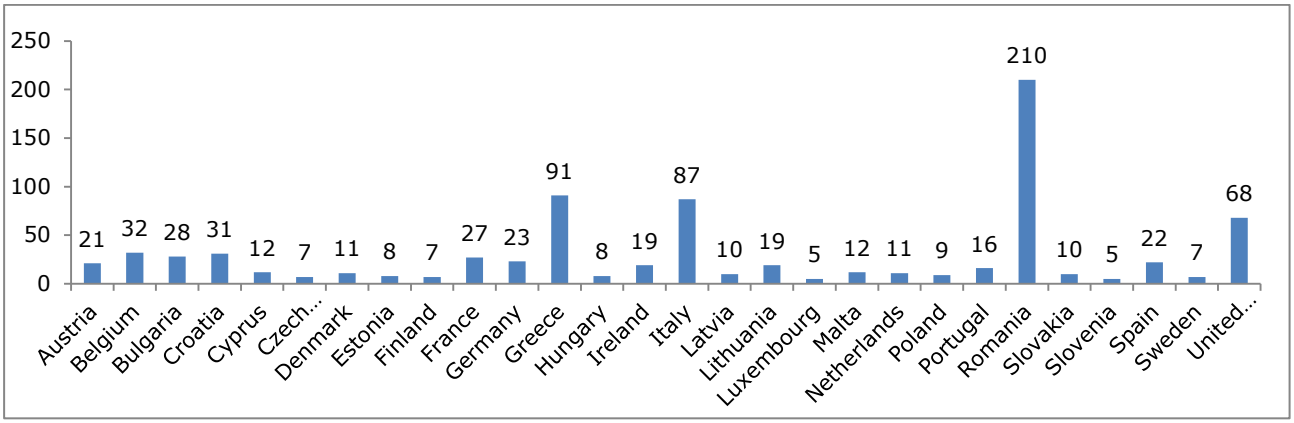
LIST OF FIGURES

FIGURE 1: Number of Responses to Questionnaire 120
FIGURE 2: Average Estimate of the Number of Mediations 120
FIGURE 3: Average Estimate of the Average Monetary Value of Mediations 122
FIGURE 4: Average Value of the Dispute in Each Member State 123
FIGURE 5: Average Number of Days in Mediation versus Litigation 124
FIGURE 6: Average Number of Days in Litigation versus Mediation then Litigation 125
FIGURE 7: Average Cost of Litigation Compared to Mediation 126
FIGURE 8: Average Cost of Litigation versus Mediation then Litigation 127
FIGURE 9: Average Responses to Questions 2-6 in Part I 127
FIGURE 10: Average Responses to Part II (Questions 7-11) 132
FIGURE 11: Average Responses to Part II (Questions 12-16) 137
FIGURE 12 : Average Ranking of the Potential Impact of the Duty to Inform 141
FIGURE 13: Average Ranking of Preliminary Mandatory Information Sessions 141
FIGURE 14: Average Ranking of Mandatory Mediation in Certain Categories of Cases 142
FIGURE 15: Average Ranking of Mandatory Mediation with Opt-Out 142
FIGURE 16: Average Ranking of Mandatory Mediation for the 'Stronger Party' 143
FIGURE 17: Average Ranking for Requiring 'Stronger' Parties to Explain Refusal 144
FIGURE 18: Average Ranking for Granting Judges the Power to Order 144
FIGURE 19: Average Ranking for Requiring Judges to Explain Non-Referral 145
FIGURE 20: Ranking for Assessing the Productivity of Judges also Based on Referrals 145
FIGURE 21: Average Ranking for Imposing Sanctions 146
FIGURE 22: Average Ranking for Providing Incentives 146
FIGURE 23: Average Ranking for a Third-Party Review 147
FIGURE 24: Average Ranking for Requiring Legal Assistance 147
FIGURE 25: Average Ranking for Designating a Number of Cases to be Mediated 148
FIGURE 26: Average Responses for the Solution with Potential for Most Impact 149
FIGURE 27: Overall Ranking for Legislative Measures 150
FIGURE 28: Average Ranking for Pilot Projects 153
FIGURE 29: Average Ranking for a 'Settlement Week' 153
FIGURE 30: Average Ranking for National Mediation Champions or Ambassadors 154
FIGURE 31: Average Ranking for a 'Mediation Pledge' 155
FIGURE 32: Average Ranking for a Mediation Advocacy Education Program 155
FIGURE 33: Average Ranking for Mediator Certification at the EU Level 156
FIGURE 34: Average Ranking for Creating an EU ADR Agency 157
FIGURE 35: Overall Ranking for Non-Legislative Proposals 158
FIGURE 36: Average Responses for the Non-Legislative Proposal with Potential for Most Impact 159

EXECUTIVE SUMMARY

This study, contributed to by 816 experts from all over the EU (Figure A), shows that, undoubtedly, the 2008 Mediation Directive[1] has helped to advance the mediation discourse across Europe. Indeed, the legislations adopted in the Member States to implement the Directive, or to overhaul pre-existing national legislation, have concurred to generate a genuine "ADR Movement" in the EU, as shown by the number of new mediation centres, publications, conferences and trainings of all sorts.

Figure A: Number of Responses to questionnaire[2] - Divided by Member State



Despite this movement, the Directive has not achieved its objective stated in its Article 1: 'to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.' In fact, only one country, Italy, has a reported number of mediations exceeding 200 000 annually. The next three countries probably exceed 10 000 only, while a significant number of EU Member States report less than 500 mediations per year (Figure B), according to estimations by the responding experts:

Figure B: Estimated Number of Mediations per Year

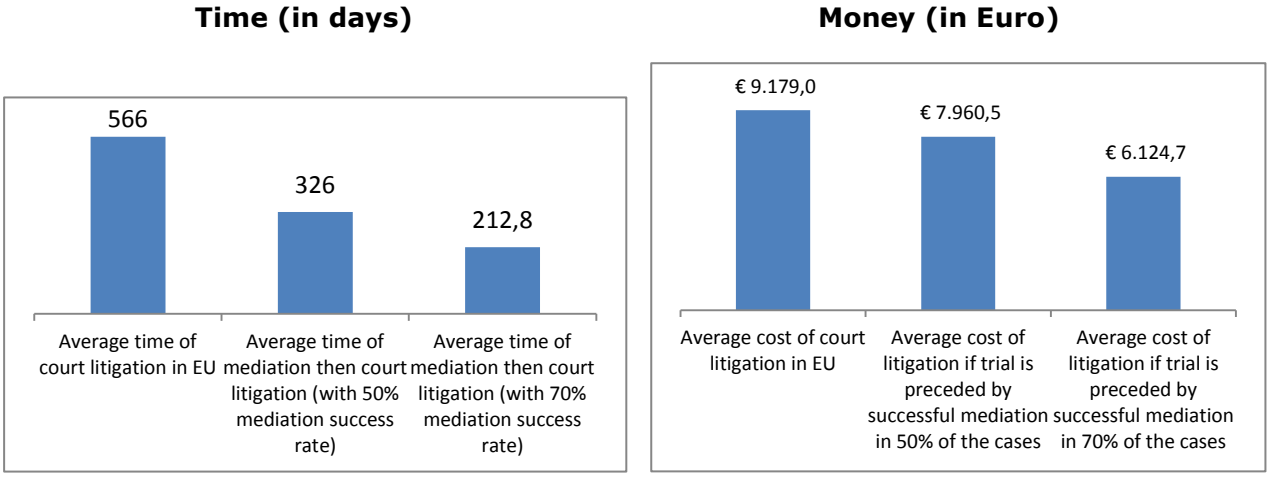
Number of mediations	Countries	Nr. of countries	% of countries
More than 10 000	Germany, Italy, Netherlands, UK	4	14%
Between 5 000 and 10 000	Hungary, Poland	2	7%
Between 2 000 and 5 000	Belgium, France, Slovenia	3	11%
Between 500 and 2 000	Austria, Denmark, Ireland, Romania Slovakia, Spain	6	21%
Less than 500	Bulgaria, Croatia, Cyprus, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal Sweden	13	46%

[1] 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, OJ L 136, 24.5.2008, p. 3–8

[2] The questionnaire had been open to response starting on 3 October 2013 and data started being analysed on 24 October 2013 under the following address: http://www.surveygizmo.com/s3/1382928/Questionnaire

In light of the many societal benefits a greater use of mediation can bring, including significant and measurable time and money savings (Figure C)[3], the European Parliament efforts to 'reboot' the Directive, more than two and a half years since the deadline for its implementation in the national legal systems, are both timely and necessary.[4] This study is part of the EU Parliament efforts in that direction.

Figure C: Comparing the Average Time and Money Savings of Litigation Only versus Mediation then Litigation (at different mediation success rates)



A thorough comparative analysis of the legal frameworks of the 28 Member States, combined with an assessment of the current effects of the Mediation Directive in terms of its produced results throughout the EU, shows that only a certain degree of compulsion to mediate (currently allowed but not required by the EU law) can generate a significant number of mediations (Figure D).[5] In fact, all of the other pro-mediation regulatory features mentioned in the study's terms of reference, such as strong confidentiality protection, frequent invitations by judges to mediate and a solid mediator accreditation system, have not generated any major effect on the occurrence of mediations. Compelling evidence of this comes by comparing the number of mediations in Member States where one or more of these features are present and, even more so, have been present for a long time.[6]

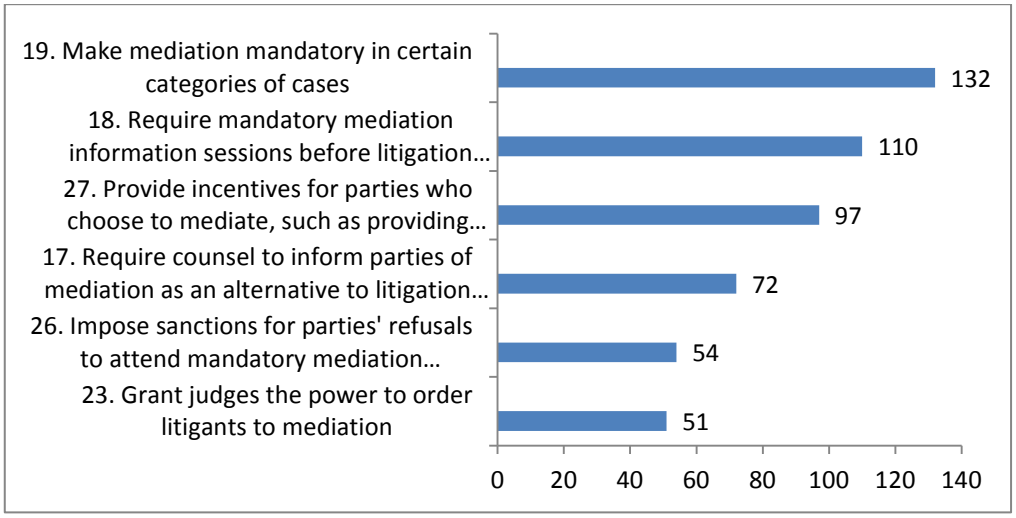
[3] As it will be shown later, if all civil and commercial cases in the EU were mediated before they are litigated, a mere 9% success rate of mediation would still generate a time saving, on average. This is so because many little time increments of failed mediations (which will be presumably followed by litigation) are offset by the huge time decrements of each successful mediation.

[4] The disconnect between the benefits of mediation and its current very limited use in the Member States has been named the 'EU Mediation Paradox'.

[5] Of course, an obligation to mediate does imply an obligation to settle the dispute. This is also the case where litigants are not just invited, but ordered, to mediated by the judge. Incidentally, the proposal of judge-ordered mediation obtained good support by the EU experts, therefore confirming the importance of the compulsion element to make more mediations happen.

[6] By way of example, judicial referrals have been part of the legal system in England and Wales at least since 1999. Statutory protection of confidentiality has been part of the Italian legal system since 1993, and of the French one since 1994/1995.

Figure D: Top-Ranked, Most Effective Legislative Measure to Increase Mediation Use (by number of preferences expressed)



Further, evidence shows that elements of mandatory mediation can have a positive effect on voluntary mediation as well. In Italy, for example, when mediation was not mandatory (until 2011), there were no more than 2 000 mediations per year. At the time mediation became mandatory (March 2011-October 2012), the number of voluntary mediations climbed to almost 45 000, out of over 220 000 proceedings as a whole. When mediation ceased to be mandatory (October 2012 – September 2013), along with that of mandatory mediations also the number of voluntary mediations fell to almost zero. Now that mediation is again a pre-requisite to litigation in certain cases (since September 2013), both mandatory and voluntary mediations are being initiated at a rate of tens of thousands per month.

Italy, actually, features a 'mitigated' mandatory mediation system. Indeed, in certain categories of cases litigants are only required to sit down with a mediator for a preliminary meeting, at no cost, in lieu of having to go through, and pay for, a full-blown mediation. If any of the parties is not persuaded that mediation has good chances to succeed, they can 'opt-out' from the process during the preliminary meeting and go directly to court without negative consequences. Amongst other advantages,[7] this model reduces to the minimum concerns about the litigants' right of access to justice.

If analysed with attention, this model resembles closely that of mandatory mediation information meetings, requiring essentially the parties to sit down with a mediation advisor, or mediation counsellor, to discuss the pros and cons of both litigation and mediation, in their case. Common to both models is the goal of making sure that people seriously consider mediation as an option. The mandatory mediation information meeting, now the law in Romania and in a number of other countries, is however an 'opt-in' system, because the parties interested in mediation, after the mandatory information session, must start a separate process to actually mediate.

At first sight, based on the higher number of respondents favouring it, the study would appear to support a stronger model of mandatory mediation, requiring parties to mediate, in certain categories of cases, before they can be granted access to the court system.

[7] Just to quote two other major advantages, the opt-out mechanism greatly enhances mediator's quality, for it is clear that only the more prepared and qualified neutral will inspire the parties to go on with the mediation process. Similarly, the free first mediation meeting will make it less likely for mediators and mediation organizations non truly committed to the process to invest their time and resources in providing the service, given the uncertainty of that the parties are willing to continue after the preliminary meeting, when they have to commit to pay for the service.

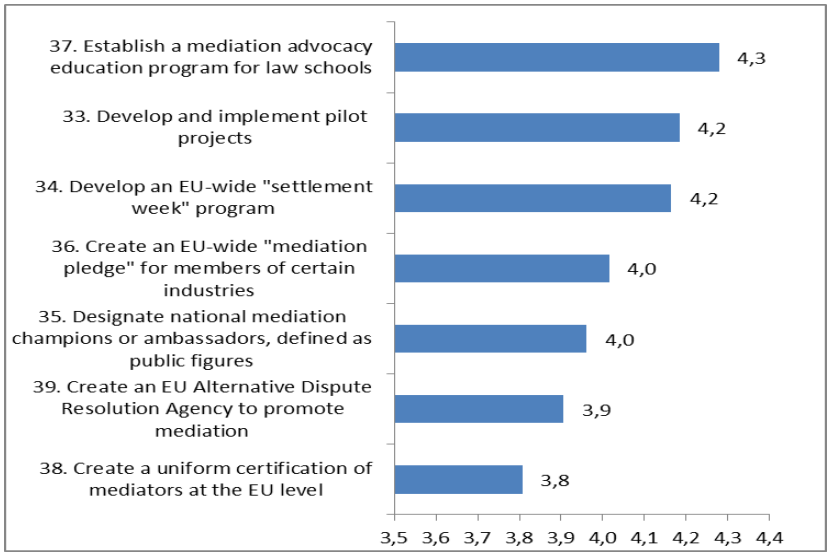
Moreover, sanctions for not attending the mandatory mediation session are regarded as having a positive effect by the majority in Europe.[8]

On closer inspection, considering the strong similarities between the 'opt-out' and the 'opt-in' system of the mitigated mandatory mediation model, and their respective high scores, the study does however suggest that this is the preferable solution. Besides, countries not favouring any mandatory elements in mediation gave, understandably, the mitigated model a higher ranking than that of what one could call a 'pure' mandatory approach.[9]

Based on the study results, the choice between 'opt-out' and 'opt-in' appears to be easy: by comparing the number of mediations generated by the two models, and considering the strong preference by experts based in 'opt-in' countries (such as Romania) for stronger mandatory elements, the opt-out model appears clearly the preferable one.[10]

Lastly, the study proposes and surveys a number of non-legislative measures to promote mediation, which the EU Institutions and the Member States could support in various ways (Figure E). While these measures are all deemed to have a positive contribution to mediation development, the study participants' majority view is that nothing short of better regulation will actually increase the number of mediated cases to a desirable level.[11] Further evidence of the desire to see mediation happen, eventually, comes from the fact that two of the top three non-legislative proposals, in terms of the greatest potential impact on the use of mediation, are 'Mediation Pilot Projects' and the 'EU Settlement Week'. In the field of mediation, these initiatives normally include, if not a degree of actual compulsion, at least very strong incentives for litigants to engage in the process.

Figure E: Average Responses for the Non-Legislative Proposal with Potential for Most Impact



In light of the foregoing, the overall suggestion coming out of the study, to increase significantly the use of mediation in the EU, appears relatively straightforward: a regulatory intervention introducing, not simply allowing, a mitigated model of mandatory mediation, at

[8] See Figure 21 of the study, noting that sanctions for lack of participation are supported even in countries that are generally not in favour of mandatory mediation, such as the UK.
[9] Differently put, a mitigated form of mandatory mediation will be faced with less resistance by the minority of the countries preferring different (yet anywhere else ineffective) approaches to increase the use of mediation.
[10] From a practical point of view, the greater effectiveness of the 'opt-out' model may consist in giving the litigants an actual mediation experience, which the opt-in version does not. Also, normally the first meeting with the mediator, which happens in the opt-out model, serves the purpose of informing them about the mediation process. Very compelling evidence about the superiority of the opt-out model to foster mediation participation comes from the US mediation foreclosure programs. For example, opt-in programs have had a 25% participation rate, while opt-out programs have reached 70%. For further information, see Annex 2, page 212.
[11] See discussion under question 45 of the study.

least in certain categories of cases.[12] A consistent EU-wide change would require modifying the existing Mediation Directive, so far scheduled for re-consideration only in 2016.

A different approach, not excluding the previous one and - most importantly - not requiring any change of EU legislation, would be for the European Parliament to continue on pressing the European Commission, and the Member States, along the path of the so called 'Balanced Relationship Target Number Theory'.[13]

The theory, already invoked by the Parliament's Legal Affairs Committee in an oral question to the Commission on December 12, 2012[14], suggests that, as a matter of existing EU law, the Mediation Directive requires the Member States to achieve, by whatever policy means they prefer, the balanced relationship between mediation and judicial proceedings prominently called for by the Mediation Directive. Failure to determine a clear target number for that relationship,[15] and/or failure to achieve that target, would tantamount to a "de facto" lack of compliance with the Directive.[16]

Taking into account the extremely modest number of mediations in the EU to date, based on the 'Balanced Relationship Target Number Theory' it could be concluded that virtually all Member States have a current statutory obligation to step up the existing mediation regulation.

The present study suggests not only the most desired mediation regulations, but also the mediation regulations that actually worked, therefore making quite simple the EU and the Member States' legislators job in solving the EU Mediation Paradox.

[12] Possibly, these new rules could be subject to a time period, in order to verify the results they produce. This is what happened in Italy, where the mandatory requirement will expire in 2017, therefore allowing for a 4-year trial period.
[13] See http://www.europarl.europa.eu/sides/getDoc.do?type=OQ&reference=O-2012-000169&language=EN.
[14] Question for oral answer to the Commission Rule 115 by Klaus-Heiner Lehne, on behalf of the Committee on Legal Affairs O-000169/2012.
[15] Understood, for clarity's sake, as a percentage of all civil and commercial disputes to be mediated in a given period.
[16] For more details on the 'Balanced Relationship Target Number Theory', please see De Palo, G. and Trevor, M. 'Introduction'. *EU Mediation Law and Practice*. (Oxford: Oxford University Press, 2012).

1. INTRODUCTION

1.1. Background of the Study

In April 2013, the European Parliament launched a request for proposals to be submitted for a comparative study on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (the Mediation Directive).

The aim of the study, as stated in the Terms of Reference, is to obtain national-level feedback regarding the experience gained from transposing the Directive into national legal orders, and to identify reasons why mediation is not used more frequently for both internal and cross-border disputes. Based on national experience and reasons identified as obstacles for a wider use of mediation, the study also aims to assess whether measures need to be adopted at the EU level to encourage a more systematic use of mediation, and if so, what those measures should be.

For the first part of the study, the Parliament asked to tackle the following issues, contentions, and areas:

- certain cases can only be adjudicated by a judge and are not 'mediatable';[17]
- the Directive's rules on confidentiality are by some Member States deemed not to be strict enough;
- differing opinions on the role of legal professions involved in mediation procedures;
- uncertainty as to the precise scope of the exceptions to the duty of secrecy and confidentiality;
- how the provisions of the Mediation Directive giving the possibility for courts to refer the parties to mediation may have affected national procedural law.

The Parliament also asked to identify and analyse legal reasons for why mediation is not used more systematically and more frequently in selected Member States, despite the adoption of the Directive.

In the second part of the study, the Parliament asked to assess whether further measures shall be adopted at the EU level to encourage the use of mediation.

Giuseppe De Palo, Professor of Alternative Dispute Resolution Law and Practice at Hamline University School of Law and President of Italy-based ADR Center, was invited to submit a proposal for the study. He presented to the Parliament a proposal to evaluate the impact of the Mediation Directive on national laws in each EU Member State, with an even deeper analysis of eleven specific EU Member States. Prof. De Palo and his team also proposed a systematic tool to assess the effectiveness of the national mediation policy instruments, along with a number of practical legislative and non-legislative solutions evaluated by EU mediation experts.[18] The Parliament chose the proposal from Prof. De Palo for the service contract IP/C/JURI/IC2013-062.

[17] A question regarding the 'mediability' of cases was originally included in the questionnaire, however upon advisement that the answers received would be too diverse to reach a conclusion and the opinion from experts that this was not a key issue, the question was removed.
[18] This tool, which consists essentially of a comprehensive online questionnaire, can be easily utilized for future studies.

1.2. History and Impact of the Mediation Directive[19]

Leading up to the Directive, ADR methods have been a topic of discourse in many nations for over thirty years, at least in the field of civil and commercial disputes. In the EU, the increasing focus on mediation was a consequence of years of mounting concern about court costs and congestion, and other obstacles to cross-border dispute resolution in the single market. During this period, the use of alternatives to litigating civil and commercial disputes was almost entirely voluntary, and subject only to limited legislative encouragement throughout the Member States. Consequently, very few litigants used mediation to resolve these disputes.

The October 1999 European Council of Tampere foreshadowed a significant effort to change its 'laissez-faire' approach, when it called for the creation of alternative extrajudicial dispute resolution procedures by the Member States. The efforts that followed spanned nearly a decade and resulted in the adoption of the Mediation Directive.

While the Mediation Directive expressly states that it applies only to cross-border disputes, Recital 8 also provides that 'nothing should prevent Member States from applying [its] provisions also to internal mediation processes'. In addition to refraining from imposing domestic mediation processes, the Directive also refrained from requiring that Member States mandate, or otherwise encourage, the use of mediation. Instead, it provides in Article 5(2):

This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial systems.

In fact, according to Recital 5, '[t]he objective of securing better access to justice … should encompass access to judicial, as well as, extrajudicial dispute resolution methods'. Ultimately, the Mediation Directive identifies its goals, in Article 1, as 'ensuring a balanced relationship between mediation and judicial proceedings', but it does not suggest what that balance might be.[20]

A study investigating the root causes of this insufficient mediation use, and suggesting remedies, is both timely and necessary. The European Parliament first raised a red flag in its Resolution of September 2011, noting that the Mediation Directive appeared to have produced modest results (except perhaps for one country, Italy). It is important to note that, of the countries indicated at that time as those where the Mediation Directive had had the largest impact, the total number of mediations was merely in the hundreds.[21] One could argue that the results mentioned in the September 2011 Resolution were predictable, considering that the Mediation Directive had to be implemented by May 2011, and that 4 months is not a sufficient length of time in which to expect significant results. However, it should be recalled that many of the Member States did not wait until the deadline to implement the Directive. Actually, in a number of Member States the pro-mediation features enshrined in the Mediation Directive had already been included in domestic law for a number of years – sometime for more than a decade.

[19] This section is largely based on De Palo, G. and Trevor, M. 'Introduction'. *EU Mediation Law and Practice*. (Oxford: Oxford University Press, 2012).
[20] At the end of this report, an explanation as to how this powerful language can prompt more effective pro-mediation policies at the national level will be provided.
[21] These numbers have not changed much since, making the characterization of mediation in the EU as being 'in the low, single digit number', as compared to litigation, a very generous one (Hopt, KJ and Steffek, F [Ed.s], Mediation: Principles and Regulation in Comparative Perspective (Oxford: Oxford University Press, 2013).

More than one year later, on 11 December 2012, the Legal Affairs Committee of the European Parliament formally returned to the need of facilitating access to ADR and promoting the amicable settlement of disputes through mediation. In response to an oral question posed on behalf of that Committee, asking about what the Commission intended to do to rectify the absence of a balanced relationship between the number of mediations and trials in the EU, it was stated that one year after the implementation deadline was too soon to assess whether the Mediation Directive's objective had been attained.[22] As noted above, in September 2011, it was already apparent that the Mediation Directive was having too little impact. Today, more than five and a half years after the Directive adoption, the argument that more evaluation time was needed is hard to sustain.

[22] See http://www.europarl.europa.eu/sides/getDoc.do?type=OQ&reference=O-2012-000169&language=EN. Doubts about the sufficiency of the Mediation Directive to actually promote mediation were debated extensively in legal circles well before its final approval in 2008, based on review of the draft version circulating at that time. For a discussion on this issue that took place at the European Parliament, please refer to the presentation by Giuseppe De Palo, on 4 October 2007, at the workshop titled 'Mediation: Pushing the Boundaries'.

2. METHODOLOGY

The research team's first task was to study and compile analyses of the current mediation legislation in each Member State. To ensure that a wide array of approaches to the implementation of the Mediation Directive would be covered, the team included in-depth analyses of the following eleven countries: Austria, Bulgaria, France, Germany, Greece, Italy, the Netherlands, Poland, Romania, Slovenia, and the United Kingdom.

For these in-depth analyses, the following aspects of each Member States' legislation were explored: the degree of regulation, subject matters that are mediated, the degree of confidentiality, the voluntary or mandatory nature of mediation, mediation information meetings, cost incentives and sanctions, the existence of court referrals to mediation, the enforceability of the settlement agreement, training and accreditation of mediators, the existence or non-existence of the lawyers' duty to inform clients of mediation, the use of legal assistance in mediation, and statistics regarding mediation use.

For the other seventeen[23] Member States, the team compiled shorter analyses exploring the following areas of each nations' legislation: current mediation legislation, the existence of court referrals to mediation, the extent of confidentiality, the enforcement of mediation agreements, the impact of mediation on the statutes of limitations, possible requirements for parties and lawyers to consider mediation, possible requirements for parties to participate in mediation, accreditation requirements for mediators, mediator duties, duties of legal representatives and other professional mediation participants, and the existence of court-annexed mediation programs.

Information and descriptions for these analyses were taken primarily from *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, from *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr Fred Schonewille, and from various other books and websites that provided such information. The analyses were later reviewed and confirmed by one or more experts per country.

In addition to compiling information about current mediation legislation, the team created a questionnaire to obtain feedback from EU mediation experts.[24] The questionnaire sought information about the current mediation market and perspectives of the current mediation legislation, as well as the experts' opinions regarding possible legislative solutions and non-legislative proposals. As soon as the questionnaire document was created, the team sent it to a number of highly selected experts in order to test the clarity of the format and the questions. After receiving feedback from these experts, the team refined the questionnaire.

The team then published the questionnaire[25] on an online survey platform, Survey Gizmo, and began circulating the link. Each member of the team researched potential experts and their contact information on websites, such as LinkedIn, law firm websites, Bar Association websites, and other websites related to mediation. The team sent emails to the contacts, and invited these contacts to forward the message along to their colleagues and other mediation contacts. The email request was also sent to specific individuals, including contributors to Professor Giuseppe De Palo and Professor Mary B. Trevor's book *EU Mediation Law and Practice,* contributors to Manon Schonewille and Dr Fred Schonewille's book *The Variegated Landscape of Mediation Regulation,* contacts from the *Clifford Chance*

[23] Croatia has already been included in this study.
[24] Please see Annex 3 for the English version of the questionnaire.
[25] The questionnaire had been open to response starting on 3 October 2013 and data started being analysed on 24 October 2013, the survey is available at the following address: http://www.surveygizmo.com/s3/1382928/Questionnaire.

International Mediation Guide, participants to the Fundamental Rights Conference of 2012 and various mediators' clubs in Europe. The request and the link were also posted on various groups on LinkedIn.[26]

The questionnaire was available online for three weeks, and then the team began to analyse the results and write the report. Through this methodology, a tool was created which may be a sustainable platform for obtaining data related to mediation legislation in EU Member States, and will also allow the Parliament and governments to assess the impact of this legislation as well as other non-legislative measures used to promote the use of mediation.

Toward the end of the study, the team determined that additional questions needed to be answered in order to fully analyse Part I. As a result, an additional questionnaire was created and published online.[27]

The results are in the following pages.

[27] Please see Annex 4 for the new questionnaire 'Cost and Time of Mediation in the EU'. This questionnaire used the same methodology as used in 'Costs and Benefits Associated with Mediation in the EU', Report of the project *Judges in ADR: Improving On-line Resources and Trainings for Judicial Referral to Mediation in the EU*.

3. ANALYSIS

In this chapter, the study team chose several countries to be subject to an in-depth analyses in order to ensure that a wide array of approaches to the implementation of the Mediation Directive would be covered.[28] The remainder of the EU Member States are the subject of shorter, albeit still comprehensive review of mediation legislation. In order to give the reader the benefit of multiple perspectives on the law, the opinions of hundreds experts are available in Annex 1.

In addition to the analyses, the key research tool was the questionnaire completed by 816 respondents (see above Fig. A and below Fig. 1), including jurists and ADR practitioners in all 28 EU Member States. The data collected was divided by country and examined by the research team. Where appropriate, the responses have been averaged and weighted by countries. Because the participation from ADR experts and practitioners was highly satisfactory, the study team has been attentive to possible biases in the study findings. The team members have done their utmost to address these wherever they could occur, but they cannot be fully excluded.

The questionnaire was divided into three parts. Part I of the questionnaire aims to gather the estimate of the current mediation market in each of the 28 EU Member States. Part II is an assessment of the existing law. Part III includes a list of legislative solutions (Part IIIA) and non-legislative proposals (Part IIIB) for the assessment in terms of ability, or inability, to make more mediations happen. The complete questionnaire in included in this Report as Annex 3.

Responding to the questionnaire simply required the participants to choose from among a list of options or to rank a number of proposals. If the participant's preferred answer was not listed amongst the options, he or she was asked to choose the closest answer to the situation in his or her country. In addition, each respondent was asked to only use the option of 'Other' if the situation in his or her country is radically different from any of the three designated options presented.

After each of the following 45 questions, we have inserted the results gathered and our analysis and comments. It is important to mention that a significant number of respondents who completed the questionnaire represented Romania. When analysing the data as a whole, there is thus a 'Romania effect' to the responses, due to this significant number of representation. As a result, the Romanian responses have a significant impact on the averages. However, when the data is separated by Member States, the 'Romania effect' does not impact the results.

3.1. Current State of Mediation Legislation in the EU Member States

3.1.1. In Depth Country Analyses

Below are in-depth analyses of the mediation legislation in eleven Member States (Austria, Bulgaria, France, Germany, Greece, Italy, the Netherlands, Poland, Romania, Slovenia and the United Kingdom).

[28] See explanation regarding the choice of countries in Chapter 2 Methodology.

Austria[29]

Degree of Regulation (extensive versus limited)

Mediation has been regulated in Austria since before European activities began and the Directive was initiated. The Austrian Act on Mediation in Civil Matters ('Bundesgesetz über Mediation in Zivilrechtssachen, Zivilrechts-Mediations-Gesetz'), ('the Mediation Act') came into effect in 2004. It established an Advisory Council for Mediation at the Federal Ministry of Justice and regulated the requirements and procedure for entries in the Mediation Register, the listing of registered mediators; it established the requirements and the procedures for training institutes and training courses, and the listing of these institutes and courses; it established the rights and duties of registered mediators; and it addressed the suspension of limitation periods by mediation of civil matters.

The Mediation Act was amended in 2004 by the Regulation of the Federal Minister of Justice on the Training Requirements for Admission as a Registered Mediator ('Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator, Zivilrechts-Mediations-Ausbildungsverordnung'), ('the Regulation'). The Regulation established the minimum number of course units that applicants must complete and verify in order to be registered as a mediator, including completion of 200-300 course units of theory and 100-200 course units of practical education.

Because Austria had already developed high standards for registered mediators, the Directive was implemented in 2011 by a separate Act on Certain Aspects of Cross-border Mediation in Civil and Commercial Matters in the EU ('Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivil-und Handelssachen in der Europäischen Union, EU-Mediations-Gesetz') ('the EU Mediation Act'), to guarantee minimum standards for mediations, including settlements facilitated by unregistered mediators.

Subject Matters that are Mediated

The subject matters that are mediated include family law, estate law, labour law (employee disability work-related claims), housing disputes and neighbour disputes.

Confidentiality

Article 18 of the Mediation Act establishes the registered mediator's absolute duty of confidentiality. A registered mediator must keep confidential all facts revealed by the parties, and may be subject to prosecution if this duty is breached. The duty may not be waived by the parties. The EU Mediation Act also adopted Article 7 of the Directive to establish that mediators cannot be compelled to give evidence regarding information arising out of or in connection with a mediation process in either civil and commercial judicial proceedings or in arbitrations. The rule is subject to the exceptions explicitly named by the Directive. In sync with this duty, Article 320(4) of the CCP makes the testimony of a registered mediator inadmissible.

The parties, however, do not have a duty of confidentiality but can agree to such a duty by contract. A mediator who is not registered is also generally not subject to confidentiality or

[29] Information from this section is taken from Christoph Leon and Irina Rohracher's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor as well as from Marianne Roth's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to the following experts who also provided assistance by reviewing the information in the country analysis: Christoph Leon and Irina Rohracher.

exemptions from the duty to give evidence. But an unregistered mediator who is a lawyer or life coach whose professional regulations impose a duty of confidentiality will be subject to the duty.

Registered mediators may refuse to give evidence in criminal cases, but this right is not extended to non-registered mediators.

Voluntary versus Mandatory

Mediation in Austria is based on the voluntariness of the parties. There is little compulsory mediation, and the Directive implementation was not used to introduce broad mandatory mediation. But mediation comes up in various Austrian legal provisions, even if not always expressly, mostly as voluntary but sometimes as mandatory.

Three provisions of Austrian procedural law refer to mediation, although not expressly. Article 204 of the Code of Civil Procedure (CCP) states that the court may work toward a dispute settlement at any time in the proceedings, and may inform the parties about institutions that are qualified to facilitate dispute settlements. Further, if settlement occurs, it may be written in the minutes of the hearing at the parties' request.

The Austrian Act on Non-Contentious Proceedings ('Außerstreitgesetz'),(family and estate law) refers twice to mediation. Article 13(3) states that the court must work towards a dispute settlement among the parties, and may do so at any point in the proceedings. Article 29 states that if settlement among the parties is expected, the court may stop its proceedings for up to six months (unless it would jeopardize one of the parties' interests).

The Austrian Supreme Court affirmed in a recent decision that mediation may not be mandated for parents in a custody battle, even if it seems beneficial to the child's best interests. But there are special cases where using mediation before instituting legal proceedings is compulsory. In neighbour disputes, for example, parties must consult conciliation committees or registered mediators before taking legal action in particular cases. Legal action may be taken only after three months from the beginning of the mediation proceeding.

Labour law also provides situations in which consultation with a conciliation committee or registered mediator is compulsory (e.g., employee disability work-related claims). Most parties prefer the traditional conciliation proceedings of the Federal Social Services Office, so very few opt for mediation. Additionally, when a new form of apprenticeship termination was introduced, a mediation proceeding before termination was made compulsory, but this new approach has not been seen favourably and has hardly been used.

Mediation Information Meetings

Courts may give litigating parties information about institutions that are qualified to offer alternative dispute resolution services. But the extent to which any given judge provides such information is left to the discretion of the judge.

Cost Incentives and Sanctions

Because participation in mediation is generally voluntary, there are no sanctions or negative consequences for a party who does not participate in mediation, or who does participate but not in good faith. Nor are there incentives to encourage the parties to try mediation instead of going to court.

Court Referrals to Mediation

The court may (and in family and estate matters, must) assist parties with dispute settlement at any time it deems appropriate during the proceedings and, when the court deems it appropriate, may inform the parties about institutions that are qualified to administer ADR.

Apart from neighbour or labour law situations, which are rare, there is no general court-annexed mediation scheme. So far, experience in Austria with court-annexed mediation is therefore limited. However, in 2008, the commercial court of Vienna launched a pilot project that received positive feedback.

The Austrian legal framework, overall, does encourage dispute settlement at any time in the proceedings. Whether a judge works with the parties toward settlement or offers information about the institutions offering mediation services depends, with the exceptions noted above, on the personal approach of the judge in question.

Enforceability

In accordance with Article 6 of the Directive, Article 433a of the CCP, entitled 'Mediation Settlement', provides that parties may bring a mediation settlement agreement before any regional court in Austria and the court will approve it as long as its provisions are consistent with the law. The settlement is then legally enforceable. This provision applies to all mediation settlements, regardless of whether the mediator is registered.

Training and Accreditation of Mediators

The Federal Ministry of Justice determines the professional qualification and training requirements for mediators, and it administers the 'List of Registered Mediators'. To qualify for the list, the applicant must be at least 28 years old; must be professionally qualified and trustworthy, as shown by passing a written accreditation exam and submitting a current certificate of good conduct and trustworthiness; and must obtain liability insurance. A mediator's registration in the list is valid for five years. It can be renewed for ten years if the registrant demonstrates attendance at a minimum of 50 hours of advanced training within the preceding five years.

Registered mediators must be trained and tested in both theory and practice. The 'theory' units of mediation education generally include 150 hours of training covering the following areas: introductory and historical background information, mediation procedures, methods and phases of mediation, communication skills, conflict analysis, scope of application, personality theory, ethical questions and the legal framework. The 'practice' units consist of self-awareness, practical seminars, peer group work and a case study.

Further, the association for mediation in procedures before the court (Verband für Mediation gerichtsanhängiger Verfahren) is working on a special certification for court-referred mediators, for which applicants must pass an exam.

Lawyers' Duty to Inform Clients

Apart from the few fields in which the use of ADR is compulsory, Austrian law does not contain a general obligation for lawyers to advise clients about alternatives to going to court, or their advantages and disadvantages. Lawyers, however, should generally be aware of mediation. For instance, the Guidelines for Practicing Lawyers (Richtlinien zur Ausübung

des Rechts- anwaltsberufes) Article XII (Sections 63-65) describe the parameters of the lawyer's position should the lawyer act as a mediator at some point.

Legal Assistance in Mediation

The presence of outside counsel is not mandatory in mediation. Nor are there any duties specified for legal representatives or other professional mediation participants under the Mediation Act or the EU Mediation Act. Such participants must, however, comply with the standards of their professions. For instance, the Austrian Act of Legal Profession stipulates that an attorney, acting as legal counsel, must comply with professional conduct rules if acting as a mediator, and an attorney, acting as a mediator, must deal with legal questions in terms of the independence, neutrality and impartiality of a mediator. Mediators and legal counsel have completely different duties, which are incompatible, and there are few lectures at universities, which reflect the different requirements of the roles.

A description of the general rights and duties of registered mediators, as laid out in Chapter I of the Mediation Act, helps to clarify the differences between the mediator's role in mediation and the roles of other participants. Mediators must use the title 'Registered Mediator' when mediating; they must not accept any compensation for recommending the use of mediation; they must not counsel or advise the parties; and they must not decide a conflict that is subject to mediation. A mediator must advise the parties of their potential need for legal counsel. In their turn, parties, counsel, consultants and other decision-making bodies must not intervene as mediators.

A mediator must act only within, and not beyond, his or her professional competence and by mutual agreement of the parties. A mediator must inform the parties about the character and the legal consequences of mediation in civil matters. In addition, the mediator must act according to the demands of his or her conscience, personally, directly and neutrally. The mediator must advise the parties about settlement enforceability and must document all stages of the mediation in their entirety (commencement through the end of mediation and potential discontinuation). Lastly, mediators must keep confidential all facts learned from mediation and treat all documents in the context of mediation as such. This also applies to employees and trainees of mediators.

Collaborative law is a recent innovation that refers to attorneys, therapists, financial experts, mediators and coaches all working together as a team in order to find a solution for the parties. The collaborative lawyer negotiates with his or her client and achieves more appropriate and constructive solutions.

Statistics

As of April 2012, there were 2 377 registered mediators listed at the Federal Ministry of Justice, of which, 1 418 were female and 959 male. In 2011, 142 entries and 88 cancellations were registered.

Statistics are only available for government-funded mediation, which includes only mediation about custody rights, visitation rights, alimony disputes and separation of property after divorce. From 1 May 2005 until 1 April 2012 there were 2 504 government-funded mediations, of which, 1 616 were divorce settlements, 210 were divorce proceedings, 614 were separations and 64 were not specified. Since 2005, 18 691 hours overall have been used for government-funded mediations; that is an average of 7.5 hours per mediation.

The average age of women participating in mediation is 38 years; of men, 41 years. A family using mediation has on average two children and the marriage or civil union lasted, on average, 11 years.

Bulgaria[30]

Degree of Regulation (extensive versus limited)

Currently, Bulgaria's legal framework for mediation provides a basis for developing mediation, but this framework has not resulted in an increased use of mediation in practice. To remedy this situation and achieve the benefits of mediation, a variety of incentives must be provided for parties using mediation, the powers to order referrals should be vested with judges and mandatory mediation for certain types of cases must be regulated.

Bulgaria's first successful effort to enact laws regulating mediation came in December 2004 with the adoption of the Mediation Act. A few years later, the enactment of the 2008 Civil Procedure Code ('the Code') created procedural measures for the use of mediation in pending court cases and established a legal relationship between mediation and civil proceedings. a further few years later, Ordinance No. 2 of 15 March 2007 ('the Ordinance') set minimum standards for mediation training, certification and training institutions. These laws together did increase mediation awareness and use by progressive judges and lawyers.

Finally, in 2011, the National Assembly implemented the Directive by amending the Mediation Act. The amendments focused on ensuring higher protections for mediating parties in the following four main areas: mediation confidentiality, statutes of limitation, mediators' impartiality/neutrality and enforcement of mediation settlements. The following references to the Mediation Act refer to the Act as amended.

Subject Matters that are Mediated

In Bulgaria, family disputes (including divorce proceedings), civil disputes and commercial disputes are all mediated.

Confidentiality

Bulgarian legislation guaranteed mediation confidentiality protections even before the Directive's implementation. The 2011 Mediation Act amendments increased these protections and carved out exceptions.

Confidentiality applies to all discussions in connection with mediation. The Mediation Act, Article 7, requires mediating parties to maintain confidentiality about all events, facts and documents developed in the course of the procedure. In addition, Article 33 of the Ordinance requires the mediator to keep confidential all the information related to activity as a mediator, both before and after the procedure.

Article 166 of the Code grants mediators the right to refuse to testify about a dispute they have mediated. Mediation Act Article 7(2) allows mediators to refuse to be interrogated

[30] Information in this section is taken from Sevdalina Aleksandrova's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Lyubka Vasileva-Karapanova's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Ms. Sevdalina Aleksandrova who provided assistance by reviewing the information in the country analysis.

about information confided by any participant that is relevant to a mediated resolution, unless the party who confided the information explicitly provides consent.

Paragraph 3 of Article 7 of the Mediation Act provides exceptions to mediation confidentiality. The exceptions are: where the exception is necessary for overriding considerations of criminal process or the protection of public order, where the exception is required to protect the interests of children or to prevent harm to the physical or psychological integrity of a person, and where disclosure of the content of an agreement resulting from a mediation is necessary in order to implement or enforce that agreement.

Parties and their lawyers are not prevented from using information obtained in mediation in subsequent court proceedings, and no sanctions are in place for parties, lawyers, or even mediators for use of such information. Parties and mediators may, however, sign an agreement to mediate that contains a confidentiality clause, whose breach may result in liability for damages.

Voluntary versus Mandatory

Bulgaria continues to maintain mediation as a voluntary procedure, so as to add choice and flexibility for the parties. Therefore, the Mediation Act and the Code remained unchanged by implementation of the Directive regarding mediation referral provisions (which did not, in any case, require any mandatory meditation). However, under Mediation Act, Article 11, a court has the general authority, in its own discretion, to 'propose to parties that they use mediation for resolving their dispute'. The timing and method of referral are regulated by the Code, which states in Articles 140(3) and 374(2) that in civil and commercial proceedings, the court has the general authority 'to refer the disputing parties to mediation when scheduling the first hearing of the case in public session'. Even if the parties are not referred to mediation at that point, they may pursue it later in the proceedings. Article 229(1)(1) states that parties can stay the proceedings of their case if they agree to mediate.

In divorce proceedings, during the first hearing, the court must direct the parties to mediation or another procedure for voluntary resolution of the dispute. If the parties agree to mediate, the case is stayed, but either party may request a resumption of the case within six months. Without such a request, the case is dismissed. Articles 321(2), (3) and (4) of the Code state that a divorce case is dismissed by mutual party consent or when a settlement agreement is reached (depending on the content).

Mediation Information Meetings

A Court Settlement Program (with a Settlement Centre) was initiated in the first quarter of 2010 by the largest Bulgarian court, the Sofia Regional Court. Parties in cases pending before the Sofia Regional Court have the opportunity to receive information and consultation about the opportunity to use mediation and other voluntary dispute resolution methods. They may also receive professional assistance with resolving their case at the Court Settlement Centre, which operates pro bono and is staffed by volunteer mediators and judges trained in mediation techniques. Parties who have reached a settlement agreement may present it to the court and request its implementation in a court settlement agreement, which has the effect of a court decision.

The promising results from the first year of the Court Settlement Centre attracted additional institutional, financial and professional support for its activity. At the start of 2011, the Court Settlement Centre extended its mediation services to the second biggest court in

Bulgaria, the Sofia City Court, and attracted additional professional mediators to support its increased activity.

The encouraging results of the court-connected mediation program in the first year-and-a-half of its existence resulted from the combined, focused efforts of judges, mediators and court administration in the following three main areas: institutional strengthening of the Court Settlement Centre (by establishing effective rules and procedures for its administration, increasing the professional capacity of the coordinators, and developing a strategy for its sustainability); improving the capacity of judges and mediators through a series of mediation trainings (in referral, basic, and specialized mediation techniques, such as for commercial and family disputes); and promoting mediation in the legal and business communities and among the general public.

Cost Incentives and Sanctions

As incentive for reaching a settlement agreement under the Code, under Article 78(9), if the agreement is implemented by the court, 'half of the stamp duty deposited shall be refunded to the plaintiff'. There are no sanctions by the court or at law if the participants in any type of mediation do not participate in good faith.

Court Referrals to Mediation

Court referral to mediation was implemented before the Directive under the Mediation Act of 2004, and referrals were bolstered by procedural measures for referral in the 2008 Code and educational measures to increase judges' awareness of mediation.

Currently, regulation of court referral mediation is completely in line with the Directive: a court (when appropriate) may encourage mediation for dispute settlement. In 2011, however, when the National Assembly implemented the Directive, it chose not to implement certain aspects of court-referred mediation in the Directive, such as the option of inviting parties to attend an information session. But the discussions that arose during the implementation debate are credited with promoting court interest in mediation; for example, some courts are now interested in starting their own court-annexed mediation program.

Enforceability

In furtherance of the Directive's Article 6, Bulgaria has enacted legislation regarding the enforceability of mediation agreements. Mediation Act Article 18 provides that the regional courts may approve an agreement reached through mediation. Such approval gives the agreement the force of a court settlement agreement.

This provision is expected to significantly foster wider use of mediation by giving mediation agreements even greater legal force than in the Directive. Under the Bulgarian Mediation Act, the court-approved mediated agreement will be both enforceable, having the full legal force of a court settlement agreement, and will also have res judicata, also known as 'claim preclusion', effect. It will be final, it cannot be subject to appeal, and the same dispute between these parties cannot be referred to the court in the future. Parties can present the settlement agreement before the competent regional court for approval and thus get the highest possible protection for the rights and interests stipulated in the mediated agreement.

This new provision for enforcement of mediated agreements is also applicable to out-of-court mediation agreements. And for pending court cases, settlement agreements reached

in mediation may be submitted for approval, or the case may be dismissed at the parties' request or on the plaintiff's withdrawal or waiver of its claim.

If parties present their mediated agreement to the court for approval, the court will check that the agreement complies with the law and good morals, and the court will implement it in the court minutes signed by both the parties and the court. Under Article 234 of the Code, if a settlement agreement refers to only part of a dispute, the court shall proceed with the unsettled portion.

Article 18 does prompt several questions that should be settled in order to ensure that its effect is to encourage mediation use, such as: which legal procedure under the Code the court should use to approve the mediated agreement; what the scope of the court's powers should be; whether the parties should appear in person to confirm the agreement; how the misuse of this provision to obtain approval of agreements that have not been achieved in mediation, but have been falsely presented as such, shall be prevented; and what state fees should be collected for such an approval.

In addition to judicial approval of settlement agreements, pursuant to Article 417 of the Code parties may choose to notarize their agreements, which will then be issued by the competent regional court. If the settlement agreement, such as any contract, bears notarized signatures, it may serve as the basis for the issuance of an enforcement order regarding the agreement obligations, such as an agreement to pay sums of money or an agreement to deliver particular items. Therefore, a settlement agreement bearing notarized signatures may be directly enforced or may lead to a suit for establishing that the receivable is the subject of the settlement agreement. This is dependent upon whether the debtor objects to the enforcement order and the receivable in the settlement agreement.

Training and Accreditation of Mediators

The Mediation Act and its implementing Ordinance provide very specific requirements for verifying the capacity of a mediator, in order to ensure the high quality of mediation training and the professional qualification of mediators.

The Minister of Justice accredits mediators by entering them into the Uniform Register of Mediators once their qualifications have been established. To be qualified, an applicant must be a legally capable person who has successfully passed mediation training, has not been convicted of a general crime, and has not been deprived of the right to exercise a profession or an activity. Additionally, reflecting the Directive, the opportunities for foreign nationals to become mediators in Bulgaria have been expanded, and now foreign nationals who have a permit for long-term or permanent residence in Bulgaria may become a mediator if they also meet the other requirements. According to the Mediation Act, Articles 8(1) and (2), such a permit is not, however, required from nationals of Member States of the EU, other states in the European Economic Area and Switzerland.

Article 4 of the Mediation Act prohibits persons who perform functions related to the administration of justice in the judiciary system (e.g., judges, prosecutors and ministry officials) from carrying out mediation activities. Government officials, unlike judges and prosecutors, can perform pro bono mediations, because the prohibition is not an absolute restriction.

The Mediation Act, Article 8(1) and the Ordinance, Chapter 2, highly regulate mediation training. Training must be provided by an accredited training institution approved by the Minister of Justice based on special requirements about its training curriculum and mediation trainers. The list of the accredited institutions providing mediation training is

available on the web page of the Bulgarian Ministry of Justice. Under the Ordinance, a minimum of 60 hours of training is required for accreditation, of which at least 30 hours must be practical. To successfully complete mediation training, mediators must pass a test, a practical exam that includes a mock mediation and an interview. Successful candidates will receive a certificate issued by the training institution where they undergo their training. Based on this certificate and on a certificate showing no criminal convictions, mediators may apply to the Minister of Justice to be entered in the Uniform Register.

The Ordinance, in furtherance of Article 4(2) of the Directive, now encourages mediators (without obligating them) to regularly improve their skills and knowledge by completing further theoretical and practical training in specialized mediation, such as commercial, family and labour mediation. The minimum duration of such specialized trainings is 30 hours. Article 11a of the Ordinance provides that their minimum content be specified and that an exam be required for the successful completion of such specialized trainings.

Lawyers' Duty to Inform Clients

Bulgaria does not include any requirement for parties and lawyers to consider mediation as a dispute resolution option, or for lawyers to inform their clients about the possibility of mediation, even after implementation of the Directive.

Legal Assistance in Mediation

The Mediation Act provides very wide opportunity for legal counsellors to participate in mediations. Any representative attending the mediation, whether a lawyer or any other type of representative, must be authorized in writing. In addition to acting as a representative and making decisions on behalf of the client, a lawyer may also have the role of consultant, providing legal advice before, during, or after mediation. In the role of consultant, the lawyer may personally attend the mediation session or assist the client between mediation sessions or by phone. This legal framework is general so that it gives sufficient flexibility.

Other specialists may likewise participate in mediation. This means that parties may bring their own consultants (e.g., financial, technical, accounting or psychological experts) or consult with such experts. Both parties may also decide to use a neutral expert to provide them with any expert examination or information needed for the resolution of their case.

Statistics

Currently, reliable and comprehensive statistics are available for cases mediated at the Court Settlement Centre at the Sofia Regional Court, but no national statistics are officially collected.

The statistics from the Court Settlement Centre show that mediation sessions are held in the Court Settlement Centre every working day and that more than one-third of the cases referred settle successfully. The increase of cases referred and settled in the second year of the Centre's activity (2011), compared to the first year (2010), was more than 90%. Cases are referred to mediation in about two-thirds of the working days, and mediations are held every other day. The statistics show that the average time needed for settlement of a case in mediation was two sessions, each with an approximate duration of two hours.

These results establish that parties save a significant amount of time through mediation, and the court saves many hours of procedural time. An additional benefit is the 50% of the state fee that is reimbursed to the plaintiff in case of settlement agreement.

France[31]

Degree of Regulation

France has experimented with different regulatory systems for mediation since the early nineteen nineties. Currently, mediation is regulated by law, but the rules are not rigid. For civil and commercial matters, judicial mediation procedures have existed since the law of 8 February 1995 ('the 1995 Law'). But while various legal instruments have been available for mediation, the last 15 years or so have shown that mediation is not a particularly popular dispute resolution mechanism in France, especially in commercial matters.

Despite the limited success of judicial mediation, it has nevertheless been in the spotlight in France over the last few years. On 16 November 2011, the French Government enacted a Decree (Ordonnance No. 2011-1540) ('the 2011 Decree'), which implemented the provisions of the Directive. The 2011 Decree followed years of consultation and studies carried out by public entities, courts and legal practitioners. The French *Conseil d'Etat,* in particular, had produced a lengthy report in 2009 urging the government to improve and harmonize the legal framework for mediation procedures. A more recent study, from 29 July 2009, also by the *Conseil d'Etat* entitled 'Développer la mediation dans le cadre de l'Union européenne' ('Develop Mediation within the Framework of European Union') had provided a list of criteria that define a coherent system for mediation. In addition, it listed all the then-current systems of mediation as well.

The provisions of the 2011 Decree were partially codified in the Code of Civil Procedure (CCP) through another Decree dated 20 January 2012 ('the new Decree'). The 2011 Decree furthered the French Government's objectives to facilitate and encourage mediation use for domestic civil and commercial disputes as well as cross-border ones. It also simplified mediation procedures by defining a common framework encompassing conventional mediation, amicable or extrajudicial conciliation and judicial mediation. Its definition of 'mediation' is similar to the one in the Directive: 'a structured process, however named or referred to, whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a third party, the mediator, chosen by them, or designated by the judge seized of the dispute, with the parties' consent'. Despite this broad definition, judicial and conventional mediation are still governed by separate sets of provisions. Judicial mediation is governed by Articles 131-1 to 131-15 of the CCP and by the 1995 Law. Since the new Decree, the CCP now contains provisions, in Articles 1530 to 1535, that apply specifically to conventional mediation.

Subject Matters that Can Be, or Should Be, Mediated

Article 1.2 of the Directive provides that it shall apply 'in cross-border disputes, to civil and commercial matters, except as regards rights and obligations which are not at the parties' disposal'. In line with the Directive, in France, national and cross-border commercial and civil cases can be mediated. However, Article 22 of the 1995 Law excludes matters relating to rights that parties cannot freely dispose of, including matters of affiliation, pensions and inheritance. The major trend in France is to use mediation for family disputes, labour disputes, commercial disputes and administrative disputes.

[31] Information in this section is taken from Jean Georges Betto and Adrien Canivet's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor; from Dr. Paola Cecchi Dimeglio's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille; and also from Frédérique Ferrand's contribution to *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads,* edited by Felix Steffek and Hannes Unberath. We are also grateful to Mr. Jean Gorges Betto who provided assistance by reviewing the information in the country analysis.

Singular versus Dual Systems

France has a monolithic regulatory system for mediation, which means that mediation legislation is applicable to both cross-border and domestic disputes. The French government chose to extend the scope of the Directive according to the option offered in Recital 8. The Directive was therefore extended to internal disputes, except in matters concerning employment law and administrative law.

Confidentiality

France has strong protection for confidentiality. The new Decree provides that mediation proceedings will be confidential, unless the parties agree otherwise. In the event that the judge orders the mediation and the parties agree to participate, confidentiality of the discussions is required, pursuant to Article 131.14 of the CCP and Article 24 of the 1995 Law. The Directive's confidentiality requirements apply only to the mediator and administrators, but confidentiality requirements apply to the entire mediation proceeding in France.

Voluntary versus Mandatory

In France, mediation is voluntary. France is reluctant to implement a system of compulsory mediation or conciliation; most feel that mediation should be based on the parties' free choice and should largely remain a free process. In the Magendie Report, a majority of the members of the Working Group opposed creating a compulsory system of court referral to mediation. Other members suggested, however, that parties benefiting from legal aid be required to participate in mediation.

Despite the scepticism about creating a compulsory system, this approach is currently being tested in France. Recently, the government issued a law that obligates parties involved in certain family disputes to participate in mediation. If the parties fail to comply with this obligation, their claims may be declared inadmissible by the judge. Article 15 of Law No. 2011-1862 of 13 December 2011 provides that this system, which began on 31 May 2013, will be experimentally tried until 31 December 2014. The publication of this Decree issued by the government on 16 May 2013 only concerns two High Courts, Bordeaux and Arras, in France.

Before the 2011 Decree, there was no general duty for disputing parties to consider mediation. The Magendie Report Working Group recommended giving judges the power to convene the parties to consider mediation as a dispute resolution option. It also envisaged certain sanctions for failure to meet this obligation. More specifically, the Working Group recommended that where the judge proposes mediation to the parties and encourages the parties to meet to look into the possibility of mediation, any claim for costs brought pursuant to Article 700 of the CCP would be automatically rejected if the requesting party has not effectively considered mediation. Some authors pointed out, however, that the idea of imposing sanctions on a party who refuses to consider the possibility of mediation is incompatible with the concept of mediation as a consensual process. In fact, it is likely that parties who feel forced to mediate will not cooperate to the degree needed for the mediation to be successful.

Currently, judges cannot require parties to participate in mediation proceedings or impose any procedural or financial sanctions for refusal to consider mediation. Some courts are now, however, testing a system of 'double summons' (*double convocation*), which would require the parties to consider whether they should refer their case to mediation before the first hearing of the case.

Mediation Information Meetings

Since the 2011 Decree, in all proceedings involving a preliminary conciliation phase, French courts can order disputing parties to meet with a mediator and obtain information on available mediation procedures.

Cost Incentives and Sanctions

As a rule, there are neither incentives nor sanctions in France. However, there is some case law suggest that incentives and sanctions may be created in the future. The only incentive, per se, is the possibility for parties who settle to have their settlement contact approved by the court, which makes it enforceable.

Court Referrals to Mediation

In France, mediation coordinators, including judges, only have the responsibility to provide general advice about mediation; they cannot order parties to participate in mediation. The law does give judges in all civil matters the authority to appoint a mediator at any point during the court procedure, but the parties must consent to the mediation before it begins. The parties' consent is expressed through a procedural agreement concluded before the judge. The judge has no obligation refer cases to mediation; it is merely an option. If the parties refuse to mediate, the court proceeding will continue.

Before 1995, it was already common practice for courts to refer some cases for attempted settlement with the help of a third party, although no CCP provision expressly addressed such referral. In 1987, for example, the *Cour de cassation* decided that it was within the power of the courts to refer disputes to mediation on the basis of the CCP, Article 21, which states that 'the mandate of the judge includes the conciliation of the parties'. The 1995 Law created a clearer framework and a stronger legal basis for referral.

The 2011 Decree now governs court referral to mediation, in conjunction with other laws. Article 22 of the 2011 Decree and the CCP set out the conditions under which civil courts may refer matters to a mediator, the length of the mediator's mission and the termination of the mediation process. Pursuant to Article 22 of the 1995 Law, a judge appointed for a civil or commercial case can, after having obtained the consent of the parties, appoint a judicial mediator. Only the *Cour de cassation* is not permitted to refer a dispute to mediation, since the role of that court is not to resolve a dispute but to review the law's application by inferior courts.

The 1995 Law provides that the judge may, at any time, terminate the mediation upon a party's request or on the initiative of the mediator. The judge then determines the mediation costs and the mediator's remuneration, which the parties can freely split between them. If they fail to reach an agreement, the costs will be borne equally unless the judge determines this would be inequitable given the parties' financial situation. If the parties reach an agreement at the end of the mediation process, they must submit it for approval (*homologation*) by the judge.

Enforceability

French law gives full effect to the agreements reached by the parties at the end of mediation. In most cases, a mediated settlement qualifies as a binding settlement agreement. In order for the agreement to be enforceable, the parties must consent to the agreement, and then must file a request for approval with the judge.

Before the 2011 Decree, the procedure and conditions for the enforcement of a mediation agreement depended on whether the agreement was reached in the course of conventional mediation or judicial mediation. If reached through judicial mediation, the agreement had to be submitted to the judge for validation (*homologation*) by all the parties that referred the matter to mediation. The judge then had to verify whether the rights of each party were protected under the agreement and was free to validate or invalidate the agreement. Once validated, the agreement was given the force of a judicial act made in a non-contentious matter. This classification was often criticized because mediation agreements are, by definition, always made in relation to contentious matters.

If the agreement was reached in the course of conventional mediation, the agreement was qualified as a *transaction*. *Transactions* by law, are 'contract[s] by which the parties settle a controversy that has arisen, or prevent a controversy from arising'. To constitute a valid transaction, the mediation agreement had to be in writing and had to relate to rights that parties could freely dispose of. The force given to transactions was equivalent to the force given to court judgments. According to Article 2052 of the Civil Code, 'transactions have, between the parties, the authority of res judicata of a final judgment'. Accordingly they could not be appealed or be subject to annulment proceedings. The validity of such agreements could only be challenged on the very limited grounds provided for at Articles 2053 to 2057 of the Civil Code, which include duress and fraud. Assuming that the agreement was valid, one of the parties could seek its enforcement through a court application to the president of the competent tribunal of first instance, pursuant to a summary and non-contentious procedure.

To unify the approach to judicial and conventional mediation, the *Conseil d'Etat* recommended in its report on the implementation of the Directive that a new article be inserted in the CCP, in the section for judicial mediation, providing that a party can, with the consent of the other parties, submit the mediation agreement for homologation to the president of the first instance tribunal.

To ensure that agreements reached during mediation can be validated at any stage of court proceedings, the Magendie Report recommended inserting a provision in the CCP authorizing the competent judge to administer and order investigative measures during the course of appeal proceedings (*conseiller de la mise en état*) to validate any mediation agreement. However, no such provision has been enacted, and this requirement would apply only in a minority of cases.

Under the 2011 Decree, an agreement reached during the course of mediation proceedings, whether conventional or judicial, can be submitted to a judge for validation (*homologation*), making the agreement enforceable. This procedure applies retrospectively for all agreements that were concluded between 21 May 2011 and the date the 2011 Decree came into force. Since the enactment of the new Decree, Article 1534 of the CCP, applicable to conventional mediation, now provides that the request for homologation shall be presented to the judge on the request of one party with the consent of the other parties, or of all of the parties. Moreover, for transnational conventional mediation, Article 1535 of the CCP provides that when a mediation agreement has been declared enforceable by a court or authority of another EU Member State, it will be recognized and declared enforceable in France.

Training and Accreditation of Mediators

French law contains various provisions requiring mediators to possess certain training or qualifications. However, these rules are considered to be somewhat rudimentary, and insufficient to ensure that mediation is conducted in a professional manner. Despite this concern, the 2011 Decree did not make any changes to the existing rules. At the national level, there is no specific Code of Conduct for mediators. Each association has different rules and requirements for the accreditation of their mediators. Most organizations request additional practical experience, and some organizations require a performance-based assessment. In addition, some organizations require the completion of a written exam.

The CCP does contain certain provisions addressing the quality of service expected from mediators. Article 131-5 imposes five conditions on judicial mediators: the mediator (i) must not have been the subject of a criminal or disciplinary sentence; (ii) must not have acted immorally; (iii) must have the qualifications needed to address the subject matter in dispute; (iv) must be able to show appropriate training or experience for mediation practice; and (v) must demonstrate independence. The third and fourth conditions listed contain only minimal and vague standards, and no other provisions add to these requirements. Nor is the number of training hours to be completed specified anywhere.

Since the enactment of the new Decree, the CCP now contains specific provisions relating to the training and accreditation of conventional mediators that are similar to the requirements imposed on judicial mediators. Pursuant to Article 1533, the mediator must not have been the subject of a criminal or disciplinary sentence and must have the necessary qualifications with respect to the subject matter and the necessary training and experience relevant for the practice of mediation. In addition, in certain areas of the law, mediators must possess specific qualifications. For example, for employment disputes, the mediator must possess relevant experience in the particular field.

The Magendie Report proposed the inclusion in the proposed charter of mediators of a stipulation that a mediator has a duty to obtain relevant training or accreditation. Article 2 of the proposed charter also provides that the mediator must possess the required qualification with respect to the nature of the dispute as well as training or experience adapted for the practice of mediation. If asked to do so, the mediator must provide proof of continuing training in the field of mediation.

Other recent measures indicate that the training of mediators will be closely monitored by national authorities in the future. On 1 January 2009, the government published the Decree of 31 December 2008 on the status of the national school for the training of judges (*Ecole Nationale de la Magistrature*). This law provides that one of the objectives of the institution is to provide training courses to persons who do not belong to the judiciary but who can exercise the functions of mediators or conciliators.

In 2011, the French Federation of Mediation Centres created a national directory of mediators to 'provide a reliable and controlled list of mediators, formed in the Centres and Associations of mediation … to expose all the tools that facilitate the conduct of the mediation process' and to make sure that the 'users can engage in mediation safely'. To improve the quality of mediation, the Federation also suggests the creation of a national watchdog that would examine mediation practices in France and ensure that ethical rules are respected by mediation associations.

Lawyers' Duty to Inform Clients

In France, lawyers are not required to inform their clients of mediation before going to court.

Legal Assistance in Mediation

The duties of legal representatives and other professional mediation participants are not regulated *per se* in French law. Outside counsel may be present during mediation proceedings, but it is not mandatory. The decision concerning the presence of counsel is in the hands of the parties and the mediator.

Statistics

Currently, there are no recent official statistics available with regard to mediation. However, the *Rapport Guinchard 2008* mentions that in 1.5% of the cases in appellate courts, a mediator is appointed. In addition, it also mentions that a mediator is appointed in 1.1% of the cases in civil courts of first instance.

Other Variables

Online mediation is another example of the initiatives that have been tried. On 7 April 2009, the Paris Court of Appeal signed an experimental convention with the Internet Rights Forum, which was created in 2004. The convention set up an initiative for cases that concern at least one private individual, in matters relating to online commerce and the provision of internet services.

Germany[32]

Degree of Regulation

The German Mediation Act, which has been in force since 26 July 2012, is the primary source of law for mediation in Germany. Before this time, there were few provisions for mediation at federal and state levels. Most provisions were found in private regulations of professional and consumer organizations.

Article 1 of this 2012 law contains the Mediation Act, which provides for the basic framework for mediation in Germany. The Mediation Act follows the recommendations of the EU Mediation Directive, but goes a step further to include domestic mediation, too. The Mediation Act includes rules for the mediation proceeding, mediator conflicts of interest, the confidentiality of the process and training requirements.

Subject Matters that Can Be, or Should Be, Mediated

The Mediation Act does not distinguish between different types of disputes for purposes of determining its applicability. Therefore, the legislation applies to all types of disputes, except for mediation conducted by conciliation judges.

[32] Information in this section is taken from Dr. Renate Dendorfer-Ditges and Dr. Ulla Glaesser's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille; from Peter Tochtermann's contribution, *Mediation in Germany: The German Mediation Act—Alternative Dispute Resolution at the Crossroads,* to Klaus J. Hopt and Felix Steffek's book, *Mediation: Principles and Regulation in Comparative Perspective;* and also from Burkhard Hess and Nils Pelzer's contribution, *Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System.*

Singular versus Dual Systems

As previously mentioned, the Mediation Act applies to both domestic and cross-border cases. Therefore, there is a singular system in Germany.

Confidentiality

Mediator maintenance of confidentiality is required by Section 4 of the Mediation Act, but the requirement is subject to a few exceptions. For example, it may be necessary for the mediator to disclose the content of the mediation proceeding to enable the implementation or enforcement of the settlement agreement, or due to overriding considerations of public policy, such as ensuring the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person. Also, if the disclosure contains obvious information, then it is not necessary for it to remain confidential. In contrast, the legislation does not require the parties or others involved in the mediation proceeding to maintain confidentiality. Such confidentiality must be discussed and agreed to by the parties prior to the mediation in order to have effect. The consequences of disclosure of confidential information by these individuals depend on the confidentiality provisions in their agreement.

In addition, all mediators are exempt from the obligation to give evidence in court proceedings or in arbitration. The parties, however, can release the mediator from this exemption for civil cases, allowing the mediator to testify.

Voluntary versus Mandatory

In Germany, mediation remains a completely voluntary process. According to the German Mediation Code (*Mediationsgesetz*), mediation cannot be ordered by law nor by the courts at any point before or during a court proceeding. The judge may recommend mediation, but the parties must agree to participate.

Although the new Mediation Act does not mandate mediation prior to court proceedings, there is legislation that allows federal states to establish compulsory conciliation procedures as a pre-trial requirement for small claims cases (up to €750), defamation claims, neighbour disputes and certain claims arising from a violation of the General Equal Treatment Law.

Mediation Information Meetings

In Germany, except for family law cases, there are no requirements for parties to attend information sessions prior to court trials or as an introduction to mediation proceedings.

Cost Incentives and Sanctions

There are currently no legal or financial incentives to encourage parties to choose to attempt mediation. But the 2012 Act to promote Mediation and Other Procedures of Out-Of-Court Conflict Mediation gives the States the option to introduce such incentives, which are described in Article 7 of the Amendment of the Court Costs Act. In addition, the individual States may opt to reduce or even abolish certain legal fees if a claim is withdrawn after the parties come to a settlement agreement as a result of mediation.

In addition, cost sanctions for parties who refuse to take part in mediation proceedings were discussed when recent legislation was under consideration. However, no sanctions were adopted; thus, the court will not impose sanctions if the parties refuse to attempt mediation. There are also no sanctions at law if mediation is not tried in good faith.

Court Referrals to Mediation

Pursuant to the Code of Civil Procedure, a court may suggest that parties attempt mediation, but the parties must agree consent for the mediation proceeding to occur. While the Mediation Act does not refer to mediation conducted by a judge, the Code of Civil Procedure allows a judge to refer a dispute to a conciliation judge for in-court judicial conciliation. The Code also allows a judge to refer a dispute to mediation with a mediator outside court.

Enforceability

In Germany, mediated agreements are not automatically enforceable. However, settlement agreements have essentially the same power as binding contracts. If the parties wish the agreement to be non-binding, it must be explicitly stated in the agreement.

There are several ways to render an agreement enforceable: it may be approved by a civil notary, it may be court-approved (for mediations conducted in parallel to court proceedings), it may be converted to an arbitral award that includes the agreed-upon terms, or it may be converted into an agreement by the parties' counsel and then recorded by the responsible district court or approved by a Gütestelle (an official registered board or person). Any of these methods makes the settlement agreement enforceable, like any court decision.

Training and Accreditation of Mediators

Currently, different mediation organizations set their own rules for accreditation. Some of the leading organizations require that mediators participate in about 200 hours of training.

However, the anticipated enactment of a regulation will soon establish a new system. According to the German Mediation Act, the Department of Justice has the authority to enact a regulation establishing the requirements for certification. These regulations will specify the required basic training and practical experience, amount of continued education, minimum hours for basic and advanced training and education, qualifications for trainers and coverage for final exams in mediation training. (Notably, the current draft regulations require 80 fewer training hours than do the current leading organizations.) The regulations will also cover transitional arrangements for current mediators trained prior to the enactment.

The enactment is expected in late 2013 or early 2014. Once it occurs, a two-tier system of mediators will exist in Germany - one tier of certified mediators and one tier of non-certified mediators.

Lawyers' Duty to Inform Clients

According to Section 1(3) of the Rules of Professional Practice for Lawyers, lawyers must advise their clients to resolve their legal problems in the most favourable way. Therefore, lawyers are required to suggest resolving conflicts through mediation if this approach is the most appropriate for the particular case. This duty has been reinforced by the updates to the Code of Civil Procedure in 2012. Pursuant to these revisions, a statement of claim must indicate whether mediation, or another form of ADR, was attempted before going to court.

Legal Assistance in Mediation

The presence of outside counsel during mediation is not mandatory, but it is allowed. In commercial and cross-border cases, outside counsel such as lawyers and tax advisers are regularly included in mediation proceedings. However, an outside counsel is considered a 'third party', and all the disputing parties must agree to the presence of outside parties before the mediation commences. Therefore, the disputing parties must agree to the presence of outside counsel prior to the mediation.

Statistics

In Germany, the terms 'mediation' and 'conciliation' have often been used interchangeably. Both terms are used to describe the amicable settlement of a dispute between parties with the help of a neutral person. Although there are no current statistics about mediation *per se*, there are statistics about conciliation. In 2011, for example, state-approved conciliation bodies recorded 12 252 civil cases, of which 53.1% settled amicably. Other statistics suggest that 10 000 to 15 000 judicial mediation proceedings take place each year in Germany. In Lower Saxony specifically, approximately 2 400 judicial mediations are launched each year, of which approximately 80% settle.

Greece[33]

Degree of Regulation

In December 2010, with the passage of Law 3898/2010, the Greek Parliament enacted a law on mediation ('the Mediation Act') that applies to both domestic and cross-border disputes. This law is the fruit of intensive consultations that began in early 2008 in response to the Directive, as well as to the devastating delays in the administration of justice for which Greece has been condemned over 200 times by the ECHR.

There had been regulation attempts in Greece before the Mediation Act. At the time of the initial attempts, the spread of ADR usage to almost all civil and commercial matters was being met with some reservations by scholars, who thought the appropriate approach to its regulation would be to take a new approach to the rules for civil proceedings. The first draft law for the amendments to the Code of Civil Procedure (CCP) in 2008, therefore, included provisions relating to mediation. But that draft did not reach Parliament. The next committee to consider changes to the CCP decided that inclusion of mediation provisions was unnecessary in light of the strong desire of the Ministry of Justice for a separate mediation act. That act was to be Law 3898/2010, the Mediation Act.

Hence, mediation in civil and commercial matters is now regulated by the Mediation Act, with the exception of voluntary court-annexed mediation. In addition, quite recently a new mediation scheme was introduced exclusively for commercial rent review disputes. It is an out-of-court dispute resolution system, based in the country's administrative regions. These mediations are overseen by a three-member panel, whose members are a judge, a representative of the professional associations and a representative of the Panhellenic Federation of Immovable Property Owners.

[33] Information in this section is taken from Apostolos Anthimos' contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Lila A. Bakatselou and Dimitra K. Triantafyllou's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Apostolos Anthimos who provided assistance by reviewing the information in the country analysis.

The definition of mediation found in Article 4(b) of the Mediation Act replicates the wording of Article 3(a) of the Directive. The new law is designed in part to meet the Directive's requirement for cross-border dispute mediation. Consistent with the Directive, it therefore defines mediation as a structured process, however named or referred to, whereby two or more parties to a dispute attempt to reach a voluntary dispute settlement agreement with a mediator's assistance. This definition excludes attempts to settle made by a justice of the peace or a judge in the course of judicial proceedings pursuant to the CCP, Articles 208 *et seq*. and Article 233(2), respectively.

In additional, rapid legislative changes, Greece introduced judicial mediation. Starting in 2012, a new Article 214 B was added to the CCP (by Article 7, Law 4055/2012 on fair trial). Paragraph 2 of CCP Article 214 B was recently amended (by Article 102, Para. 2, Law 4139/2013) to grant the right to each first and second instance court in the country to appoint one or more presidents of the respective court, or senior judges, as full or part-time mediators for a tenure of two years. Even more recently, a new Code of Lawyers was passed (by law 4194/2013). Article 130 of the Code (entitled *Mediation*) is a solemn manifestation of the support given to mediation by the Bars. Paragraph 1 provides for actions to be taken by the Hellenic Bars to direct awareness-raising campaigns towards lawyers and the public at large. Pursuant to paragraph 2, the Bars shall be in charge of certified training centres, and they have the right to establish mediation centres, providing the opportunity for parties to resolve their cases.

Subject Matters that Can Be, or Should Be, Mediated

According to Article 3, Part 2 of 'Mediation for civil and commercial matters', civil and commercial cases can be mediated.

Singular versus Dual Systems

In Greece, the Mediation Act applies to both domestic and cross-border disputes.

Confidentiality

Article 10 of the Mediation Act provides that mediation shall be conducted in a way that does not compromise confidentiality, unless the parties agree otherwise, and that before initiating the mediation procedure, all persons participating must commit themselves, in writing, to respect the procedure's confidentiality. Under Article 9(3), should they wish to, the parties may also bind themselves to maintain confidentiality as to the content of the agreement they might reach during mediation, unless its disclosure is necessary for securing enforceability (*see also* the Directive, Article 7(1)(b)).

Article 10 of the Mediation Act also provides that mediators, parties, their attorneys or representatives, and any other persons involved in the mediation process are not to be summoned as witnesses, nor may they be compelled to produce evidence, in any subsequent judicial or arbitration proceedings. On this point, the new law appears to differ from the Directive, which confines the confidentiality protections to limiting service as witnesses and the production of evidence in civil and commercial proceedings. The Mediation Act does, however, provide for an exception to its prohibition for public policy reasons. Such reasons are addressed in Article 7(1) of the Directive and repeated in the Mediation Act, Article 10(2).

By way of contrast, the historical progression of the CCP confidentiality provisions took a different path. In the old version of the CCP, Article 214A(4) contained similar confidentiality requirements to those in the current Mediation Act regarding a third person

who assumes an assisting role in the dispute resolution process. This particular provision was, however, abolished by the recent CCP amendments. Now, as provided for by the new wording of CCP Article 214A, third persons may not participate in CCP-regulated ADR schemes.

Voluntary versus Mandatory

Participation in mediation is completely voluntary under the Mediation Act. Mediation is voluntary and a judge cannot mandate parties to participate in mediation; however, the judge can refer a case to mediation for civil and commercial disputes. In this case, the parties must agree to participate for the process to begin.

One of the most delicate issues discussed with respect to the Mediation Act concerned whether there should be a requirement for the parties themselves to participate in mediation, should mediation be pursued. Ultimately, the decision was reached that only the parties' lawyers need attend, should mediation be pursued.

Mediation Information Meetings

In Greece, there have been advanced discussions about introducing a certain degree of compulsion to mediating disputes; however, these discussions have not led to any mandates.

Cost Incentives and Sanctions

The issue of granting incentives or raising counterincentives has been discussed with regard to CCP, Article 214A, which addresses out-of-court dispute resolution. Currently, there is no mandatory mechanism for that law.

Court Referrals to Mediation

The Mediation Act opens several paths to the mediation process. First, under Article 3(1), mediation may begin on the parties' initiative before or after notice of a pending lawsuit (*lis pendens*) is given. Second, pursuant to Section 2 of the same Article, mediation may begin if the court asks the parties to seek recourse to mediation. This request may happen at any stage of the proceedings, depending on the case and taking into account the particulars of the subject matter. The resemblance to the Directive, Article 5(1)(a), here is clear. In this area, court referral may be also initiated by a foreign court, as provided for by the Mediation Act, Article 3(1)(c).

Third, under the Mediation Act, Article 2(d), mediation may begin if mediation is required by law for the type of dispute in question. This provision refers to mediation schemes regulated by Law 3588/2007 (Bankruptcy Code), Articles 99–106; Law 1876/1990 on collective bargaining; and Law 2251/1994 on consumer protection, which institutionalized out-of-court resolution panels. Recently, the Parliament added Law 3869/2010, Article 2, on debt settlement for individuals with excessive debt, which, more than previously, emphasizes the use of mediation. The debt settlement law went into effect in the beginning of 2011.

Enforceability

With regard to agreements to mediate a dispute, the explanatory report accompanying the Mediation Act demonstrates that recourse to mediation by means of a contract is permitted under Article 3. Nevertheless, due to the importance of voluntary submission to mediation to achieving a successful result, it has been deemed that the contractual agreement should

be confirmed once a dispute arises. The explanatory report includes or raises the following two points concerning agreements to mediate disputes: the agreement to mediate is governed by civil law provisions on the law of contracts, and the impact on judicial proceedings of having an agreement to mediate is not the same as the impact of having an agreement to arbitrate.

The Mediation Act also addresses mediation agreements, in other words, the agreement reached when mediation leads to settlement. In such a case, the mediator draws up the mediation agreement record (the minutes). According to Mediation Act, Article 9(1), the minutes should contain the following: the name and surname of the mediator; the location and time of the mediation proceedings; the names and surnames of those participating in the mediation proceedings; the agreement to mediate upon which the mediation proceedings were based; and the mediation agreement reflecting the parties' settlement.

Under Article 9(2) of the Mediation Act, at the end of the mediation proceedings, the minutes are signed by the mediator, the parties and their attorneys. Upon the request of one of the parties, the original of the minutes may then be submitted by the mediator to the court of first instance of the jurisdiction where the mediation took place.

Once submitted in this manner, the minutes become enforceable under the Mediation Act, Article 9(3). Thus, the agreement's enforceability is secured even in the case of one party's reluctance to give explicit consent for the agreement to be made enforceable, unlike the Directive approach in its Article 6(1). The Directive, at least in principle, requires the parties' joint action. It should be noted that a procedure similar to that of the Mediation Act is followed for the minutes prepared by the parties in the now voluntary out-of-court dispute resolution process covered in CCP, Article 214A(3).

Concerning cross-border mediation agreements, two options have been suggested for enforcement of mediation agreements: first, implementing the procedure provided by Regulation No. 805/2004 of the European Enforcement Order; or, second, making use of the *exequatur* proceedings established in the Brussels I and Brussels II Regulations.

A problem might arise here concerning recognition of certain foreign mediation agreements. Under Greek law, a settlement agreement is inadmissible in Greek courts for several types of civil cases (including divorce or parental responsibility cases), and under the Brussels regulations, it would seem that Greek courts should be able to invoke the public order clause (in its material dimension) to bar enforcement of a settlement agreement in such cases. But the EEO regulation, in contrast, does not appear to allow this type of exception. Therefore, Greek courts may be forced to recognize foreign mediated settlements even where they would be inadmissible if reached in Greece.

Training and Accreditation of Mediators

There are detailed legal rules concerning mediator training and accreditation in Greece. Mediators are accredited by the Administration Directorate General of the Greek Ministry of Justice, Transparency and Human Rights following the completion of training through Public Training Mediator Institutes. Each institute collaborates with international mediation training providers to deliver these trainings; therefore, most mediator trainers are taught in English by foreign trainers. However, there are institutes that provide trainings in the Greek language. The Piraeus Mediation Center, for example, was the first accredited training provider in Greece. The Chamber of Commerce in Athens and the Bar of Corinth also offer mediation trainings.

Pursuant to the Mediation Act, Article 7, the accreditation body for mediators is the Department of Lawyers' Function and Bailiffs, which is attached to the Justice Administration General Directorate at the Ministry of Justice. By virtue of a decision from the Ministry, a number of important issues will be regulated under Article 7(2), such as quality control mechanisms for the assessment of mediators; accreditation requirements for foreign mediators; a 'Code of Deontology' that accredited mediators must respect; and other issues related to accreditation.

With respect to mediation training institutions, the Mediation Act opted for the following solution: pursuant to Article 5(1), a training centre must be founded by at least one Greek bar association and one Greek professional chamber. Under Article 5(2), any other mediation training issues (for example, the required number of training hours needed) will be regulated by presidential decree, following a proposal by the Ministry of Justice and the Ministry of Education, Lifelong Training & Religious Affairs.

Additionally, the Mediation Act, Article 6, provides for the establishment of a commission entrusted with the preparation of necessary rules and regulations related to the certification criteria. The Ministry of Justice will determine the commission members.

In domestic disputes only trained and certified lawyers are allowed to assume mediator duties (Art. 4 lit. c law 3898/2010). Beginning on 2 April 2012, senior judges or judges presiding at first instance courts have been appointed as mediators (Art. 7 law 4055/2012, introducing a new Art. 214 B in the Greek Code of Civil Procedure). They are not subject to training, certification, or accreditation requirements to serve as mediators. Their seniority is considered sufficient qualification, pursuant to the law's explanatory report.

In cross-border disputes, any certified person may be appointed to serve as a mediator (Art. 4 lit. c, last sentence, law 3898/2010). A lawyer's monopoly, which would be clearly contrary with basic notions of EU law, is therefore avoided. Judicial mediation is also an option, starting from 2 April 2012, based on the provision mentioned in the previous point.

Lawyers' Duty to Inform Clients

In Greece, no specific duties have been imposed on legal representatives and other professional mediation participants. During the reading of the draft law at the committee stage, and in the bill presented to the Greek Parliament, some deputies suggested that mandatory mechanisms should be included in the Mediation Act. The final version of the Act, however, contains no such provisions.

Legal Assistance in Mediation

According to Article 214A(4) of the Mediation Act, parties must be assisted by lawyers during the mediation process. Specifically, the Act's Article 8(1) states that the parties (or the legal representative of a legal entity) must participate in mediation with the assistance of an attorney at law. It is important to note that the language of the Mediation Act presupposes the presence of the parties themselves at the mediation, in contrast with the old CCP, which provided instead that the parties could be represented by their lawyers and need not attend themselves.

Mediation advocacy is not only a party's right, but rather his/her obligation. No mediation procedure can unfold without the parties' attorneys, both for domestic and cross-border cases (Art. 8 Para. 1, law 3898/2010). The obligation to take part in mediation in the presence of the party's lawyer extends also to the newly introduced court-annexed mediation scheme (Art. 7 Para. 3 law 4055/2012).

Statistics

No current statistics are available on the use of mediation. No measures beyond the Mediation Act have been issued by the government. However, a number of ministerial decisions and presidential decrees need to be promulgated if mediation is to become operative in Greece.

Other Variables

Mandatory out-of-court dispute resolution was introduced through a CCP amendment in 1995 but came into force only after September 2000, with admittedly poor results. Pursuant to the new wording of CCP, Article 214A, out-of-court dispute resolution is no longer mandatory, but it is now available for all first-instance cases.

Judicial mediation is provided for free to interested parties, since no providence for stamp duty has been made in the recent law, except for the payments made for lawyers' fees and the sum of €20, in case the process leads to an agreement. In contrast, mediation pursuant to law 3898/2010 presupposes full cover of the mediator's fees in advance (€100 per hour), in addition to the lawyers' fees.

Italy[34]

Degree of Regulation

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

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

On March 21, 2011, provisions on mandatory mediation went into effect. During that period of time, in certain types of civil actions, litigants in Italy were required to try mediation before they could have access to courts. As a result of these new rules, the *OUA*, a leading Italian organization of lawyers, challenged Legislative Decree 28. According to these lawyers, Article 5.1 of the Legislative Decree 28 was in violation of Article 24 of the Italian Constitution. Article 24 states that, 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law.'

[34] Information in this section is taken from Giuseppe De Palo and Chiara Massidda's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille, and 'Lead 5.4 Million Thirsty Horses to Water, and the Vast Majority Will Drink' by Giuseppe De Palo. We are also grateful to Mr. Francesco Franza who provided assistance by reviewing the information in the country analysis.

When the organization of lawyers brought this matter before the Italian Constitutional Court, the Court found Article 5.1 not to violate Article 24 of the Italian Constitution, but instead that it violated Article 77, which states that, 'The Government may not, without an enabling act of the Parliament issue a decree having force of law.' The ruling dictated that the law was enacted in an 'excess of legislative power.' Specifically, the requirement for preliminary mediation was contained in a Governmental Act (Legislative Decree 28/2010), but that issue was not indicated by Parliamentary Act (Law 69/2009), which delegated power to the executive branch to issue detailed rules on mediation.

It is worth noting that the Constitutional Court did not address the claim that Article 5.1 violated Article 24. In fact, the Court did not consider mandatory mediation to be in violation of the European Directive for mediation, or of the Italian Constitution. Rather, Article 5.1 was barred solely because of Article 77 of the Italian Constitution. As a result of the decision, all mediations in Italy came to a virtual halt, even those which had been initiated voluntarily by both parties.

As mediations stopped, the crisis of backlogged cases continued. To combat this issue, the Italian Minister of Justice, Anna Maria Cancellieri, began rewriting the original mediation rules, opting again for mandatory mediation and also adding several modifications. As a result, motor vehicle accident disputes are now exempt from mandatory mediation. Also, litigants are now allowed to withdraw from the mediation process at the initial stage for a nominal cost if they believe that settlement is unlikely. In addition, several incentives and sanctions, which will be discussed later in this section, were included.

On June 21, 2013, the Italian Government approved the Law Decree 69, and these new mediation rules were converted into law by the Parliament on August 9, 2013. On September 20, 2013, the new rules came into force.

The mandatory mediation rules were reintroduced in Article 5, 1bis, Legislative Decree 28. Article 5, 1bis is in effect for four years, ending in September 2017. Also, after two years from its introduction, in September 2015, the Ministry of Justice will conduct a mid-term review of the rules.

Although mediation is regulated by the law, mediation procedure is regulated by mediation organizations. However, these regulations must ensure certain rules as they are set forth in Legislative Decree 28. Such considerations include confidentiality, impartiality of the mediator, the length of the mediation and the assistance of outside counsel.

Subject Matters that Can Be, or Should Be, Mediated

The mediation procedures introduced by Law Decree 69, which covers both cross-border and domestic disputes, only apply to claims and rights that can be freely disposed of by the relevant parties, as opposed to rights which cannot be freely disposed of by the relevant individuals, such as family law issues.

According to Article 5, the following cases are subject to mandatory mediation: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, medical and sanitary malpractice, defamation by the press of other means of advertising, contracts, insurance and banking and finance. The new legislation also introduces new rules for mediation, and introduced a non-mandatory procedure which applies to any civil and commercial litigation regarding matters other than those listed above.

Singular versus Dual Systems

Italy has a monolithic regulatory system for mediation, meaning that the same mediation legislation is applicable to both cross-border and domestic cases.

Confidentiality

Mediation confidentiality is regulated by the law. According to Article 9 of Legislative Decree 28, each individual involved in the mediation process, including parties, counsel and the mediator, has an obligation of confidentiality. This obligation is also applicable to documented statements and information acquired during the proceedings. However, if the parties have consented to the disclosure of information, the mediator is exempt from the obligation of confidentiality. The mediator is also exempt if keeping the information confidential would be in violation of the law. Finally, as regulated by Article 10 of Legislative Decree 28 and Article 200 of the Italian Code of Criminal Procedure, a mediator cannot be required to testify about information obtained during mediation.

Voluntary versus Mandatory

Pursuant to the new Government in Law Decree 69, mediations are now mandatory for those subject matters previously listed.

Mediation Information Meetings

For mandatory mediation proceedings, the first meeting is informational in content. During the meeting, the mediator clarifies the function of mediation and how it will be conducted. The mediator will then invite the parties and their attorneys to comment on the possibility of starting the mediation procedure. If the parties agree, they then proceed with the mediation.

Cost Incentives and Sanctions

Although there are no incentives for parties voluntarily attempting mediation before going to court, there are cost incentives for parties to use mediation to agree on a settlement. Article 17 of Legislative Decree 28 states that all acts and documents related to mediation are exempt from stamp duty, all expenses, taxes and other charges. In addition, the final agreement is exempt from registration tax, up to a maximum value of €51 646.

Article 20 of the Decree also grants parties a tax credit towards the mediation fee if the mediation is concluded. This tax credit depends upon the amount paid to the mediation organization. There is a maximum of 500 Euro for a successful mediation, and if the mediation fails, the maximum tax credit is reduced by half. In addition, if the case is settled as a result of mediation, there is an incentive of 25% compensation of the attorney fees.

Pursuant to the new mediation rules that recently went into effect, parties are given an incentive to continue with the mediation process. Upon a party's withdrawal from the mediation, a mediator has the authority to propose a solution to the dispute. If this is rejected by one of the parties and the case subsequently goes to trial, the judge may shift all mediation and litigation costs onto the rejecting party if the judgment is consistent with the mediator's proposed solution.

Article 8.5 of Legislative Decree 28, which was previously barred, set forth sanctions by the court. These sanctions have been restored by the new Legislative Decree. According to Article 8.4, the judge may make presumptions about evidentiary issues in a subsequent

trial. Furthermore, the Court may also order sanctions for parties who refuse to attempt mediation in good faith. The judge can condemn a party who declines participation in the mediation process without a valid justification by ordering that party to make an additional payment, equal to the administrative fee due in the judicial proceeding into the state budget, which would result in this party's fees being doubled.

In addition, when a lawyer is hired, he or she must clearly inform clients, in writing, of the option of mediation as an alternative to litigation. The lawyer must also provide information about tax breaks available to parties who participate in mediation. The client may void the attorney-client contract if the lawyer fails to provide this information.

Court Referrals to Mediation

Pursuant to the new rules, judges now have the power to order parties to mediation at any stage in the dispute. In evaluating the nature of the case, the judge may invite the parties to proceed with mediation, even during appeal.

Enforceability

A mediated settlement agreement is automatically enforceable. When the parties have reached an agreement, it is summarised in the minutes (*verbale*). The *verbale* must be signed by the mediator, both parties, and counsel for both parties. Then the *verbale* is attached to the agreement. According to Article 12 of Legislative Decree 28, each of the parties may file the mediated settlement agreement with the court. It then becomes a writ of execution and has the same legal effect as a court judgment. However, if the agreement is in violation of public policy or mandatory rules, the judge will not accept it.

Training and Accreditation of Mediators

Detailed legal rules address mediator training and accreditation. Mediation organizations that are registered with the Ministry of Justice regulate the certification of mediators. A mediator can only practice mediation if he or she is registered with one of the many Ministry-approved mediation organizations. Local bar associations, chambers of commerce and various professional organizations can establish mediation organizations. However, they must be registered with the Italian Ministry of Justice before beginning operations. Pursuant to Article 16 of Legislative Decree 28, a register of organizations authorized to offer accreditation trainings for mediators is maintained.

Mediators are required to have 50 hours of development training. They must also participate in a minimum of 18 hours of refresher courses every two years. A mediator is required to have a three-year university degree or be enrolled in a professional society. Newly certified mediators are required to assist experienced mediators in at least 20 mediations during the first two years immediately following certification.

In addition to requirements set forth by the statute, each mediation organization has its own supplementary requirements.

Lawyers' Duty to Inform Clients

Lawyers have a strict duty to inform clients about the option of mediation and to try to resolve disputes by way of mediation. In fact, a litigant can void the attorney-client contract if counsel fails to provide detailed information about mediation. The impact of this regulatory feature in promoting mediation awareness has been significant.

Legal Assistance in Mediation

Before the enactment of the new legislation, the presence of counsel during mediation was encouraged, but not required. However, according to the new rule introduced by the Decree, the presence of outside counsel is now mandatory.

Statistics

Due to the fact that the new rules so recently went into effect, there are no statistics to reflect the results of the new changes; however, there are statistics to reflect the effects of the first attempt at mandatory mediation in Italy. According to official government statistics, between March 2011 and October 2012, when mediations were made mandatory the first time, 220,000 mediations were initiated. Close to half of these mediations were settled when the defendant agreed to mediate. This is a stunning success in light of the usual three-year wait for a court decision, which can rise to nine years with an appeal.

Other Variables

Italy has proven to be a true 'mediation policy experimentation lab' on multiple levels. First, a single regulatory feature caused a record number of mediations in the EU. Second, when that single feature was gone, mediations virtually stopped, thereby confirming its absolute relevance.

All other incentives to use mediation within the Italian law have remained unchanged since March 2010 to this day, but they have not facilitated an increase in mediation. Moreover, mandatory mediation reaped positive results during the first and second stages of enforcement. Initially, in March 2011, the number of mediations went from negligible to several thousand per month. In March 2012, when the mandatory requirement was extended to car accidents and condominium disputes, numbers rose even further to over 12,000 mediations per month. The numbers were still climbing each month until the Constitutional Court decision brought mediation to almost a complete halt.

The Netherlands[35]

Degree of Regulation (extensive versus limited)

The Directive prompted the Dutch government to regulate mediation in legislation. The Law (Bill No. 32,555) as it was presented by the Ministry of Security and Justice, was initially adopted by the House of Representatives in 2011, but subsequently raised a number of concerns in the Senate. The new law was comprised of new limitation rules, namely that a mediation stops the expiry of limitation and prescription periods; a new article in the Code of Civil Procedure which stipulated that the judge could recommend mediation in all cases; the privilege of non-disclosure for the mediator protecting confidentiality, and that no parties/mediators were to be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process. Also, with regard to enforceability of written agreements, a gap in the law was to be closed and in divorce procedures an agreement in a referred mediation was to

[35] Information in this section is taken from Pim Albers' contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Simon Arvmyren and Manon Schonewille and Dr. Fred Schonewille's contributions to *The Variegated Landscape of Mediation Regulation*, also edited by Manon Schonewille and Dr. Fred Schonewille, and *Access to Justice at the Crossroads,* edited by Felix Steffek and Hannes Unberath. We are also grateful to Mr. Pim Albers who provided assistance by reviewing the information in the country analysis.

be enforceable. One important aspect was that the Law was not limited to cross-border mediations.

In drafting the Law, the government tried to limit the number of mediators entitled to privilege by adding a new sub article granting privilege to the mediator when the confidential character of the mediation has been explicitly agreed upon. However, it was not clear who would qualify as a mediator. The term 'mediator' is not protected, unlike 'Netherlands Mediation Institute ('NMI') Mediator', which is a registered collective brand that only a registered NMI mediator is entitled to use. Furthermore, there was a problem of proof concerning the confidentiality agreement because the law does not require such agreements to be in writing.

All these concerns led the Minister of Security and Justice to withdraw the bill and introduce a new one designed to limit implementation of the Mediation Directive to cross-border disputes and limited to the issues of the Directive. This bill, Bill No. 33 320, passed the House of Representatives and the Senate unchanged (due to a large extent to the fact that the Netherlands had surpassed the time limit for implementation), and entered into force on 15 November 2012.

The Minister of Security and Justice has recently announced supplementary legislation regulating, *inter alia*, quality standards and a national register for mediators to be put into effect in 2014. In addition, a private member's bill on mediation has been announced. So for the first time in history it is expected that the Netherlands will have a considerable amount of legislative activity concerning mediation. According to the innovation agenda that was drawn up (Innovatieagenda rechtsbestel, 2011), the Minister of Security and Justice wants to promote extra-judicial procedures through amendments to the arbitration procedure and through a strengthening of the position of the professional and business dispute commissions. The minister will also campaign for greater familiarity with mediation with the aim that mediation will become the norm for individuals, businesses and government bodies. The determination and on-going supervision of quality requirements, the conditions for inclusion in the mediators' register, the privilege of non-disclosure and the right of individual recourse and/or disciplinary law will also be further regulated.

After the implementation of the supplementary law, the description of concrete mediation rules and their quality assurance will still be left to the self-regulation of professionals practicing mediation. The minister is also considering creating a differentiated scheme for the contributions to be made by individuals seeking legal aid so that required contributions for mediation will be smaller in order to encourage clients to use mediation. The legal desk will be asked to give more prominence to referrals to mediation, and triage and conflict diagnosis should become standard for referring parties.

Subject Matters that are Mediated

In the Netherlands, the following types of cases are mediated: dismissal, divorce and guardianship, rent disputes, conflicts with the government, neighbour disputes, commercial disputes, referrals by legal aid insurers, trade unions, dispute committees, government bodies, rents commissions, ombudsman, community mediation and the business market.

Singular versus Dual Systems

The Netherlands has a dualist regulatory system for mediation, meaning their mediation law currently only applies to cross-border disputes but will likely be amended to account for domestic mediations in the future.

Confidentiality

When it comes to confidentiality, the Dutch legislature has decided to opt for limited protection, i.e., confidentiality is granted only to those voluntary rights and obligations agreed upon between the parties. It is the parties themselves who can decide if a mediator may rely on this protective measure or not. As a result, in situations where parties have agreed that a non-disclosure arrangement will not be included in the mediation agreement, or the parties simply do not include one, the mediator may have to testify in court.

Before the implementation of the Directive, there were no specific measures in Dutch civil law addressing mediation confidentiality, largely because it was common practice for parties to include a confidentiality clause in their mediation agreement that provided parties and their mediators a certain level of confidentiality. However, despite the fact that a judge often would recognize a confidentiality clause as a legitimate reason not to testify, this recognition was not, necessarily, formally required.

This lack of a statutory provision protecting confidentiality was one of the reasons that Articles 165 and 1041 (Arbitration) of the Civil Procedure Code (CPC) had to be modified. Article 165, paragraph 3 now reads: 'When the confidentiality of a mediation is expressly agreed, the mediator and the parties involved in the mediation can decide to make use of a non-disclosure arrangement which protects the parties and the mediator from the obligation to give evidence or information that is related to the mediation in so far as this is related to the voluntary rights and obligations agreed between the parties.' Further, Article II, point C of the CPC, underlines that only 'if the confidential character of the mediation is explicitly agreed by the parties' will the mediator and the parties involved have the right to withdraw from the obligation to testify before the court or to provide information that is related to the mediation.

One exception to the right of non-disclosure is based on reasons of public order, especially in cases concerning the protection of the interests of children or a person's physical or mental integrity. The other exception to this rule is when disclosure of the content of the mediation agreement is necessary for the effective execution of the agreement.

In an *obiter dictum* regarding mediator neutrality under Article 165.1, the Dutch Supreme Court held that confidentiality is essential to mediation, and that it is open to accepting a privilege for the mediator in law. However, the Court held that due to the fact some mediators have certification and have met quality assessments while others are *ad hoc*, providing a privilege to all would be over-inclusive and counterintuitive to the notion of privilege. Furthermore, there is a problem of proof concerning confidentiality agreements generally because the law does not require such agreements in writing.

All these concerns led the Minister of Security and Justice to withdraw the bill and introduce a new one, designed to limit implementation of the Mediation Directive's confidentiality provisions to cross-border disputes, which was entered into force on 15 November 2012. The privilege of non-disclosure and the right of individual recourse and/or disciplinary law has been cited as an objective of the supplemental legislation.

Voluntary versus Mandatory

In general, mediation in the Netherlands is based on voluntary choice and can be initiated in one of two ways: (i) mediation developed completely outside the sphere of the courts and (ii) court-annexed mediation. Given the Dutch policy choice of voluntary mediation, no provision in the Civil Code or the CPC requires mediation participation. The main reason for not mandating mediation in civil and commercial matters is the assumption that there will

be a higher chance of a successful mediation if both parties agree to mediate than if they are forced to mediate.

Mediation Information Meetings

In mediations developed outside of courts, there is no role for a judge to play, since the parties go directly to a mediator without the intervention of a judge. In court-annexed mediations, a judge can recommend to the parties that they make use of a mediator. This second path can be followed in two ways: (i) the court can suggest mediation in a letter to the litigants (written referral), and (ii) the court can suggest mediation during a court hearing (oral referral). In the case of a written referral, parties will receive a letter before the court hearing that encourages them to consider mediation. The letter is accompanied by a brochure and a 'self-assessment' so the parties can determine whether mediation would be a suitable approach to resolving their dispute. If the parties agree to try mediation, the court case will be suspended for a period of three months, the amount of time often required to complete a mediation.

In the context of referrals, the mediation officer working at the court is responsible for mediation administration, is the first contact person for parties with questions concerning mediation, and is also the person who can be contacted in situations of a written referral to mediation or an oral referral to mediation.

Cost Incentives and Sanctions

The nationwide implementation of a referral system for mediation was accompanied by two financial incentives: (i) a temporary financial stimulus to offset some of the costs for cases referred from a court to a mediator, and (ii) the introduction of legal aid for mediation. The temporary financial stimulus (2005–09) was available for parties who were not eligible to receive legal aid. In practice, this arrangement meant that parties received the first 2.5 hours of mediation for free.

In April 2010, the financial stimulation arrangement was terminated, based on the assessments that it had accomplished its purpose of raising awareness of mediation and that financial incentives were no longer needed. A large majority of the citizens had by then become aware of the possibility of mediation as an alternative for regular court procedures.

In contrast with the temporary stimulus, the special provision for granting legal aid in mediation cases was introduced by the Ministry of Justice as a permanent financial arrangement for those parties who could not afford mediation. Legal aid for mediation can be received as follows: (i) for married persons, persons living together, and one-parent families, when annual (gross) income is below €34 700, and (ii) for persons living alone, when annual (gross) income is below €24 600. Depending on the duration of the mediation and the income levels of the parties, a small financial contribution may be required (ranging from €50 to €101).

In court-annexed referral procedures, certain costs are covered by the judiciary, since a specialized mediation officer of the court is responsible for assisting the parties and the judge in situations where mediation is proposed. Not only must courts cover costs in situations of a court-annexed mediation, but the parties also have to cover costs. How much parties have to pay for the mediation is not regulated by law and is dependent on the possibility of receiving legal aid for mediation. In legal aid cases, the parties only have to make a relatively small financial contribution.

Court Referrals to Mediation

The Netherlands judiciary has installed a referral to mediation faculty in all courts of first instance and in all courts of appeal. This means that a system is in place to assure the possibility of referral to mediation in cases that seem suitable for mediation.

The history of this development starts in 1999. In that year, the Ministry of Justice published a letter to Parliament— *More paths to justice* — to outline the new policy views on mediation in the Netherlands for the period 2000–02. Combined with a major reform program of the judiciary (*Judiciary of the 20th century program*), the policy letter resulted in nationwide experiments with court-annexed mediation. The conclusion of the experiment was that there is room for negotiation both before and during court proceedings. The implementation of referrals was realized in 2004, when the former Minister of Justice announced his support for introducing mediation at a national level. Based on these conclusions and the minister's support, the implementation of the referral faculty started in 2005, and from 2007 onwards all courts have had a referral faculty. Since 2007, all courts may refer cases which they consider suitable for mediation, albeit not on a mandatory basis.

Enforceability

According to Article 279(4) of the CPC, the parties may record the results of a successful mediation in a settlement agreement (*vaststellingsovereenkomst*). If requested by the parties, this agreement can be formally confirmed in an act by a notary, or, in situations where the mediation resulted from a court referral to a mediator, in a court report, judgment, or order.

The confirmation document will be countersigned by the parties or their official representatives. If one of the parties does not abide by its obligations in the mediation agreement, the other party may (by making use of the notary act, the court report, the court judgment, or the court order, as applicable) enforce the agreement directly with the assistance of a bailiff.

Training and Accreditation of Mediators

Currently, the mediator profession is not regulated by law. The private sector and professional mediator associations determine the minimum qualifying criteria for becoming an accredited (registered or certified) mediator. The NMI, in particular, plays two important roles in establishing minimum quality norms for a mediator. The first role is as a general association for all professional mediators, and the second role is to oversee quality control and quality assurance of registered mediators.

To become a 'register mediator' at the national register of the Dutch Mediation Institute, the mediator must meet the following minimum requirements:

a) the mediator has taken an NMI-recognized training course for mediators;
b) as detailed later, the mediator has successfully passed both a knowledge test and an assessment of the mediator's conduct of a role-play mediation;
c) the mediator must conduct a minimum of nine mediations every three years (in total, 36 contact hours per mediation); and
d) the mediator must participate in 'intervision' sessions (i.e., mediation sessions where colleague-mediators observe the work of the mediator) and implement suggestions for improving his or her work and services provided in this peer-review process.

All mediators who want to act in a court-referred procedure must be registered at the NMI. To receive legal aid funds, mediators must also comply with the rules laid down in the Law for Legal Aid that determine minimum requirements for registration with the mediation register at the Legal Aid Board.

Lawyers' Duty to Inform Clients

There are no rules or regulations concerning the duties of legal representatives or other professional mediation participants.

Legal Assistance in Mediation

Outside counsel may be present during mediation proceedings, but it is not mandatory.

Statistics

According to the Annual Report for the Council for the Judiciary 2010, in 2010 there were a total of 51 690 cases from the legal desk, a majority of which were family law/divorce cases (66%). To a much lesser extent, mediation was used for commercial law cases (5%), labour/employment dismissal cases (4%), neighbour disputes (2%) and rental cases (2%).

In administrative law cases the largest group of referrals are tax/fiscal cases (29%) and in social security law cases (23%). A smaller number of referrals in administrative law are related to civil servant law cases (7%) and general disputes against a government (10%). As with the figures provided in the Mediation Monitor, the majority of the disputes are related to family law cases (33%), labour law cases (25%), administrative law cases (8%), commercial law cases (8%) and neighbourhood mediations (15%).

According to a report published by the NMI in 2011 the number of NMI mediations for 2011 was also 51,690. Family disputes constituted 33% of these cases, labour 25%, community 18% and government, business to business and 'other' all constituting 8% of mediated cases. Further, the NMI issued a short questionnaire in 2011 to all registered mediators seeking information about cross-border mediations. From the total of 4,493 registered mediators, 1,154 mediators replied. According to this group of respondents, the total number of cross-border mediation cases has increased from 2,655 mediations in 2010 to 4,200 mediations in 2011. As is the case with domestic mediation cases, the majority of cross-border mediations are related to family law (44%), labour law (22%) and commercial law (19%).

Finally, based on the annual report of the Dutch judiciary 2012, the percentage of referrals from the court to a mediator was reduced in 2012 (compared with the previous years) to 11%. The largest reduction of the court-annexed referrals was in the area of administrative law (reduction of 44%) and fiscal law (reduction of 62%). One of the main reasons for the sharp reduction in the referrals to a mediator in administrative and fiscal cases lies in the introduction of a 'new case approach' (nieuwe zaaksbehandeling). As a part of the new case approach in administrative and fiscal cases the written information letter for referring to a mediator has been abolished. Other causes for the reduction in the number of court referrals that are mentioned in the annual report of the judiciary are the abolishment of the stimulation measure (the temporary financial stimulus measure for mediation); the fact that more and more citizens go directly to a mediator instead of going to the court and being referred by the judge to a mediator; stimulation of other forms of alternative dispute resolution mechanisms; and a more active role of judges in settling cases.

Other Variables

Under the influence of developments such as the stimulus policy subsidizing citizen participation in mediation, the active cooperation of the judiciary in developing court-annexed mediation schemes, various pilot projects and the proactive role of various professional associations for mediators, mediation has become a fully accepted alternative to 'traditional' judicial procedures. One example of this sort of alternative approach is a pilot project in mediation for criminal law cases in Amsterdam. Among its goals are to see how mediation can have a positive effect on the reduction of recidivism, reduction of costs and the level of satisfaction of the victims of crime. The program also is concerned with mediation meetings that can contribute to a restoration of the relationships between the victim(s) and the offender(s).

Poland[36]

Degree of Regulation

Poland is currently in the process of working on updating aspects of its justice system, including the regulation of mediation. Both the Prime Minister and the Minister of Justice have announced that one of the government's priorities is to improve the administration of justice. One stated goal is that the average duration of court proceedings will be reduced by one-third by the end of the current cabinet's term in 2015.

Another expectation is that the current mediation regulatory scheme, based on the Code of Civil Procedure (CCP) as amended in 2005 to provide for mediation, will be revised in 2014. In mid-2013 the Civil Law Codification Commission, together with the experts from the Civil Council for ADR, presented a draft amendment to the mediation provisions in the CCP. The draft is now up for discussion discussed by the newly established (in September 2013) committee of experts at the Ministry of Economy, in collaboration with the Ministry of Justice. The amendments are to encompass mediation in all kinds of civil matters, with the particular focus on business-to-business disputes.

Subject Matters that are Mediated

The following matters can be mediated in Poland: commercial, labour, and family and other civil law matters, as well as criminal, juvenile offenders, collective redress (class actions) and administrative court matters.

Singular versus Dual Systems

Poland has a monolithic regulatory system for mediation, which means that its mediation legislation is applicable to both cross-border and domestic disputes.

Confidentiality

Under the Polish regulations, ensuring confidentiality in the mediation process is mainly an obligation of the mediator. According to the CCP, the mediator has a duty to keep confidential all facts acquired during the mediation process unless the parties have exempted the mediator from keeping such information secret. Further, the CCP provides

[36] Information in this section is taken from Dr. Ewa Gmurzynska and Dr. Rafal Morek's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Dr. Ewa Gmurzynska's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Rafal Morek who provided assistance by reviewing the information in the country analysis.

that a mediator may not be called as a witness in court proceedings to testify about the facts learned in mediation unless the parties have excused the mediator from that duty. Because the parties hold the privilege, it is their responsibility to explicitly give the mediator permission to pass along certain information they wish to share to the other party. Doing so without the consent of the party may be a breach of the confidentiality rule and the mediator may be liable for damage caused by breach of that duty.

The CCP does not explicitly require the parties to keep mediation information confidential. However, the Code provides for general evidentiary exclusion, under which revealing information about settlement proposals, mutual concessions, or other statements made in mediation to a court or an arbitration tribunal is ineffective, meaning that the information should not be taken into account in making a final decision.

In addition, the provisions of the Civil Code on negotiation should apply to the parties in mediation because of the similarities between the two processes. According to these provisions, if one party in negotiation passes information to the other party and declares that it is confidential, the other party has an obligation to keep it secret and not to pass it to a third person or use this information for its own purposes, unless the parties have agreed otherwise.

The minutes from mediation, which a mediator has an obligation to submit to the court, must also preserve confidentiality. The court may not obtain detailed information about the mediation process, particularly concerning information exchanged during mediation, settlement offers, or positions of each party. In the event that the parties sign a settlement agreement, the mediator, with the consent of the parties, also submits the settlement agreement for approval by the court.

Voluntary versus Mandatory

According to the CCP, both contractual and court-referred mediation have a voluntary character. This approach is based upon the right of access to courts, expressed in Article 45 of the Polish Constitution. The legislative motives for the mediation provisions in the CCP state that 'the parties shall decide about the way in which they want to claim their legal rights and choose the method'.

In principle, a court may not refer a case to mediation without the consent of the parties, and their lack of consent to mediate is not subject to negative consequences. However, the rule of voluntary mediation, as expressed in the CCP, is that mediation will not be conducted if the parties, within one week from the date of issuance of the order to mediate, have not expressed their consent to mediate. So the literal wording of this provision is that the parties have to behave actively and express their consent to mediate; otherwise, the mediation is not conducted. The most common practice of the courts is that mediation is conducted, unless a party expressly decline to participate in the process.

In addition, courts always refer the parties to mediation upon the respondent's objection, raised in its statement of defence, that the parties had agreed to mediation but the claimant failed to initiate it, and instead filed a lawsuit.

Some attempts have been made to introduce mandatory mediation in certain types of cases. For example, in 2008 a draft proposal was prepared that would have introduced mandatory mediation in all matters where the divorcing couple has minor children. This proposal was an attempted response to the necessity of protecting children. However, the draft was not submitted for parliamentary legislative work.

Mediation Information Meetings

There are no information meetings on mediation that are officially a part of court procedures. In some courts, however, such meetings are available based on pro-bono work of mediators and individual consents by judiciary administration.

Cost Incentives and Sanctions

Should the parties refuse to participate in mediation in certain circumstances, certain CCP provisions may apply. According to Article 103(1) and (2) of the CCP, the court may assign litigation costs to the party that caused them by 'unreliable or obviously improper behaviour'. This provision may be applied particularly to a party 'who unjustifiably evades participation in mediation, if the party previously agreed to mediate'. This provision operates both as an incentive to mediate, and (especially) as an incentive to seriously consider the decision of the court in this regard. Further, the provision is also consistent with the rationale that if the parties have given their consent to mediate, they should not withdraw from the process without reason. This provision has not yet been applied by the Polish courts, but its presence likely motivates parties to mediate.

Court Referrals to Mediation

In Poland, court-referred mediation was introduced in 2005 when a statute was enacted to amend the Code of Civil Procedure (CCP). The resulting provisions of the CCP provide two foundations for conducting mediation. In the first, independent from a court, the parties may sign an agreement to mediate outside of the court proceedings. This so-called contractual mediation takes place initially outside of the court system. However, there can be some connections between contractual mediation and court proceedings. For example, according to the CCP, Articles 183-13 (1) and 183-14, if a settlement agreement is signed as a result of contractual mediation, the mediator should submit the mediation minutes, along with the settlement agreement, to a court, and either party may request that the court approve the settlement agreement. If the settlement agreement is approved by the court, it becomes a writ of execution and may be enforced.

The second basis under the CCP for conducting mediation is a court order referring the case to mediation. The court may issue an order to mediate on the motion of a party or upon its own initiative. In addition, if the parties decide partway through the court proceedings to attempt to settle the case in mediation, they may submit a joint motion to mediate to the court.

According to Article 10 of the CCP, all civil matters in which a settlement agreement is permissible may be referred to mediation. This rule results in almost all civil cases, including family, labour and commercial cases, being referable to mediation. Polish law does not provide for any specific criteria for how the cases shall be selected for mediation.

There are, however, certain limitations as to how often and when the court may order the case to mediation. For example, the court may refer the case to mediation only once during the proceedings, and the court may only order the case to mediation up until the end of the first hearing. Thereafter, the court may send a case to mediation only upon a joint request of the parties.

The court-annexed mediation schemes (*sensu largo*) presently available in Poland include:

a) the system of court referral to mediation;
b) the network of judge-coordinators responsible for mediation in individual courts;

c) the quasi-mediation settlement procedure (in Polish: *postępowanie pojednawcze*) handled by a judge, in a separate court procedure that may not lead to a judgment.

The quasi-mediation settlement procedure regulated by Articles 184–186 of the CCP may also be considered 'judicial mediation' (even though the Code does not use the term 'mediation' in this regard). The procedure is handled by a judge based on a party's pre-trial request, and, if successful, it results in a court settlement.

Enforceability

Under Polish law, the phrase 'mediation agreement' may refer to either of two separate kinds of agreements: 'an agreement to mediate' (in Polish: *umowa o mediację*) and 'a settlement agreement reached before a mediator' (*ugoda zawarta przed mediatorem*).

Enforceability of an agreement to mediate

The enforceability of an agreement to mediate has been debated in Polish jurisprudence. Most authors believe that the specific performance of an obligation to mediate may not be ordered due to the voluntary nature of mediation. Some, however, argue that the general rule in Article 1050(1) of the CCP applies, which states that when a debtor is to perform an act that cannot be performed by anyone else, and that act depends solely on its will, if so requested by a creditor the court may set a deadline for the debtor to perform the act under the penalty of a court fine for non-performance. If not performed by the deadline, the court may repeatedly impose fines on the debtor, in escalating amounts, until the debtor complies or until a set maximum fine amount is reached.

Finally, it is accepted by most Polish academics in this field that the failure to fulfil the obligations under the agreement to mediate is subject to the general rules of contractual liability. Should a breach of the agreement to mediate result in a loss for any party, that party would, under these rules, be entitled to damages.

It must be noted, however, that because there is no reported case law on the enforceability of agreements to mediate as yet, relevant issues remain to be verified in practice.

Enforceability of a settlement agreement reached before a mediator

Under Article 183-15 (1) of the CCP, 'a settlement agreement reached before a mediator' (in short: mediation settlement agreement) has the same legal effect as a court settlement agreement, but the rule is subject to important exceptions. First, the mediation settlement agreement becomes fully effective only after it is approved by a court. Second, if the applicable substantive law directs that it must be concluded in a specific form (such as a notary deed or with confirmation of signatures or the date), the agreement is not legally effective until it conforms to those requirements.

The most important procedural effect of the mediation settlement agreement relates directly to its enforceability. Once confirmed by a court, the mediation settlement agreement becomes a writ of execution, which may then be enforced in the same manner as court judgments, arbitral awards or court settlements.

As with court settlement agreements, mediation settlement agreements are not given *res judicata* effect. Instead, they may result in an objection called *exceptio rei transactae.* This objection does not lead to the rejection of the claim without examination of its merits (which is characteristic for *res judicata*), but may lead to its dismissal.

Training and Accreditation of Mediators

Many Polish commentators agree on the necessity of high qualifications for mediators. But when the Polish Parliament introduced provisions on civil mediation in the CCP in 2005, it decided to introduce only very general requirements for mediators in civil disputes. Every person who has full legal capacity and a full range of public rights may be a mediator.

The CCP excludes active judges from being mediators (retired judges may be mediators). The law does not differentiate between mediators who are on the lists administered by the courts, and private or *ad hoc* mediators appointed by the parties outside of court proceedings. Both types of mediators are subject only to the general regulations.

Further, the CCP provides that NGOs, as well as universities, may submit their internal lists of permanent mediators to district courts, so the lists may be sent to all civil courts on the regional level. These organizations may also establish mediation centres. The courts do not evaluate the submitted lists of mediators. Placement on or removal from the lists depends solely on the requirements established by the submitting organizations. Usually, they demand a certain number of hours of training, as well as of mediation observation and participation in co-mediation.

In the absence of real qualification standards for mediators, the Civic Council for ADR, the body of Polish experts established in 2005 to advise the Minister of Justice on all issues concerning mediation and other ADR forms, adopted the following three documents: Standards for Conducting Mediation of 26 June 2006, Standards for Mediator Training of 29 October 2007, and the Code of Ethics of Polish Mediators of 19 May 2008. The main goals of these documents are to promote best practices and the highest ethical standards among Polish mediators, and to build the credibility of the mediation profession among mediating parties and the public.

The Civic Council recommends that each person who wishes to become a mediator participate in at least 40 hours of training, confirmed by a certificate of completion. According to the Council, mediation training should include the following topics: basic rules and elements of mediation proceedings, psychological mechanisms of conflict creation, escalation and its resolution, workshops on practical skills to conduct mediation, and the legal and organizational aspects of mediation proceedings.

Lawyers' Duty to Inform Clients

Due to the voluntary character of mediation in Poland, parties and lawyers do not have any general obligation to consider the use of mediation and there are no sanctions for not using mediation. However, according to Article 27 of the Code of Professional Conduct of Legal Counsellors, legal counsellors have the duty to inform their clients about the possibility of mediation in a dispute if to do so is in the best interest of the client. Similar rules apply to advocates.

Legal Assistance in Mediation

Under Polish law, as in the majority of other legal systems, parties to mediation do not need to be represented by professional legal counsel in mediation. The parties are at liberty to choose any individual they find appropriate with full legal capacity - whether it be a lawyer or not - and grant that person the power of attorney to represent them in mediation.

In regard to other outside parties, experts rarely are invited to take part in mediation in Poland. If it happens, however, then the parties are free to choose any private expert they

wish. The status of such private experts is typically regulated by contract rather than any specific statutory provisions.

Statistics

The adoption of mediation in Poland has been slow. The statistics clearly show that use of mediation by state courts remains very limited. While the total number of cases referred to civil mediation amounts to a few thousand per year, all together over 12 million new cases (in all kinds of judicial proceedings) are registered by the Polish courts each year.

Other Variables

While the Polish law of 2005 amended the CCP in a way that is formally consistent with the Directive, it is often criticized for having unsatisfactory mechanisms for ensuring the quality of mediation and for its lack of public funding and legal aid for mediation in civil matters.

The current regulatory model for mediation in Poland has been unsuccessful, and should be revised. In addition to regulatory changes, more proactive actions for the promotion of mediation by courts, state agencies and legal professions are needed. But in the end, despite critical assessment of the status quo, the prospects for growth of mediation in civil matters in Poland are still good. Mediation in Poland has huge potential and capacity for growth.

Romania[37]

Degree of Regulation

After ten years of ADR programs, mostly conducted by NGOs, the Mediation Law was published in the Romanian Official Journal on 22 May 2006. The enactment of the law was part of a judicial reform strategy designed to increase the quality of the justice system. Its publication followed a series of successful programs funded by Romanian and foreign donors that enabled a wide, realistic and in-depth understanding of dispute resolution as a field of study and as a means of nurturing a peaceful society. The Romanian Mediation Law has much of the same substance as the Directive, published two years later.

The Mediation Law defined mediation as voluntary and included special provisions regarding court-related cases, in which mediation information meetings can become mandatory. It established criteria for the acquisition, suspension and termination of mediator status, and it also established a national regulatory body - the Mediation Council. The Mediation Council created by the Mediation Law consists of a coordinating body of nine practicing mediators and three substitute mediators. It has the status of an autonomous body, independent from any public or private organization.

The Mediation Council sets the rules for basic training and continuing professional development of mediators, for the mediators' organization into professional associations, and for the practice of mediation. The Council is also responsible for creating the Code of Ethics and Conduct, and for establishing rules for professional misconduct and the mediation procedure. Its members are elected by authorized mediators.

[37] Information in this section is taken from Anca-Elisabeta Ciucă and Constantin-Adi Gavrilă's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Sanda Elena Lungu and Constantin-Adi Gavrilă's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. The legislative update up to October 2013 was edited by Irina Ioana Popa.

Subject to additions and amendments, the Mediation Law did not provide for different categories of mediation by subject area, and thus the norms apply to all types of mediation. There is one exception: special provisions governing family law disputes set forth, in detail, the different types of family disputes to be mediated, the possibilities for settlement through mediation and the additional obligations incumbent upon the mediators in such circumstances.

Since the Mediation Law came into force in 2006, it has four times been subject to additions and amendments, by Law No. 370 of 3 December 2009 on the amendment and completion of the Mediation Law, by Law No. 202 of 26 October 2010, by Law No. 115 of July 2012, and by Law No. 214 August 2013.

As of July 2013, there were about 16,209 persons trained as mediators, 7,763 mediators authorized by the Council, 85 trainers, 47 assessors accredited by the Council and 20 mediation training providers. In 2009, the Mediation Law added provisions regarding both foreign mediators willing to extend their work to Romania and Romanian mediators developing their practice in other EU Member States.

If the Mediation Council receives any complaints against a mediator, it has the obligation to investigate and render a decision regarding that complaint. The decision of the Council in these cases is based on documents issued by other public institutions and, in most cases, provided by the mediator. In addition, the parties to mediation must be informed by the Council about their right to complain.

Subject Matters that are Mediated

In Romania, civil and criminal cases; labour and workforce cases; and education, family and healthcare disputes are all matters that are mediated.

Singular versus Dual Systems

The Mediation Law did not provide for different categories of mediation by subject area, and thus the norms apply to all types of mediation. Romania also has a monolithic regulatory system for mediation, which means that the norms are also applicable to both cross-border and domestic disputes.

Confidentiality

The Mediation Law recognizes the importance of providing protection to mediators to ensure confidentiality, both with regard to revelations to other mediating parties and with regard to revelations to other interested juridical institutions, such as judges, prosecutors, lawyers, or other interested parties. Thus, the mediator cannot be asked to be a witness or to give a deposition concerning facts discussed with the parties in the official role of mediator. The mediator is also responsible for providing space for discussions during mediation in such a way as to ensure confidentiality for the parties, and also for handling documents resulting from the mediation activity so as to keep the personal data of the parties confidential (Article 32).

The Mediation Law mandates that this responsibility to ensure confidentiality is included in the contract signed by the parties and the mediator before the mediation starts, and Article 44 states that the contract must be signed by all parties before the mediation starts. Mediators are also subject to ethical and deontological responsibilities concerning confidentiality, and sanctions have been established by law and in Mediation Council regulations for instances where a mediator violates the obligation of confidentiality.

Confidential information may be revealed if, at any time during the mediation process, the mediator becomes aware of illegal activities of one of the parties that may endanger the other party, the result of the mediation, or the integrity of the mediator or the public. Disputes concerning the rights of a child or children are potentially the source of another limit on confidentiality. If the mediator becomes aware that a child's development or education are endangered by one of the parties, based on information received during the mediation process, the primary ethical and legal responsibility of the mediator is toward the child. According to the Mediation Law, the parties have the right to know about these exceptions to confidentiality before signing the initial mediation contract, and the mediator has the legal and ethical obligation to give all necessary details in order for the parties to correctly understand the limitations.

In additional, all parties providing support during the mediation, whether legal representatives or other professional mediation participants such as experts and translators, must keep any information they learn confidential as to third parties. The information cannot be used as evidence for judicial and arbitral procedures, except where the parties agree otherwise or the law states the contrary. The mediator must make all persons participating in the mediation aware of these legal provisions and their obligation to keep total confidentiality and thus, the Mediation Law allows the mediator to require them to sign a confidentiality agreement.

Voluntary versus Mandatory

Participation in out-of-court settlement mechanisms can stem from either the initiative of one of the parties or of the judge. If the initiative belongs to one of the parties, that party must inform the court about the intent to try mediation, either during a session in front of the judge, so that it is recorded in the session's notes, or in a written notification submitted by the party to the judge. Whatever the means of notification, mediation must be accepted by the other party, and the mediator is the person in charge of motivating the other party to accept the invitation to mediate.

In all cases—declared intention of one party, accepted mediation process by all parties, or mediation being recommended by the judge—the Mediation Law sets a three-month period as the time limit for the mediation. At the end of that time, the parties must return to the court to report the failure of the attempt, or the accomplishment of a mediation agreement. During the three-month window, all court procedures are delayed.

Mediation Information Meetings

The judge may, at any stage of a lawsuit and as appropriate under the circumstances, recommend to the parties that they use mediation in order to amicably settle their dispute. In case of disputes which may be subject to the use of mediation, the court has the obligation to invite both sides to take part in an information meeting, which will detail the benefits of using mediation as an alternative procedure. The mediation information meeting is free of charge, no fees, duties, or any other amounts may be charged. Starting on 1 August 2013, party attendance at such an informational meeting becomes required by the court, even though mediation remains optional in Romania.

The presentation in the meeting about mediation may be done by a judge, prosecutor, legal adviser, lawyer, or notary. The proof of attendance at the information session is provided in a certificate completed by the official who provided the information in the meeting.

Because participation at the information meeting is mandatory, the court must dismiss a request for summons as inadmissible if the applicant does not meet its obligation to attend

the information meeting before filing the request for summons, or after the onset of the trial by the time limit set by the court for this purpose.

Cost Incentives and Sanctions

The Mediation Law states that if the parties use mediation to settle a case that is also pending in a court of law, and the case is not subject to other laws that state otherwise, they will receive full reimbursement of the court fees. A different law regarding legal aid in Romania states that if a party will not try mediation or another form of ADR, if applicable, the application for judicial assistance might be denied.

Before 2006, mediation services were available as part of internationally funded projects conducted by different NGOs that, in some cases, received governmental support. In fact, the involvement of civil society in promoting ADR was achieved almost entirely through internationally funded projects.

Mediator fees in the field of court-annexed mediation are regulated by the rules on awards and the reimbursement of travel expenses of mediators. In certain disputes, such as in family dispute mediations concerning relations between parents and children and in labour dispute mediations that concern termination of an employment contract parties, parties do not pay the mediator's costs and travel expenses since the court has the duty to reimburse these costs and expenses. In mediation concerning any other type of dispute, except commercial disputes, the court bears the mediator's costs and expenses relating to the first three hours of mediation.

In addition, according to the Free Legal Aid Act, Article 7(1), free legal aid may be granted for legal advice, legal representation and other legal services in proceedings aiming at the peaceful settlement of disputes.

Finally, according to the Court Fees Act, the parties pay only one-third of the usual court fee if they conclude a court settlement.

Court Referrals to Mediation

Judicial and arbitral bodies, as well as other authorities with jurisdictional competencies, must inform the parties about the possibilities and advantages of using mediation and advise them to use this alternative approach to settle their conflicts.

Before 2006, court referral to mediation resulted from the cooperation between the Romanian Government and different Romanian NGOs through internationally funded projects. Since the enactment of the Mediation Law in 2006, if a dispute has already been submitted to a court, Section 5 of the law allows the case to be referred to mediation upon the initiative of the parties or, if the parties agree to it, at the recommendation of the court. Only disputes regarding rights about which the parties may legally reach settlement may be referred.

Mediation may deal with total or partial settlement of the dispute. After the close of the mediation, the mediator must inform the court in writing about whether the parties reached an agreement. With a legal framework established for referrals to mediation from the courts of law, but with another framework for professional mediation services based on mediation contracts involving fees for the parties, after 2006 the number of cases that used mediation by court referral was substantially diminished. However, as noted earlier, the law includes an important incentive if the parties settle a court-referred case through mediation: the reimbursement of the court fees.

Also, since 2010, the Superior Council of the Magistracy of Romania (SCM) has focused on the involvement of the judiciary in mediation. In May 2011, a partnership agreement was signed by the SCM and the Mediation Council which should form a strong basis for promoting court referral of cases to mediation.

Also, professional associations of mediators are cooperating with the courts to develop partnership agreements that can produce results similar to those in traditional court-annexed mediation schemes. Case referral, judiciary public assistance, and pro bono programs are being included in the agreements. Also, the Mediation Council is cooperating closely at a national level with the SCM to help promote mediation through for local and regional programs.

Enforceability

When the disputing parties reach an agreement, a written mediation agreement that includes all the clauses the parties have agreed upon is drafted, and it is recognized under provisions of the Mediation Law. The agreement then has the power of a written contract. Usually, it is drafted by the mediator, except for situations in which both the parties and the mediator agree otherwise. The Mediation Law states that the mediation agreement may not include provisions likely to affect the laws or public order, but it may be subject, in accordance with legal provisions, to certain terms and conditions as agreed by the parties.

The effect of a mediation agreement varies depending on the type of agreement, and different types of additional proceedings may be required to enforce the agreement. If, for example, the mediation case concerns the transfer of a private right to real estate, the parties must present the agreement, as drafted by the mediator according to content and form requirements, to a notary public or to a court of law so it may be executed. If a court-referred case is settled through mediation, the parties must seek a decision from a court, in accordance with Article 271 of the Civil Procedure Code (CPC), to make it enforceable.

The follow-up to a mediation agreement in the criminal context is different. According to the Mediation Law, if the mediation procedure takes place before a criminal trial starts, and the mediation procedure ends with a reconciliation of the parties, the injured party may no longer report the same deed to a penal authority or a court of law.

More and more efforts are being made to put pressure on the Parliament to change the law in order to have more incentives for the parties to try mediation. One proposal is to make mediation agreements enforceable without the need for any other formalities before a court or notary.

In civil cases referred by the court, the parties' report to the court must prove the result of the mediation process by including a copy of the memo signed by the parties and the mediator at the end of the mediation. The result of the mediation will be mentioned in the memo, but the content of the agreement will not be included, in order to ensure the confidentiality of the mediation process.

Training and Accreditation of Mediators

The Mediation Law establishes that the mediator is a specially trained person who must be authorized by the Mediation Council. There are special requirements for those wishing to be authorized as mediators and to practice mediation as a liberal profession.

The first set of requirements, those concerning the required mental capacity to exercise the profession and the lack of a criminal record, requires a document issued by the police to

support the lack of criminal record and a document issued by a family doctor declaring the would-be mediator 'clinically sane' in order to prove that the person is mentally balanced.

The applicant must also demonstrate at least three years' working experience through a legal document establishing the applicant's work record. The work record demonstrates not only the knowledge, but also the life and specific working experiences, of those who would like to become mediators.

In order to develop the capacity to train mediators in Romania, the Mediation Council adopted procedures to accredit specialized trainers in the mediation field and to authorize training providers. There is an established training system program in mediation that provides 80 hours of basic training and subsequent training courses to improve and to update the professional development of the mediators.

The accreditation and authorization systems are open to all persons proving their capacity as trainers in the mediation field, whether from Romania or other countries. Moreover, the Council recognizes training programs in mediation delivered by organizations outside Romania, as long as they meet the requirements of the procedures and standards mentioned above. Out of the total of around 7,763 mediators who have been authorized as mediators by the Council, there are over 500 mediators who have completed their training in mediation outside Romania.

The mediators authorized by the Mediation Council are registered in the Mediators' Panel, which is the official way to certify a mediator that is available to the public. Being included in the Panel establishes the professional responsibility of the mediator; it also means that the mediator is subject to disciplinary measures based on complaints.

Lawyers' Duty to Inform Clients

Article 6 of the Mediation Law stipulates that 'the judicial and arbitral courts, as well as any other authorities having jurisdictional duties should inform the parties of the possibility and benefits of using the mediation procedure and should advise them to use this method in order to settle the dispute between them'.

Legal Assistance in Mediation

According to Article 52 of the Mediation Law, the parties to a dispute have the right to be assisted in mediation by a lawyer or other persons, under mutually agreed conditions. Also, during the mediation process, the parties can be represented by other persons, who can participate, make decisions and sign agreements on their behalf in accordance with legal provisions.

In the area of penal cases, the mediation has to be conducted in a way that guarantees the right to legal assistance for each party involved and, if applicable, the right to have an interpreter. According to Article 68 of the Mediation Law, the mediation minutes should indicate whether the parties used the assistance of a lawyer or interpreter or, as the case may be, state that the parties have expressly rejected such assistance.

Statistics

The only recent statistical data on the number of matters referred by the courts and settled as consequence of recourse to the mediation were released by the SCM for the years 2010 and 2011. The report pointed out that 'such alternate procedures for dispute settlement are intended to relieve the burden of the courts, but as per the answers given by such courts to

the questionnaire for gathering necessary data for the above report, only 258 case files were resolved through mediation in 2010 and an optimistic 591% increase to 1525 court related cases resolved through mediation in 2011'.

Other Variables

Mediation activity in Romania is clearly organized based on the provisions of the Mediation Law. It relies on mediators who can provide support for the courts, public prosecutors, or other institutions willing to include mediation in their practice.

Even so, mediation in Romania is a rather new approach and the public is poorly educated about the use of alternative means to resolve disputes. It is currently unclear who bears the responsibility of educating the public to accept and use mediation as an alternative to litigation.

The Council can develop strategies and identify mediators who can help develop educational and promoting materials, but there is a need for the involvement of public institutions to establish a clear strategy in practice. Although the Directive suggests the provision of public funds to educate the public, and even to train mediators, the Romanian legislature has given no clear responsibility to any institution in this respect.

Slovenia[38]

Degree of Regulation

The Mediation in Civil and Commercial Matters Act ('the Mediation Act') transposed the provisions of the Directive into Slovenian law. It was adopted on 23 May 2008, published on 6 June 2008, and entered into force on 21 June 2008.

The Mediation Act applies to court-annexed as well as to out-of-court mediation processes in civil and commercial matters and labour and family disputes are expressly included in its scope. The provisions of the Mediation Act may also apply to mediation in other disputes, as long as applying them is consistent with the nature of the legal relationship out of which the dispute has arisen and is not prohibited by law.

Parties may reach their own agreements as to certain issues regulated by the Mediation Act. They may also agree that an individual provision of the Act will not apply to their situation, except for the provisions on the independence and impartiality of the mediator, and on the effect of mediation on limitation and prescription periods.

Another important act, the Act on Alternative Dispute Resolution in Judicial Matters ('the Judicial ADR Act'), was adopted in November 2009. The act imposes an obligation on all courts of first instance and courts of appeal to offer mediation to parties in civil, commercial, family and labour disputes. In addition, courts may choose to offer other types of alternative dispute resolution procedures.

There are additional notable aspects of the Judicial ADR Act. One important feature is that mediation conducted under this Act is offered to parties free of cost in certain types of

[38] Information in this section is taken from Bojana Jovin Hrastnik's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Bojana Jovin Hrastnik's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to the following experts who provided assistance by reviewing the information in the country analysis: Bojana Jovin Hrastnik, Neva Cokert and Aleš Zalar.

disputes. Another aspect is that, when the Republic of Slovenia is a party to a dispute, it is obligated to agree to participate in mediation when such a decision is appropriate, given the circumstances of the case.

Initial implementation of the Directive

Before 2008 mediation appeared in some legislative acts as a means of resolving conflicts, but no general regulatory framework for mediation existed in Slovenia. Instead, the Civil Procedure Act (CPA) stated that courts should advise the parties of the possibility of settling their disputes and help them achieve this end. The CPA also contained several provisions regarding the possibility of a court settlement, but no provision on mediation. In practice, however, mediation has been in use since 2001, primarily taking the form of court-annexed mediation.

At the beginning of 2008, a group composed of practitioners and experts from the Law Faculty of Ljubljana prepared the Proposal for the Mediation Act. In preparing the proposal, the group agreed that it would not be appropriate to regulate mediation in the same way as court proceedings because mediation is an alternative to litigation, and therefore should remain informal and flexible. Overall, the working group aimed to create a law that would protect the parties' rights in the same way as a court proceeding, but which would, simultaneously, retain the informal character of the mediation procedure.

The first court-annexed mediation program was introduced as a pilot program in the District Court of Ljubljana, the largest among the Slovenian district courts. Mediation was first offered to parties in civil disputes and then also in family and commercial matters. The pilot program was successful and soon became a regular program of the court.

In the absence of legislative guidance on mediation, the court-annexed mediation program included some basic principles and rules on mediation procedure. Because the program was introduced, in part, to fight court backlogs, it offered mediation free of charge — a feature that contributed to greater mediation use.

In 2005, the mediation program of the District Court of Ljubljana was reviewed and evaluated by experts working within the context of the Phare project. In the same year, this court took part in the competition for the Crystal Scales of Justice; the Slovenian project was one of the three finalists out of 22 submissions that were recognized as examples of good practice.

By 2009, several other district and local courts in Slovenia introduced similar programs. By the summer of the following year, a number of additional courts were offering mediation. This resulted from the Judicial ADR Act. It requires all first instance courts and courts of appeal to prepare a program to offer mediation to parties in civil, commercial, family and labour disputes. The 59 courts of first instance (44 local courts, 11 district courts and 4 labour courts) began to offer mediation starting on 15 June 2010. The five courts of second instance had to introduce such programs before 15 June 2012. In July 2010, the Charter on ADR, which is not legally binding, was prepared by the Ministry of Justice with the aim of promoting ADR.

One notable event in this sequence is that, in 2012, Slovenia changed its law for cases where the state is a party in court proceedings and the State Attorney's Office (as the representative of the state in court proceedings) deems mediation not suitable. The State Attorney's Office is no longer required to ask the Government to decide on the question whether to try mediation in that particular case. The State Attorney's Office therefore

decides independently (and may refuse mediation without asking the Government its opinion).

A number of developments suggest that out-of-court mediation, is also developing, although only limited data is available in this area. The Slovenian Association of Mediators, established in 2006, has over 400 members. In 2008, the Association published the White Book on Mediation, an overview of the development of mediation in Slovenia that also included some guidelines for future measures in mediation legislation.

Another association, MEDIOS (the Association of Mediation Organizations of Slovenia), was established in 2008 and has 27 members. In order to help promote the quality of mediators, this Association has adopted Mediation Training Standards.

There are some legislative acts in the works that will complement the existing legislation. For example, the future Proposal for the Family Act is expected to include several specific provisions on mediation in family matters. At present, the development and promotion of ADR is one of the priorities of the Slovenian Ministry of Justice.

Subject Matters that are Mediated

Civil, commercial, family and labour.

Singular versus Dual Systems

Slovenia has a monolithic regulatory system for mediation, which means that mediation legislation is applicable to both cross-border and domestic disputes.

Confidentiality

The Mediation Act contains three articles dealing with certain aspects of confidentiality. First, Article 10 regulates confidentiality within mediation proceedings. Under this Article, the mediator may disclose information received from one party to any other party in the mediation unless the information has been given to the mediator subject to a specific condition that it be kept confidential.

Second, Article 11 regulates confidentiality outside mediation proceedings and the sharing with third persons of information gained in the process. It stipulates that all information originating from the mediation, or relating to it, is confidential unless otherwise agreed by the parties, disclosure is required by law, or disclosure is required for the implementation or enforcement of a dispute settlement agreement.

Third, Article 12 covers the admissibility of mediation-related evidence in other proceedings. It provides that parties, mediators, or third persons who participate in mediation shall not do any of the following in arbitral, judicial, or other similar proceedings: rely on, introduce as evidence, or give testimony regarding an invitation by a party to engage in mediation proceedings; reveal the fact that a party was willing to participate in mediation proceedings; reveal views expressed or suggestions made by a party in the mediation with respect to a possible settlement of the dispute; reveal statements or admissions made by parties in the course of mediation; reveal proposals made by the mediator; reveal that a party had indicated willingness to accept the mediator's proposal for amicable dispute settlement; or share documents drawn up solely for purposes of the mediation proceedings.

In general, mediation-related information may only be disclosed or used under conditions and to the extent required by law, with particular consideration of public policy concerns or

the necessity for the implementation or enforcement of an agreement on the settlement of a dispute. Otherwise, such information shall be treated as an inadmissible fact or evidence.

Voluntary versus Mandatory

The Mediation Act does not expressly require parties and lawyers to consider mediation as a dispute resolution option. Nevertheless, its goal is to create a legal framework that will encourage the use of mediation.

The Judicial ADR Act requires the court to provide the option of alternative dispute settlement to the parties in each case, unless the judge deems this to be inappropriate under the circumstances. In this sense, parties in court proceedings are invited, not required, to consider mediation as an option. Nonetheless, the Act does provide a strong incentive to consider mediation: under Article 19 of the Judicial ADR Act, parties who unreasonably decline the use of mediation might bear the costs of the judicial proceedings, irrespective of the outcome of the dispute.

Another aspect is that, according to the letter of the law, when the Republic of Slovenia is a party to a dispute, it is obligated to consent to participate in mediation (when such a decision is appropriate, given the circumstances of the case).

Mediation Information Meetings

The Directive leaves the decision of whether to introduce a special information session on mediation into the judicial process to the Member States. In Slovenia, in cases where the parties do not propose referring the case to ADR, the court may require that parties take part in a special information session at any time during the judicial proceedings.

This information session may be conducted by a judge or by the judge's assistant. After the information session has been held, the court may decide that parties must try to solve their dispute in mediation, though parties do have the right to oppose this decision and in that case mediation proceedings do not commence.

Additionally, a settlement hearing in which the judge may inform parties about the possible use of mediation is a compulsory part of the proceedings under Article 306 of the CPA. If the parties then agree to try ADR, the court may interrupt the civil proceedings for up to three months.

Cost Incentives and Sanctions

Mediation conducted under the Judicial ADR Act is offered to parties free of cost in certain types of disputes. However, according to Article 19 of the Judicial ADR Act, parties who unreasonably decline the use of mediation might bear the costs of the judicial proceedings irrespective of the dispute outcome.

Court Referrals to Mediation

Under the Judicial ADR Act, the court must directly offer the option of alternative dispute settlement to the parties in each case unless the judge deems this approach to be inappropriate for a particular case. The act imposes an obligation on all courts of first instance and courts of appeal to offer mediation to parties in civil, commercial, family and labour disputes. In addition, courts may choose to offer other types of alternative dispute resolution. The judge may refer the case to a court-annexed mediation program or to any other mediation program in accordance with the parties' wishes.

Enforceability

Under Article 14(2) of the Mediation Act, parties reaching a settlement agreement who wish it to be enforced may decide whether their agreement will take the form of a directly enforceable notarial deed, a court settlement, or an arbitral award based on the settlement. Parties may also choose not to have their agreement enforced.

Article 4 of the Notary Act provides that a notarial deed is enforceable if the person who has an obligation stipulated in the deed consents to its direct enforceability, provided that the claim is due.

With respect to court settlements, parties who reach a settlement in court-annexed mediation may have the agreement recorded as a form of court settlement immediately after the termination of mediation proceedings. In the event that an action has not yet been formally initiated in court, it is still possible for parties to conclude mediation with a court settlement, because Article 309 of the CPA provides that a person who intends to bring an action may try instead to resolve the dispute with a court settlement in the local court.

Finally, for parties who successfully try mediation during arbitration proceedings, the agreement may take the form of arbitral award based on the settlement. According to the Arbitration Act (ZArbit), an arbitral tribunal may terminate the proceedings if the parties to the arbitration instead resolve the dispute via settlement. The parties may then demand that the settlement be memorialized in the form of an arbitral award that has the same effect as any other arbitral award.

Training and Accreditation

According to Article 3(1)(b) of the Mediation Act, a mediator is any third person who accepts a request to mediate, irrespective of the person's title or profession, and irrespective of the manner in which the person has been appointed or approached. Out-of-court mediation is therefore, to a large extent, a matter of the free market, and there is no central register of mediators for that field.

The situation in court-annexed mediation is different. Mediation in court-annexed programs is conducted by mediators who are registered in the list of courts. Currently, there are nearly 350 mediators in the list of courts.

The Judicial ADR Act determines the criteria for a mediator to be listed, and the number of mediators in the court's list is limited. Under Article 8(1), to be listed, the candidate must have the capacity to enter into a contract; not have been convicted by a final judgment for a deliberate criminal offence in an *ex officio* prosecution; have at least the first level of post-secondary education; and have undergone mediation training according to the program determined by the Minister of Justice. However, it is not necessary for the candidate be a lawyer.

Lawyers' Duty to Inform Clients

The Mediation Act does not expressly require parties and lawyers to consider mediation as a dispute resolution option.

The Judicial ADR Act requires the court, not lawyers necessarily, to provide the option of alternative dispute settlement to the parties in each case, unless the judge deems this to be inappropriate under the circumstances.

Legal Assistance in Mediation

The Judicial ADR Act, Article 16(5) and (2), provides that the parties' legal representatives may be present at the mediation and that legal persons as parties in a proceeding shall make sure that a person authorized to enter into judicial or extrajudicial settlements is present or reachable during meetings. Further, the Code of Professional Conduct, adopted by the Bar Association of Slovenia, directs lawyers to try to prevent the aggravation of disputes between the parties and to aim to promote a peaceful settlement of the dispute.

In the event that the parties decide to use mediation, however, under Article 16 of the Judicial ADR Act, they must attend meetings that are part of the procedure in person. Parties' legal representatives may also be present at the meetings.

Statistics

The use of mediation is constantly growing, and statistical data is available for court-annexed mediation. 800 cases were resolved in mediation in 2008, and 1,031 cases in 2009. In 2010, the number of cases resolved in mediation more than doubled the number in 2009: there were 2,239 cases solved in mediation in the year 2010. In 2011, 2,735 cases were resolved in mediation.

Other Variables

Today, Slovenia has enacted modern legislation on mediation, stipulating basic principles and rules of mediation and leaving the rest to self-regulatory mechanisms. Mediation is used more and more often as both court-annexed and out-of-court mediation develop rapidly.

United Kingdom[39]

Degree of Regulation (extensive versus limited)

In the UK, there is no Mediation Act controlling the procedure or practice of mediation, and there is no current state control for training, performance, or appointments of mediators. Instead, there are private company, as well as judicial and government initiatives, to promote mediation and to persuade parties to use mediation.

Historically, mediation has not been governed by a separate piece of legislation, but has been developed through piecemeal judicial decisions in individual cases—an approach that results in a lack of clarity in certain areas, such as confidentiality. Mediation tends to be known to lawyers and the business community, but remains virtually unknown by the man in the street. Since mediation's introduction into the civil justice system in 1997, the judiciary has encouraged mediation, and reforms to the civil justice system have stimulated the use of mediation. Paradoxically, though, mediation is not used frequently. With the implementation in England and Wales of the Directive, mediation has been brought to the forefront by initiatives affecting the civil justice system, public bodies, charities, tax authorities, employment tribunals and individual business sectors.

ADR was introduced about 15 years ago. The Civil Procedure Act of 1997, c. 12, introduced the Civil Procedure Rules (CPR), which were intended to enable courts to deal with cases

[39] Information in this section is taken from Andrew Hildebrand's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor. In addition, sections from Andre Colvin, Victoria Wilson, John Sturrock, and Graham Boyack's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille, were used as supplemental material.

justly, manage cases actively, and require parties to help the courts do so - while encouraging the use of ADR. Although the CPR requires solicitors and judges to inform clients about, and promote the use of, ADR, many cases still enter the court system unnecessarily. These concerns recently led the Ministry of Justice (MOJ) to consider introducing 'a mechanism or step in the process to ensure that those attempts at resolution are made and that disputes only progress to a hearing when absolutely necessary'.

The Directive was implemented differently in the three UK jurisdictions (England and Wales, Scotland and Northern Ireland). In Wales, it was implemented only for civil and commercial cross-border disputes. It was implemented through two statutory instruments: the Cross-Border Mediation (EU Directive) Regulations ('the Cross-Border Regulations') and the Civil Procedure (Amendment) Rules ('the Civil Procedure Amendment Rules').

In both Scotland and Northern Ireland, it was implemented only in relation to cross-border mediation (as opposed to internal domestic mediation). In Scotland, the Directive was implemented through the Cross-Border Mediation (Scotland) Regulations 2011. This gave effect to Article 7 of the Directive (confidentiality of mediation and mediators) and set out draft amendments to extend limitation periods in a number of statutes (Directive, Article 8). The Regulations do not deal expressly with any other articles of the Directive. Also in Scotland, mediation case law does not apply; different rules govern obligations concerning disclosure, and various civil procedure rules have not extended to Scotland. Additionally, there are differences in the conduct and 'language' of court processes, and, while a successful party is generally entitled to recover costs, the method of assessment differs.

In Northern Ireland, the Directive was implemented through the 2011 Cross-Border Mediation Regulations (Northern Ireland) and the 2011 Rules of the Court of Judicature (Northern Ireland), (Amendment), ('the COJ Rules'). These gave effect the Directive's Article 7 and set out draft amendments to nine limitation periods in different statutes regarding the Directive, Article 8.

Subject Matters that are Mediated

The following are matters and dispute types that may be mediated in the UK: business, family, civil, commercial, cross-border, small claims and criminal justice disputes.

Confidentiality

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

Allegations regarding serious misconduct, like duress or fraud, are exceptions to the rule that participation in mediation is subject to a 'without prejudice' privilege. Another exception to the confidentiality rule came in the 2009 *Farm Assist No. 2* case, when a judge determined that evidence from a mediator can be admitted if the judge considers it to be 'in the interests of justice'. In response to the court's decision, the Civil Mediation Council (CMC) recommended 'tightening up' mediation agreement clauses to protect mediators from

being compelled to give evidence in further litigation or arbitration. Specifically, it recommended widening the ambit of the clauses so that instead of only applying 'in relation to the dispute', they also cover matters 'arising from or in connection with the dispute and the mediation'.

An area that has been unclear arises in relation to the 'without prejudice' privilege—a privilege enjoyed by the parties, and not by the mediator. Regulation 10(a) of the Cross-Border Regulations now clarifies that, at least for cross-border disputes, consent is required from all of the parties to admit evidence; however, this does not mean that a similar ruling would automatically apply in a civil domestic case. In the Consultation, the MOJ proposed similar cross-border provisions to give mediators, and mediator providers, greater protection from being compelled to give evidence in domestic civil disputes.

Another anomaly is in subject matter of a disclosure. Article 7 of the Directive refers to 'information arising out of or in connection with a mediation process;' but, instead of simply importing this wording, Regulation 10 of the Cross-Border Regulations refers to 'mediation evidence'. This distinction implies that matters such as admissibility and relevance should also be considered. There are concerns that a judge could decide that something constitutes 'mediation evidence' requiring disclosure, even though (a) it might be something that a party tells a mediator in confidence (in privacy), and (b) a mediation agreement may have been signed, prior to the mediation, by all of the parties (and mediator) expressly stating that information remains confidential and no disclosure.

Voluntary versus Mandatory

Mediation is the choice of the parties as a voluntary process. The only court-annexed mediation procedures in England and Wales are for certain appeals and for small claims disputes, of up to £10 000 in value (except for housing disrepair or personal injury claims, both of which stay at £1 000). Small claims claimants are referred to a mediation service before they proceed with their court claim. This does not mean that mediation is mandatory for these cases, but a mediator is contacted to establish whether mediation would be suitable for the case.

Aside from small claims, a court may stay a hearing to allow a party to negotiate in mediation, but it is not an order to mediate. When the court deems it appropriate the parties are merely encouraged to use ADR.

Mediation Information and Assessment Meetings ('MIAM')

Courts may provide short information hand-outs and mediation suitability questionnaires to the parties about mediation and the mediation process. Through the CPR, parties are supposed to be encouraged by the court to use an ADR procedure when the court considers it to be appropriate; however, the courts are generally reluctant to go further and compel mediation. In addition, in the family courts, all potential applicants in relevant family proceedings are generally expected, before making an application for a court order, to attend a MIAM to consider dispute resolution options, if invited by a mediator to do so.

Cost Incentives and Sanctions

A party who unreasonably refuses to mediate can face serious cost sanctions at the end of a trial. As a general rule in England and Wales, legal costs are awarded at trial in accordance with the principle that the 'loser pays'. This rule is subject to the court's discretion, and the court must take into account the conduct of the parties before the commencement of legal proceedings, and to any efforts made during those proceedings, to resolve a dispute. Where

a court decides that a party has unreasonably refused to engage in ADR, it can exercise its discretion and make adverse cost awards. The courts have developed guidelines indicating the sort of factors a court should take into account in making its determination, which includes the following: the nature of the dispute, the merits of the case, whether other settlement methods have been attempted, whether the costs of mediation would be disproportionately high, delay to trial if mediation is undertaken, and whether the mediation had a reasonable prospect of success. These guidelines were intended to help influence parties to choose to use mediation.

In October, 2013, the Court of Appeal extended the guidelines to 'send out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation'. It was also decided that 'the court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which...operates pour encourager les autres.'

As a result of this decision, if a party wishes to reject a request to participate in ADR, he or she should take the following suggestions into account:

a) Do not ignore an offer or request to engage in ADR;
b) Respond, promptly and in writing, and explain clearly and in full why ADR is not appropriate, taking into account the stage of the litigation;
c) If needed, approach the opposition to discuss any missing information or evidence that might pose problems in an alternative proceeding such as mediation, and consider how that problem might be remedied;
d) Do not completely reject any possibility of using ADR, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing.

The courts may go beyond imposing costs sanctions at the conclusion of litigation. For example, a court might prevent a party from bringing a claim if an offer of a full remedy for that claim has already been raised in an ADR proceeding, as happened in 2013 in the UK High Court in a case concerning the sale of an insurance product.

Court Referrals to Mediation

Although courts are to encourage parties to use ADR when appropriate, courts are generally reluctant to go further and compel an unwilling party to mediate, due to fear that doing so would violate a party's right of access to the courts under the European Convention on Human Rights. However, this argument seems misconceived. First, even if a judge were to compel a party to mediate, that would not mean that the party would also be compelled to settle at mediation. Second, because the mediation process is voluntary, and is conducted on a 'without prejudice' basis, the parties enjoy the 'privilege' of being able to explore the possibility of settlement without their communications subsequently becoming known to the court if they fail to reach agreement, or either party declines to settle. The case then returns to litigation, without adverse consequences. Imposing mediation would not replace a litigant's right to trial, but would merely offer the litigant an additional option.

The possible introduction in the county courts of a mandatory system for claims of up to £100 000 met with a strong adverse reaction from the judiciary in 2011, which felt that 'the essence of mediation is that it should be voluntary'. While the MOJ recognized that there was no immediate prospect of introducing any form of compulsory mediation for claims of up to £100 000, it was nevertheless hopeful that judges may be willing to make referrals more of a default position in small claims court.

The last couple of years have seen increasing attention, both in cases and in practice, paid to the problem of legal costs that are disproportionate for the parties who need relief. Courts have been increasingly willing to intervene more directly in these areas, and there is a general recognition that reform in this area is important. But it is hard to predict exactly what will happen.

Enforceability

Article 6 of the Directive requires each Member State to create a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. In England and Wales, this aspect was implemented for cross-border disputes through Schedule 2 of the Civil Procedure Amendment Rules. Rule 78.24 provides that, for existing proceedings, an application can be made in accordance with the existing Court Practice Rule 23. Where a dispute is cross-border, and there are no existing proceedings, a court application can now be made under rule 78.24 for a new type of order, called a mediation settlement enforcement order (MSEO). The settlement agreement is attached to the MSEO and the court will require evidence that each party has given its explicit consent to the application being sought.

Securing a MSEO enables a party to apply for judgment on an expedited basis if the other party breaches the settlement terms. Failure to include, or inability to obtain, a consent would prevent a party from obtaining a MSEO, but would not render a settlement agreement unenforceable. The enforcement-seeking party would need to sue on the settlement agreement itself, or on the original breach of the original contract. Under the Directive's Article 6.1, an order may not be issued if the content is contrary to the law of a Member State where the request is made, or where its law does not provide for its enforceability. In the Consultation, the MOJ has proposed adopting provisions similar to the cross-border provisions for the enforceability of written settlements in domestic civil and commercial disputes.

Training and Accreditation of Mediators

The state does not regulate mediation in England and Wales, nor does anyone professional body have overall control over accreditation. While there is no requirement for a mediator to be legally qualified, the mediation profession tends to be heavily populated by solicitors and barristers, many of whom were previously litigators, although relatively few have solid transactional experience. There is also no requirement for a mediator to be a member of a panel accredited by the CMC. That said, the CMC represents the interests of 80 mediation providers in civil, commercial and workplace mediation, and an estimated 6,000 mediators are accredited with these providers. The CMC provides an accreditation scheme for mediation providers, which the MOJ considers to be a mark of quality assurance and very much in line with the Directive's encouragement in its Article 4 for Member States to develop effective quality control mechanisms.

As of 11 January 2012, to gain accreditation, a mediation provider must have a panel of at least six trained civil, or commercial, mediators; require successful completion by its mediators of an assessed training course that includes training in ethics, mediation theory, mediation practice, negotiation and role play exercises; and ensure that if a mediator is not professionally qualified in a discipline that includes law, he or she can demonstrate a grasp of basic contract law before undertaking a civil or commercial mediation.

The provider must be satisfied that every mediator member has obtained an accreditation certificate from a recognized training establishment, indicating successful completion of a

recognized mediation training course and assessment. The course and assessment must include performance assessment and minimum hour training and role-play (previously 24 hours, but now 40 hours).

Providers must have a Code of Conduct for members to follow, no less rigorous than the 2004 ECCM, and must have a published complaint-handling procedure; keep written records of any complaints and follow through on them; and notify a complainant of any outcome within a specified timescale. Providers must have a feedback system, inviting assessments and reviews by mediation par- ties and their lawyers.

Mediators must have observed a certain number of civil or commercial mediations (three for new members, two for existing members) over the last 12 months, prior to accreditation (or re-accreditation), to ensure they have sufficient experience. Panel members are required annually to undertake at least six hours of mediation-specific continuing professional development training courses.

Providers must have in place at least £1 000 000 coverage to insure themselves against claims of negligently administering a mediation, and require member mediators to obtain and provide evidence of professional liability insurance coverage of not less than £1 000 000 (or higher levels where mediators are doing work involving greater sums).

Providers should have suitable and sufficient administrative arrangements, proportionate to the work and workload undertaken, and should have allocation systems ensuring the availability of an appropriately trained, experienced, and skilled mediator for each case taken on. Further, providers need to seek re-accreditation every 12 months.

The government has re-confirmed that the MOJ will continue to work with the CMC to strengthen its accreditation process and has hinted that accreditation may become compulsory for all civil and commercial mediators, to set clear standards of training and service. While the CMC currently has no jurisdiction over mediators who practice on their own account, or through the panel of a provider that does not seek CMC accreditation, this may, in time, also change. No additional legislation has been introduced in England and Wales, either for civil cross-border or domestic mediation, in response to Article 4 of the Directive regarding either voluntary codes of conduct by mediators and mediation provider organizations or additional training requirements.

Lawyers' Duty to Inform Clients

Solicitors are required, under the Civil Procedure Rules of the Civil Procedure Act of 1997, to inform clients about ADR early in the proceedings. The CPR requires the courts to actively manage cases, and the parties to assist the court in doing this, which places a duty on solicitors to inform clients about ADR processes.

Legal Assistance in Mediation

The presence of outside representation or counsel is allowed within mediations, but is not mandatory for the parties. In civil and commercial cases, it is usual for the parties to be represented. In family law, usually the only parties present will be the parties and the mediator, but the parties are entitled to seek legal advice if they wish to do so.

Lack of Electronic Mediation

Electronic mediation in England is rarely used as a form of ADR, except for small claims. For small claims, under the Consultation (published before Directive implementation in England and Wales), it has been estimated that over 10 000 small claims cases have been conducted with 96% done by telephone - which saves parties time and money of having to go to court. But other than for small claims, such forms of e-mediation are not frequently utilized currently.

Statistics

While there are no official statistics for the number of mediations that take place in England and Wales, or that record their success rates in settling disputes, there have been various informal studies.

According to a 2012 Mediation Audit conducted by the Centre for Effective Dispute Resolution (CEDR), 8,000 commercial and civil cases are now mediated annually, at a collective case value of £7.5 billion, 90% of which settled, either on the day (over 70%) or shortly after. The most 'important contributors to settlement were preparation (by clients, mediators and lawyers, in that order)'. CEDR also estimates that 'by achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession ... save(s) the British Economy around £2 billion a year in wasted management time, damaged relationships, lost productivity and legal fees'.

In their 2010 mediation count, the CMC reported that there were 7 628 mediations in 2010 (a 22% increase over its 2009 figures), 6 813 of which were civil and commercial cases. Additionally, the MOJ reported that, in 2010, over 75% of all civil court claims were settled before trial, which the Home Secretary, Kenneth Clarke, felt represented another '87,000 cases which could potentially have been resolved earlier if mediation had been used more widely'. If his calculations are correct, simply introducing MIAMs sessions might have led to a ten-fold increase in the number of cases being considered for mediation.

In 2012, Lord Justice Jackson cited research suggesting that through judicial encouragement of ADR, the number of commercial disputes referred to mediation in England and Wales had increased by 141%.

In a recent European study comparing relative costs and time involved as between mediation and litigation, the assessment for England and Wales showed that litigation worth €200 000 takes around 333 days to solve via the courts, and costs an average of €51 000, while mediation only takes around 87 days and costs roughly €9 000.68

The study also calculated how low, in percentage terms, success rates could be for mediations and yet still yield time and cost savings as compared to litigation. The study predicted that, across the EU, in terms of time savings, only a 19% success rate would be needed, or 24%, in terms of cost savings. This figure compares closely to the UK National Audit office's own research. This research showed that the average cost, per legal aid client, of mediation is £535, as compared to £2 823 for cases going to court. The audit also revealed that the average time for a mediated case to be completed was 110 days, as compared to 435 days for court cases on similar issues.

3.1.2. Country Analyses

Below are the analyses of the mediation legislation in the other seventeen EU Member States in alphabetical order (Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Spain and Sweden).

Belgium[40]

Mediation Legislation

In Belgium, federal law governs judicial organization, and its rules of civil procedure ultimately govern mediation procedures. Therefore, mediation procedure does not differ based on the region in which the mediation is located or organized.

Currently, mediation procedure is codified in one of the chapters of the general Code of Civil Procedure, called the *Code judiciaire/Gerechtelijk Wetboek* ('*Code judiciaire*'). The provisions on mediation were formally enacted on 21 February 2005, and they entered into force on 30 September 2005 as an amendment to the *Code judiciaire*. The amendment broadened the scope of mediation from family disputes to mediation in all types of civil and commercial actions. The 2005 amendment applies to mediation performed at any stage in the proceedings, except proceedings before the Belgian Supreme Court (*Cour de cassation*), which generally concern only matters of law, and proceedings before the *Tribunal d'arrondissement*, which concern only jurisdictional matters. In general, parties may enter into an agreement to mediate before, during, or after a judicial dispute. The parties decide among themselves who the mediator will be or appoint a third party (e.g., an institute) to choose the mediator.

For multiple reasons, Belgium has not formally implemented the Directive. The government has been experiencing a prolonged crisis which has affected the ability of the Parliament to focus on such matters. In addition, at the time the Member States were encouraged to begin transposition, similar legislation had already been enacted in Belgium. As a result, the Belgian Government gave the European Commission formal notification that no implementation of the Directive was needed.

Although the Directive has not been implemented by Belgium's legislature, its legislation concerning mediation is generally compatible with the Directive. In fact, there are no provisions of the law which are incompatible with it. Following the enactment of the Directive, legislative proposals were made in an effort to strengthen the current mediation procedures in Belgium. But it is uncertain if and when such proposals will be adopted.

Court Referral to Mediation (judicial mediation—*médiation judiciaire*)

According to the *Code judiciaire*, the courts may refer disputes to mediation at any stage of judicial proceedings. The option for mediation referral continues until the final arguments have concluded. Referral may result from the parties' request or from judicial referral with the parties' consent. Thus, mediation is exclusively a voluntary procedure, even when the judge refers the parties.

[40] Information in this section is taken from Ivan Verougstraete's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Luc Demeyere's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Ivan Verougstraete who provided assistance by reviewing the information in this country analysis.

Even before judicial proceedings begin, the parties may present a demand for a referral by submitting a letter to the clerk of the court. If both parties so demand, orders to prepare for trial are suspended, and the clerk formally notifies the parties and their lawyers of the suspension. Once judicial proceedings begin, the parties may present the mediation demand directly to the presiding judge. When the parties are referred, the judge will appoint an accredited mediator unless the parties request an unaccredited mediator. The judge must comply with the parties' request for an unaccredited mediator unless the mediator lacks the skills required to conduct mediation. The judge also designates the amount of time the parties will have to find a solution, up to a maximum of three months, and the date for the resumption of court proceedings if the mediation is unsuccessful.

Confidentiality

In Belgium, confidentiality is one of the most important and attractive aspects of mediation. Under Article 1728 of the *Code judiciaire*, documents created for the mediation process and statements made during and for a mediation are confidential and privileged. These materials may not be referred to or admitted as evidence in other proceedings, such as judicial, administrative and arbitration proceedings. The only exception to this rule occurs when disclosure is necessary for a court's implementation or enforcement of a mediation agreement. Such disclosure requires the consent of the parties.

Article 1728 of the *Code judiciaire* further preserves confidentiality by providing that the mediator and the parties involved in the mediation process, including witnesses and experts, may not be compelled to testify in civil and administrative proceedings about information obtained during the mediation process. Article 1728 also states that parties have a duty to maintain confidentiality even if explicit confidentiality agreements have not been created. A violation of this duty may lead to liability in tort. Any agreements made by the parties concerning the duty of confidentiality will, *a fortiori*, be upheld by the judge.

Enforcement of Mediation Agreements

In Belgium, most settlement agreements are enforceable as a contract. They can be invalidated by typical contract defences such as unconscionability, mistake, fraud and duress. Settlement agreements may also be incorporated into court decrees, meaning that there will be a level of judicial oversight before they are made enforceable.

Under Belgian law, enforcement rules differ depending on whether the mediation is voluntary or judicial. An agreement that results from a successful voluntary mediation may be ratified by a court, provided the agreement has been reached under the supervision of an accredited mediator. The agreement must be submitted to a judge who has jurisdiction over that type of dispute. A ratified (enforced) agreement has the legal authority of a judgment. The rules for enforcement of a settlement agreement are even simpler for judicial mediation. If the mediation is partially or totally successful, the parties (or even just one of the parties) may simply ask that the judge who ordered the mediation at the outset ratify the agreement. Only agreements that go against the fundamental rules of the Belgian State will be deemed unenforceable by a judge. If the agreement is not a full agreement, in that it does not resolve all issues in the dispute, normal court proceedings are resumed to address the remaining issues.

Impact on Statutes of Limitations

Under Belgian law, even one party proposing mediation has a temporary tolling effect. If the proposal is formally made through a registered letter, it has the effect of a formal notice, which means that a response is due from the moment the notification is received. According

to Article 1730 of the *Code judiciaire*, a proposal made by registered letter initially suspends the statute of limitations for one month, beginning from the presumed time of receipt of the letter. If such a proposal is made and agreed to, then, according to Article 1731(3), writing the mediation protocol tolls the statute of limitations for as long as the mediation continues. It is generally believed that the end of the mediation is the moment the parties receive notification to this effect as determined by the arrival date of a registered letter. The suspension of the statute of limitations ends one month after notification of the end of the mediation either by the mediator or by one of the parties, so long as the parties have not reached an agreement to the contrary.

The Belgian approach to tolling the statute of limitations is compatible with the Directive and the aims of the European legislature. The already-existing Belgian provisions ensure that the statute of limitations for a judicial action will be tolled while the parties pursue mediation. Therefore, no further implementation of the Directive is required in this area.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

In Belgium, parties are not required to consider mediation as an option, and lawyers are not bound by a clear ethical norm to inform their clients about the possibility of mediation. But there is an on-going effort to provide parties with as much information about mediation as possible. In cooperation with the Official Mediation Commission, the Ministry of Justice provides significant information about mediation procedures via the internet. In addition, many courts and bar associations make information about mediators and mediation organizations available.

Requirements for Parties to Participate in Mediation

There are no general mandatory mediation requirements in Belgium, and therefore mediation is always voluntary. Belgian law distinguishes between voluntary mediation and court-annexed mediation, and it does not preclude the existence of a third category, not provided for in the statute, which may be described as ad hoc mediation. Even in court-annexed mediation, however, the court may not order mediation without the parties' consent.

Accreditation Requirements for Mediators

The 2005 legislation that amended the Code of Civil Procedure to include mediation provisions also created a federal commission. The commission has, as an essential duty, the power to accredit mediators or to grant accreditation to organizations that offer training sessions to aspiring mediators. This commission is charged with defining the criteria for accreditation according to the type of mediation, and establishing a code of conduct.

Belgian legislation lists a few fundamental requirements for accredited mediators (Article 1726, *Code judiciaire*): candidates must demonstrate sufficient professional experience to establish expertise in their field and to show that they have accumulated enough relevant experience for the practice of mediation; they must provide guarantees of their independence and impartiality; they must not have been condemned for a crime that would make them unfit to be a mediator; and they should not have been subject to disciplinary or administrative sanctions incompatible with the function of a mediator. Mediators must also fulfil continuing education requirements; basic mediator training in Belgium requires about 40 hours. These 40 hours must be followed by about 60 hours of training in the chosen specialization.

Accreditation is not required, however, to practice as a mediator. For example, as noted above, the court may appoint a non-accredited mediator in court-annexed mediation at the request of the parties.

Mediator Duties

The *Code judiciaire* does not explicitly define the duties of a mediator. The yardstick of a mediator's performance, therefore, is the performance of a similar task, in the same circumstances, by another mediator.

In practice, a mediator is entrusted as a general matter with various duties. These duties may include such items as signing a declaration of impartiality according to the guidelines of the mediation body and in accordance with the law, informing the mediation body and the parties if there is any likelihood of partiality, and replying promptly to each request for mediation. A mediator appointed in a judicial mediation has an additional duty to make a short report to the judge stating whether there was a final agreement. In such a case, the mediator would be liable in tort for any misrepresentation of the factual situation at hand or for divulging confidential information.

Duties of Legal Representative and Other Professional Mediation Participants

In Belgium, the presence of, and party representation by, counsel is allowed during mediation sessions. However, it is not mandatory. Legal representatives and other mediation participants are bound by the same duty of confidentiality as the mediator or the parties themselves.

Court-Annexed Mediation Programs

There is no specific court-annexed mediation program in Belgium. But there is significant activity, at all levels of the judiciary, with respect to court settlements: many judges see assisting the parties in resolving their dispute as one of their main obligations. The *juges de paix* actively engage in settlement activity and are not reluctant to suggest reasonable solutions to the litigants. A few commercial courts are also very actively involved in conciliation and, in rare instances, will refer cases to mediation.

Croatia[41]

Mediation Legislation

Croatian mediation is a development of recent history. The first steps in the mediation field were taken by a large Croatian company, the Končar Group, in early 2000, when the group began using mediation as a way to resolve internal disputes. A few years later, in June 2003, the first 100 mediators completed basic training, provided by U.S. experts, for mediating commercial disputes. The use of mediation continued, and on 19 September 2003, the Croatian Mediation Association was founded. Since that time, it has had a significant role in mediation promotion, education and international cooperation.

As mediation practice expanded, legislation followed. In October 2003, Croatia adopted the Law on Mediation. In 2004, the Croatian Parliament adopted the Strategy of Development of Alternative Dispute Resolution. The strategy contained three developmental phases to be implemented between 2006 and 2012. With these two major initiatives, Croatia had created

[41] Information in this section was provided by Srdan Simac, Judge of the High Commercial Court of the Republic of Croatia.

a new legal framework for mediation, and the Government had expressed general acceptance of ADR.

In 2006, the courts and judges began promoting the use of mediation. The promotion began in the Commercial Court in Zagreb, and then continued in eight municipal courts. At the end of 2007, a mediation program was created at the High Commercial Court of the Republic of Croatia. Mediation then spread to five other commercial courts. Despite significant obstacles to the development of mediation in courts, the efforts of the courts proved positive, and in October 2008, Croatia adopted a new Law on Civil Procedure, which formally allowed the possibility for implementation of mediation in all courts. These years saw enthusiasm about mediation and the most fruitful period of mediation development in Croatia.

In the years since the enactment of the 2008 legislation, however, progress has slowed. Courts with mediation programs lost their capacities to mediate, and mediation did not spread to other courts. The number of mediated cases has been very small.

Despite this lag in development, different groups have continued to promote mediation. The Croatian Bar Association, for example, organized a historical mediation conference for lawyers, *Negotiation and Mediation - A Threat or a Business Niche for Lawyers,* on 1 June 2009. In addition, the Ministry of Justice created two educational videos, one twenty-five minutes long and one thirty seconds long, which have been shown on all television stations, and an audio clip, which has been played on all radio stations, in order to promote mediation. In 2008, the Ministry of Justice also initiated a project to create a self-standing mediation system in and outside of courts. The project ended in 2009 but has proved to be of great importance for the future of mediation in Croatia.

Recent years have seen continuing legislative promotion of mediation as well. In June 2009, Croatia adopted a new Law on Mediation and Strategy of Developing Mediation in Civil and Commercial Cases. Then, on 9 February 2011, Croatia adopted a new law on mediation in order to transpose the Directive for cross-border disputes.

Currently, the Ministry of Justice is making preparations to change some laws in order to further encourage the development of mediation in Croatia.

Court Referral to Mediation (judicial mediation—*médiation judiciaire*)

According to the 2008 Law on Civil Procedure, all Croatian courts may organize mediation programs, and judges may refer cases to mediation within their courts or to outside mediation centres. Mediation is voluntary. Therefore, judges cannot make mediation mandatory for parties, and there are no consequences for those parties who refuse a mediation referral.

Confidentiality

Confidentiality is one of the most important and attractive aspects of mediation: it is required by the 2008 Law on Mediation. A violation of the duty to preserve confidentiality raises the possibility of liability in tort. Any agreements made by the parties concerning the duty of confidentiality will, *a fortiori*, be upheld by the judge.

Enforcement of Mediation Agreements

The Croatian Law on Mediation contains a provision stating that all agreements made in mediation which contain a private enforcement clause are enforceable at law. Interestingly,

several courts and financial institutions have complained about the provision, and these bodies have caused some difficulty in the enforceability of some mediation agreements. Parties who reach an agreement for mediation do, however, have an alternative. They can enter into their mediation agreements with the help of an arbitrator (arbitration verdict under the settlement), public notary, or court.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

In Croatia, lawyers and judges are required to inform parties of the option to mediate. However, there are no mechanisms in place to ensure that they do so, nor are there sanctions for attorneys who fail to do so. Information about mediation is available through additional sources. The Ministry of Justice provides information via the internet about mediation procedures, and some courts, bar associations and mediation institutions make information about mediation organizations and mediators available.

Requirements for Parties to Participate in Mediation

Aside from the mandates concerning certain labour disputes, there are no general mandatory mediation requirements.

Accreditation Requirements for Mediators

In Croatia, the Ministry of Justice regulates the registry of mediators, including the Rule Book of standards for accreditation. The Rule Book contains provisions regarding who can be registered mediators, and which mediation institutions can be accredited for mediation education. Mediators are required to participate in 40 hours of training before being registered, and each registered mediator must participate in 20 hours of training every two years. However, there is no requirement for mediators to become registered in order to practice.

Mediator Duties

The National Mediation Code of Ethics and the codes of ethics of various mediation institutions in Croatia require mediators to meet certain duties. However, there are no disciplinary bodies which deal with violations of these codes.

Duties of Legal Representative and Other Professional Mediation Participants

In Croatia, the presence and participation of outside counsel are allowed during mediation sessions but are not mandatory. Legal representatives and other mediation participants are bound by the same duty of confidentiality as the mediator or the parties themselves.

Court-Annexed Mediation Programs

There is no such formal program in Croatia. Only one court refers cases to mediation by an outside court mediation centre.

Cyprus[42]

Mediation Legislation

In 2012, the 'Certain Aspects of Mediation in Civil Matters' Law 159(1)/2012 (the '2012 Law') was enacted to transpose the EU Mediation Directive into Cyprus's national law. The 2012 Law applies to all civil and commercial cases, both cross-border and domestic, and expectations are that mediation will be more widely used following its enactment. The 2012 Law provides that a court may give disputing parties before it information regarding the use of mediation, and may invite the parties at any stage of the proceedings to use mediation to attempt to settle their dispute. The law also provides that the court may stay its proceedings to allow the parties to take part in mediation should they choose to do so.

Court Referral to Mediation (judicial mediation—*médiation judiciaire*)

In Cyprus, mediation is always voluntary. The 2012 Law states that only voluntary recourse to mediation is allowed. Courts cannot coerce parties into mediation. Their coercive power is limited to calling the parties to a 'directions' hearing, in order to be informed about the possibility of mediation.

Confidentiality

In Cyprus, the mediator and all other people involved in the mediation are bound by a duty of confidentiality. Evidence heard before the mediator cannot be used in judicial proceedings. In addition, the mediator is exempt from the obligation to give evidence in court or arbitral proceedings. Articles 23(1) and 24, for example, state that the mediator cannot be used in subsequent proceedings related to the dispute, although this rule is subject to limited exceptions.

Enforcement of Mediation Agreements

Settlement agreements are not automatically enforceable in Cyprus. However, a settlement agreement can be enforced through a joint application to a court with the consent of both parties. The court does have discretion to reject an application for enforcement if the settlement agreement is against the law or it cannot be enforced. If the settlement agreement states that all parties to it agree to its enforcement, then it is not necessary to obtain their consent when making the application.

Impact on Statutes of Limitations

In Cyprus, limitation and prescription periods are stayed during the pendency of the mediation.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

As stated above, the parties are required to consider, but cannot be obligated to, resort to mediation. Lawyers should inform their clients about the possibility of mediation (s.13(2)).

[42] Information in this section is taken from Agis Georgiades' contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor. Agis Georgiades also helped with the creation of this section.

Requirements for Parties to Participate in Mediation

In Cyprus, as previously stated, parties must consent to participate in mediation. Therefore, they may opt-out without consequences at any time.

Accreditation Requirements for Mediators

There is no requirement for mediators to be accredited. However, mediators are required to register with the Ministry of Justice and Public Order. In order to register, the mediator must participate in trainings. Mediators who are members of the Cyprus Chamber of Commerce and Industry and the Cyprus Scientific and Technical Chamber must attend 40 hours of training in order to be registered. Each registered mediator is then required to attend at least 24 CPD hours every 3 years. There is no specific requirement for a certain length of training for lawyers who have been accredited.

Mediator Duties

According to Section 10 of the 2012 Law, the mediator should act independently and impartially; should explain the nature of the process and his/her role to the parties; must provide to all parties equal opportunities to be heard; and must provide to the parties (if requested) details of his/her professional qualifications, and training and experience in mediation. A mediator cannot coerce the parties into settlement, but may make non-binding suggestions. He/she must be guided by the European Code of Conduct for Mediators.

Duties of Legal Representative and Other Professional Mediation Participants

There is no express reference to duties of legal representatives and other professional participants in Cyprus, except for the duty of confidentiality.

Court-Annexed Mediation Programs

There is no information available regarding court-annexed mediation programs in Cyprus.

Czech Republic[43]

Mediation Legislation

Until 2012, there was no tradition of mediation regulation in the Czech Republic. The Mediation Act was adopted by the Czech Parliament on 2 May 2012, and it became effective on 1 September 2012. This legislation is fully compatible with the EU Mediation Directive.

Before the 2012 Act, the law recognized only one alternative dispute resolution process: a conciliation procedure. There had been attempts to incorporate mediation into the Czech legal framework, but the proposals presented were not accepted by the legislature for further debate.

[43] Information in this section is taken from Bie Heyninck and Veronika Vanišová's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Bie Heyninck's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Ms. Bie Heyninck who provided assistance by reviewing the information in the country analysis.

Court Referral to Mediation (judicial mediation—*médiation judiciaire*)

Under current law, the Czech legislature has, through regulations in the Code of Civil Proceedings, endowed the courts with specific powers relating to ADR. However, none of these provisions includes referring parties to mediation. Instead, it is the practice of court-referred conciliation that is an integral part of ADR in the Czech Republic.

The amended Code of Civil Proceedings does introduce a role for a mediator, but it is not for the purpose of conducting mediation. According to amended paragraph 100 of the Code of Civil proceedings, the presiding judge in a court proceeding may, when practical and appropriate, order the parties to attend a three-hour introductory meeting with a registered mediator. The objective of the introductory meeting is solely to make the parties familiar with the process of mediation and its main advantages. After the prescribed three hours has lapsed, it is fully up to the parties whether they wish to engage in mediation. Further, although the court may refer the parties to the introductory meeting, no provision allows the court to force the parties to attend it. However, if a party refuses to participate in an introductory meeting, the court does have the power not to grant costs to that party.

Confidentiality

Under the 2012 Act, the mediator has a duty to maintain confidentiality. Paragraph 9 of the Act provides that '(1) the mediator shall keep confidential all facts which he learns in connection with the preparation and conduct of the mediation, even after his removal from the list.' Under paragraph 9(3) of the Act, however, a mediator may testify about a mediation in proceedings before a court or other authority 'if the subject of the litigation is a dispute between him and a party to the conflict or its legal representative, arising from his mediation activities and to the extent necessary for his defence in the exercise of supervision of a mediation or in disciplinary proceedings.'

With regard to the parties to the mediation, the Act provides that they may determine the extent of their duty of confidentiality in their agreement to mediate.

Enforcement of Mediation Agreements

No specific provision in the 2012 Act addresses the enforceability of a mediation agreement. However, the Act does list what a mediation agreement must include: the signatures of the parties and the mediator, and the date of closure.

A mediation agreement is not intended to be directly enforceable, as indicated in the legislation's Memorandum. Instead, the parties must choose one of two alternatives. They may seek court approval in the form of a conciliation agreement, although here are no rules about how that approval is to be sought. Alternatively, they may enter into an additional agreement about fulfilling any claims resulting from the mediation agreement. This additional agreement may be a notarial deed or an execution record with consent to enforceability, but no rules address specific requirements for such agreements.

Impact on Statutes of Limitations

In accordance with the Directive, parties who choose to mediate are not prevented from exercising their rights in legal or arbitration proceedings due to participation in the mediation process. Limitation periods are suspended when the parties enter into the contract on mediation.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

The 2012 Act does not impose requirements for the parties or lawyers to consider mediation. Czech law does, however, limit whether mediation may even be considered as a dispute resolution option based in part on the subject matter of the dispute. According to the Memorandum, the subject matter of mediation is restricted to non-criminal disputes; thus, it applies to disputes in civil law, commercial law, labour law, family law and administrative law matters. In the case of administrative law, mediation can be used only for disputes of a private nature where the parties have equal status. Similarly, in public law disputes where the parties have unequal status, mediation cannot be used.

Requirements for Parties to Participate in Mediation

Mediation in the Czech Republic is generally voluntary. While the court may refer parties to participate in an introductory meeting on mediation, as discussed above, it may not require the parties either to attend the meeting or to participate in mediation. Should the parties choose to mediate, paragraph 3(1) of the Act states that 'the mediation is commenced by the contract on mediation.' The contract on mediation is an agreement concluded between the mediator and the parties.

Accreditation Requirements for Mediators

The 2012 Act creates two groups of mediators: registered mediators, who are entered into a list maintained by the Ministry of Justice, and non-registered mediators. The Act only governs registered mediators and therefore only those mediators may conduct a mediation that will be governed by the provisions of the Act.

Paragraph 2(c) of the Act states that 'a mediator is a natural person who is registered in the list of mediators.' According to paragraph 16(1) of the Act, to be entered into the list by the Ministry, the applicant must be a natural person who has legal capacity; has a clean criminal record; holds a university degree in a master's or post-master's study programme in the Czech Republic, or who has received a similar higher education abroad if the international treaty by which the Czech Republic is bound recognizes this education or the education has been recognized by other regulations; has passed the mediator exam or has qualifications recognized by another legislative act; and was not removed from the list, in accordance with paragraph 4(22), in the five years preceding the application.

However, these particular registration requirements apply only to Czech citizens. A citizen of another EU Member State, or other natural person under the Act 18/2004 Coll. on Recognition of qualifications of nationals of another Member State, may conduct mediation in the Czech Republic as a guest mediator. The mediator must register as a guest on the list of mediators.

To be listed as a guest, mediators must, first, submit an application for registration that is the same as that submitted by Czech mediators, along with a request to be registered as a guest mediator. Guest mediators must also file with the Ministry of Justice a certified copy of a document confirming that they conduct, in accordance with the laws of another Member State, a practice comparable to that of a mediator. They must also submit an affidavit stating that their licence to conduct such a practice in the Member State has not been revoked or suspended. Upon submission of those documents the guest mediator is authorized to practice as a mediator in the Czech Republic.

Mediator Duties

In the Czech Republic, mediators have the duty to preserve the confidentiality of a mediation. They also must inform the parties about a variety of matters, including any suspension of the mediator's license to mediate or the mediator's removal from the list of mediators; that starting mediation does not affect the parties' rights to seek a resolution of their dispute through the courts; the nature of the mediator's role during mediation and the mediator's remuneration; the purpose, principles and costs of the mediation; the effects of the contract to mediate and the mediation agreement, if any; the possibility of ending the mediation at any time; and that the parties are solely responsible for the content of the mediation agreement. Mediators also have the duty to maintain impartiality and inform the parties immediately of all the facts 'from which, in view of the relationship to the issue, the parties to the conflict or their representatives, there may be reason to doubt [the mediator's] impartiality.'

If doubts arise before the mediation begins, the mediator must refuse to sign the contract to mediate with the parties. If the mediation has begun and such facts arise, the mediator must terminate the mediation. Additionally, the mediator cannot provide legal services in a conflict for which he is conducting or has conducted mediation or has taken preparatory steps for mediation. The breach of a mediator's duties may be treated as an offence or an administrative offence; it may also result in liability for damages.

Duties of Legal Representative and Other Professional Mediation Participants

Legal representatives and other professionals who participate in the mediation process are governed by the same duty of confidentiality that applies to the mediator. However, no other duties are imposed on those persons relating to their participation in mediation.

Court-Annexed Mediation Programs

There are currently no court-annexed mediation schemes in the Czech Republic.

Denmark[44]

Mediation Legislation

The Danish Administration of Justice Act ('the Justice Act') is the Danish legal code governing court procedure; it includes the formal provisions for how legal actions are to be administered. There is no law, separate from the Justice Act, governing mediation. Instead, Danish Legislative Decree No. 168 of 12 March 2008 ('the Decree') amended Chapter 27 of the Justice Act to include clauses covering mediation. The Justice Act only covers mediations that happen through the court system.

Due to the Danish opt-outs from the Maastricht Treaty concerning Justice and Home Affairs, Denmark is not bound by the Directive, as acknowledged in Section 30 of the Directive's Preamble. So far, Denmark has not complied with the Directive due to the opt-out. Nevertheless, Denmark has enacted legislation that, while it contains no reference to the Directive, conforms in virtually all respects to the provisions of the Directive. The Directive

[44] Information in this section is taken from Mogens Flagstad, Tina Monberg and Claus Kaare Pedersen's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Dr. Lin Adrian's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Mogens Flagstad who provided assistance by reviewing the information in the country analysis.

differs from Danish national laws only in that the Directive applies only to mediation in cross-border disputes.

Court Referral to Mediation (judicial mediation—*médiation judiciaire*)

In Denmark, mediation is completely voluntary. Under clause 271 of the Justice Act, to be eligible for mediation subject to the Justice Act, the dispute in question must be part of a case pending before a court. Thereafter, it is up to the parties to request mediation. The court's role is a passive one, without any obligation to implement the mediation process. In the first letter from the court to the lawyers of the claimant and defendant, however, the court will announce that mediation by the court is a possibility. Together with the letter the court will enclose an 'information memorandum', which can differ in form and content depending on the judicial district.

In the information memorandum, the court generally explains the Danish rules of court mediation. What happens after the receipt of the letter and information memorandum depends on the advice of the lawyers. After the request of the parties, or a request by a party that is not rejected, the judge will determine whether the case is suitable for mediation. If the judge refuses the request for mediation, the decision can be appealed as an interlocutory appeal.

Confidentiality

The rules regarding confidentiality can be found in Clauses 275 and 277 of the Justice Act. Confidentiality can be addressed by the parties and the mediator because they are the ones who create the mediation process, not the courts. Therefore, the parties and the mediator often enter into a mediation agreement dealing, among other issues, with confidentiality, secrecy and the duty to give evidence.

If the parties do not have a mediation agreement, the parties are covered by supplementary acts or rules from the Justice Act, Clause 277 provides: 'Information obtained during mediation is confidential unless the parties agree otherwise or the information is otherwise available to the public.' 'Information' in this context includes documents, unless the parties agree otherwise.

Only court-connected mediators are exempted in court proceedings or arbitration from the obligation to provide evidence and information revealed in the mediation.

Enforcement of Mediation Agreements

According to Danish law, a settlement agreement can be enforced by the courts on equal terms to those applying to any other written agreement. If it is an agreement made before the court, it is automatically enforceable, and it is recommended that the parties use this approach. An agreement made without the court's intervention has to be supplemented with an enforceability clause, but if the dispute is about money or other clearly defined terms, usually this approach raises no problems.

Impact on Statutes of Limitations

For court mediations, the mediations covered by the Justice Act, limitation periods are automatically suspended because mediation is not available until legal proceedings have started. However, in the case of non-court, private mediation, the parties must agree to a suspension of any applicable limitation period on a mutual basis.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

While the court may suggest that the parties consider mediation and will provide information about mediation to the parties and their attorneys, there is no obligation for the parties to consider mediation. Consequently, there are no sanctions if either or both of the parties refuse to consider mediation.

Requirements for Parties to Participate in Mediation

There is no obligation for the parties to participate in mediation, and no negative consequences for not doing so. In practice, though, it is generally recommended that, to secure an equal playing field, parties entering into an agreement should decide on the details of any eventual mediation that might occur and memorialize them in a contract.

Accreditation Requirements for Mediators

Clause 273 of the Justice Act determines whom the court can appoint as a mediator. Only people with a legal background, such as judges or lawyers, can be appointed as mediators. Mediators must have relevant education as mediators in addition to their legal training. The court itself decides which of the judges attached to the court can be mediators. The Danish Court Administration (Domstolsstyrelsen) selects the lawyers who can act as mediators. These lawyers can then be appointed by the court in question in a specific dispute. In order to act as a mediator, both judges and lawyers must have, at a minimum, an education authorized by either the Courts of Denmark or the Law Society.

Mediator Duties

Mediators under the Justice Act are to act neutrally in relation to the parties and in relation to the conflict. The mediator must inform the parties of the voluntary nature of mediation. The mediator has a duty of confidentiality with regard to all the information that is produced in the course of the mediation.

Duties of Legal Representative and Other Professional Mediation Participants

Legal representatives play an important role in the initial determination of whether to request court mediation. Beyond that, the Justice Act has no specific provisions regarding duties of non-mediator participants in mediation.

Court-Annexed Mediation Programs

There are currently no court-annexed mediation schemes in Denmark.

Estonia[45]

Mediation Legislation

Estonia was one of the first EU Member States to implement the EU rules on mediation in its national legislation. On 18 November 2009, the Estonian Parliament adopted the Conciliation Act in order to implement the Directive, and the law entered into force on 1

[45] Information in this section is taken from Carri Ginter's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Triinu Hiob's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Ms. Maria Pihlak who provided assistance by reviewing the information in the country analysis.

January 2010. Even though the Estonian Conciliation Act uses the term 'conciliation'—the term 'mediation' is neither defined nor used—'conciliation', as used in the Estonian legislation, essentially expresses the concept meant by 'mediation' in the Directive. The new Act supports the resolution of civil law disputes; therefore, it is intertwined with the area of civil law.

Court Referral to Mediation (judicial mediation—*médiation judiciaire*)

Under Estonian law, mediation is generally voluntary. However, Article 11 of the Conciliation Act directs that mediation may be a mandatory precondition to court proceedings when such a precondition is specifically stated in the law. In addition, once a court takes on a case, it will take all possible measures during its proceedings to settle the case, or at least a part of it, by an agreement of the parties reached through compromise or in another manner. For such a purpose, Article 4(4) of the Code of Civil Procedure states that the court may call upon the assistance of a mediator.

While there is no regulation compelling parties to mediate before court proceedings, encouragement by the court and legal representatives for disputing parties to use mediation is welcomed by the law. At the beginning of the judicial proceedings, the court can order the parties to mediate, but such discretion has hardly ever been exercised.

Confidentiality

Under the Conciliation Act, Article 4(2), the mediator must keep all information related to the mediation proceedings confidential, including information that has been revealed both during and outside the proceedings. Confidentiality protection is supported by procedural measures: a mediator testifying as a witness must not be interrogated on matters that relate to the information provided during the mediation. The Conciliation Act, Article 4(4), states that, in addition, the mediator cannot be ordered to give statements on such matters.

Confidentiality protection, while extensive, is not absolute. Under Article 4(5) of the Conciliation Act, a court may compel the mediator to disclose information in criminal, civil, or administrative proceedings where to do so is necessary for overriding considerations of public policy. In particular, the court will compel disclosure when it is necessary to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person. Unlike in some Member States, however, Estonia's law does not obligate the mediator to disclose information in circumstances where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Enforcement of Mediation Agreements

In Estonia, the requirements for enforcing a mediation agreement depend on who performs the role of mediator. If the mediation agreement is concluded by a notary or an attorney-at-law, the mediation agreement is enforceable if it is authorized by a county court. If the mediated agreement concerns a property claim, together with the debtor's obligation to consent to immediate enforcement, it will be authenticated by a notary at the request of the parties pursuant to the procedure provided in the Notarisation Act. A mediated agreement concerning a non-property claim, together with the debtor's obligation to consent to immediate enforcement, is to be authenticated by a notary only if the parties to the conciliation proceedings are in a position to make a compromise agreement concerning the subject matter of the dispute. The notary must verify whether the settlement agreement was concluded as a result of conciliation proceedings. The agreement becomes a writ of

execution immediately and is no longer subject to a court's approval. Such a possibility offers a speedier way for enforcing the agreement.

If the mediator is neither a notary nor an attorney-at-law, the agreement can be enforced only if the court has determined that the mediator's character ensures impartiality and independence. Therefore, as stated in the Code of Civil Procedure, Article 627^2(2) and (3), the court will conduct a formal hearing at which the parties and the mediator can be heard, the impartiality and neutrality of the mediator determined, and conformity of the agreement with the law and public morals confirmed.

Impact on Statutes of Limitations

Under Estonian law, a mediation procedure is recognized as a pre-trial proceeding. Mediation proceedings are equivalent to negotiations; therefore, provisions applicable to the statutes of limitation for negotiations also apply to mediation proceedings, and the limitation period is suspended when the mediation proceedings are commenced.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

Currently, no legislation requires parties to consider mediation as an alternative dispute resolution option, although it is highly recommended that lawyers, notaries and court personnel promote mediation proceedings.

Requirements for Parties to Participate in Mediation

Because mediation is based on voluntary participation, there are no specific requirements for parties to participate in mediation proceedings.

Accreditation Requirements for Mediators

In Estonia, there is no requirement for licensure to be a mediator. The duties of a mediator can be performed by a notary, an attorney-at-law, a neutral person, or a mediation organization. Notaries wishing to perform as mediators have to be accepted by the Chamber of Notaries, which registers a notary as a mediator after the receipt of a proper application. The Ministry of Justice is responsible for the surveillance of notaries performing as mediators.

Attorneys-at-law wishing to register as a mediator have to be accepted by the Bar Association after submitting an application. The list of attorneys-at-law registered as mediators is published on the website of the Bar Association. The Bar Association and the Minister of Justice supervise attorneys-at-law who are listed as mediators.

No special accreditation requirements are needed for natural persons wishing to perform as mediators.

Mediator Duties

The Conciliation Act specifies several mandatory duties of a mediator. Contractual liability results if they are violated. Mediators must be independent and impartial. They are prohibited from representing a party in a judicial proceeding that concerns the same dispute as that addressed in the mediation. They must also keep confidential all the information and documents that are discussed during the course of the proceeding. Finally, a mediator is

obligated to keep records of the mediation proceedings and maintain these records for at least five years.

Duties of Legal Representative and Other Professional Mediation Participants:

Estonian law does not establish any duties for legal representatives involved in mediation proceedings. Legal representatives must, however, be authorized by their client to participate. They can either accompany their client or attend the mediation meeting on the client's behalf.

Court-Annexed Mediation Programs

There are no court-annexed mediation schemes in Estonia.

Finland[46]

Mediation Legislation

Finland implemented the Directive through the Mediation Act on Court Mediation and Confirming Settlements in Courts ('the Mediation Act'). The Mediation Act, which entered into force 21 May 2011, constitutes the essential legislative framework for mediation in civil and commercial matters in Finland. Although the Directive applies only to cross-border disputes, Finland opted for a broader scope for the Mediation Act. Consequently, it covers, as a general rule, cross-border and domestic disputes alike. However, the Mediation Act is not applicable to settlement agreements resulting from mediations conducted abroad with no cross-border ties.

Court Referral to Mediation

In Finland, judges have a duty to explore the possibility that parties could settle a dispute. Since 2006, judges have acted as mediators in court mediation, as opposed to simply referring the parties to mediation by a mediator or other organization. Court mediation starts in two main ways: one of the parties files an application for mediation with the court before or during legal proceedings, or, if the proceedings are already pending, the court suggests mediation on its own initiative.

Once the parties have agreed to mediate in court, the court decides when mediation will start. The Mediation Act expressly allows the parties to request that a particular judge be their mediator. Such a request was not explicitly forbidden before the Mediation Act, but was not expressly allowed either. This new option is intended to enhance the attractiveness of court mediation as an alternative to court proceedings. If the case is already pending as a civil lawsuit, the request for a particular judge may be made informally during the preparatory hearings. However, parties are not entitled to obtain the particular judge they requested, nor may they appeal the decision concerning the appointment of the mediator-judge.

During the preparatory work on the Mediation Act, the Finnish Parliamentary Ombudsman criticized the suggestion that the Mediation Act allow the parties to request a particular judge to act as their mediator, stating that it might interfere with maintaining the

[46] Information in this section is taken from Petri Taivalkoski's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Antti Heikinheimo's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Petri Taivalkoski who provided assistance by reviewing the information in the country analysis.

independence and neutrality of the court or an individual judge. This concern did not ultimately prevail based on the reason that, while the concern is fully relevant in the adjudication context, it is hardly a major one in mediation: in that context the judge acts in a purely facilitative role while the parties seek to reach an agreement. Thus, the possibility that the parties may request and receive a particular judge as the mediator in their case is a clear improvement to the law.

The appointment of the mediator takes effect when the mediation begins, and the mediator must be a judge of the appointing court. The mediator-judge may use an assistant where needed, as provided in Section 5 of the Mediation Act. In matters requiring specific expertise, for example, the mediator-judge may wish to be aided by an assistant who has the relevant expertise. The Mediation Act specifies that the cost of this assistance will be borne by the parties. Accordingly, parties need to consent to the assistant's appointment.

Confidentiality

In Finland, out-of-court mediation - for example, mediation conducted in accordance with the Mediation Rules of the Finnish Bar Association (FBA) - is, as a rule, confidential. In contrast, the confidentiality of court mediation has long been a controversial issue. Under the Mediation Act as it now stands, court mediation proceedings are presumptively public.

Despite the presumptive publicity of court mediation, the Mediation Act does include provisions protecting the mediator's duty of confidentiality. The Mediation Act provides that neither the mediator nor an assistant may reveal anything learned regarding the mediated matter, unless the person benefitting from the confidentiality obligation consents to disclosure or disclosure is otherwise directed by law. To further protect the mediator's duty of confidentiality, a new provision was inserted in Chapter 17, Section 23 of the Finnish Code of Judicial Procedure, which now states that the mediator or mediator's assistant may not testify about knowledge gained in the course of the mediated matter, unless important reasons require questioning in the matter, or the person protected by the duty consents.

In the case of mediation taking place out-of-court under the Mediation Rules of the FBA, members of the bar have a duty of secrecy and confidentiality. Consequently, the mediator must keep all matters relating to the mediation confidential. In addition, the parties themselves must keep the mediation process confidential under the FBA. In practice, the parties are not permitted to disclose any offers made for the purpose of reaching settlement during the mediation, any admissions of the other party, or any opinions expressed by the mediator during the mediation.

Enforcement of Mediation Agreements

When the parties settle their dispute through mediation, they can have their settlement agreement enforced irrespective of whether the mediation was conducted in or out of court. A settlement reached in court mediation can be confirmed, upon the request of the parties, as the court's formal decision and is therefore enforceable. When an out-of-court settlement agreement is confirmed by the court, it also becomes enforceable. Therefore, a settlement reached in mediation under the Mediation Rules of the Bar Association can now be confirmed and enforced accordingly. Certain provisions of the Mediation Act limit the enforceability of either type of agreement if it is against the law, unfair, or breaches the rights of a third party. In addition, under the Mediation Act, enforceability of a mediated settlement agreement requires that the mediator have been trained in mediation.

Impact of Mediation on Statutes of Limitations

Under the Mediation Act, the running of the period of limitations is suspended once the mediation has officially started. In court mediation, the relevant point in time is when the court decides upon the commencement of mediation—mere delivery of documents to the district court does not trigger the suspension. In out-of-court mediation, the agreement between the parties and the mediator resulting in the commencement of the mediation has the same effect. The suspension then lasts as long as the proceedings continue. On the day the mediation proceedings conclude, the suspension of the limitation period ends.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

Disputing parties do not have a duty to consider mediation prior to litigation. But their counsel are required by the Bar Association's Code of Conduct to assess whether the dispute could be settled or resolved by use of ADR by considering a range of aspects, from economics to the emotional impact on the client. Further, in the preliminary hearing at the start of judicial proceedings, the judge has a duty to explore whether there is a possibility that the parties could settle their dispute.

Requirements for Parties to Participate in Mediation

Under Finnish law, there are no requirements for parties to participate in mediation. Because mediation is voluntary, the parties must agree on mediation whether it is undertaken in or out of court.

Accreditation Requirements for Mediators

Judges who act as mediators must undertake the mediation training provided by the Ministry of Justice. The purpose of the training is to guarantee the quality of the mediation, and to ensure that the mediation is 'efficient, unbiased and skilled'. The training is based on the philosophy of facilitative mediation. The Bar Association's training is based on the same philosophy and developed by the same specialists who develop the training for judges, and it is designed to give practical skills to advocates acting as mediators.

Mediator Duties

The mediator's primary duty is to facilitate the communication between the parties. The judge-mediator or advocate-mediator, as the case may be, is responsible for creating a framework for the staged process within which negotiations can take place.

In court mediation, the Mediation Act explicitly imposes certain core duties on judge-mediators. They cannot participate in legal proceedings addressing the same matter as that in the mediation proceedings, and they have a duty of impartiality and confidentiality. The judge-mediator's role is to manage the mediation so that the parties themselves find the solution and terms of their settlement, but the judge-mediator is allowed to suggest a settlement agreement at the request or with the consent of the parties.

The advocate-mediator is forbidden from assisting either party in subsequent legal proceedings. An advocate who has an existing conflict of interest with one of the parties cannot accept a nomination as mediator in the first place. Further, the advocate-mediator has a duty to facilitate, effectively and expediently, the amicable settlement of the disputed issues. As a facilitator, the advocate-mediator is clearly not an adviser of any of the parties, and must treat the parties equally. The advocate-mediator must refrain from giving legal

advice to the parties, let alone making arguments in favour of either party. It is of the utmost importance that the advocate-mediator is aware of this role, and the training of the Bar Association takes this into account by arranging multiple practical exercises in addition to discussing the theory.

Duties of Legal Representatives and Other Professional Mediation Participants

The legal representatives in mediation are bound by all of the same professional requirements as in court representation in general.

Court-Annexed Mediation Programs

As already discussed, the Mediation Act establishes the possibility for court-annexed mediation. It enables judges to be directly involved in mediation procedures, as opposed to simply referring parties to mediation by a mediator or other organization, and it regulates the manner in which the mediation procedure should be carried out in court.

Hungary[47]

Mediation Legislation

In July 2009 July a complex act came into force that modified many acts in connection with the justice system and implemented the EU Directive. The basic rules of mediation however, are set out in Act No LV of 2002 on mediation ('the Mediation Act'). The Mediation Act govern the registration, operation and supervision of mediators, as well as the main principles and legal nature of mediation procedures. It applies to all kinds of civil and commercial disputes, irrespective of whether they are considered cross-border disputes, provided that the parties have the free ability under the law to resolve a dispute of the type in question. The Mediation Act therefore does not apply to controversies such as disputes as to parentage and parental custody disputes.

In addition to the Mediation Act, there are a number of specific regulations applicable to the activity of mediators. Decree No. 3 of 2003 (III.13) of the Minister of Justice governs the roll of mediators ('Registration Decree'), including the administrative proceedings for applying to be registered on the official roll of mediators. The Decree No. 3 of 2006 (I. 26) of the Minister of Justice governs the administrative fee payable for registration on the role of mediators ('Registration Fee Decree'). In addition, the Decree No. 63 of 2009 (XII.17) of the Minister of Justice and Law Enforcement, governs the professional qualification and training of mediators ('Qualification and Training Decree') and sets out detailed requirements for the professional education and training of mediators. The detailed rules of court mediation are set out in Order No. 20 of 2012 (XI.23.) of the National Judiciary Office.

Beyond the foregoing laws and regulations specifically concerning mediation, there are provisions affecting mediation in the Civil Procedure Code as well as in Act No. LIII of 1994 on judicial enforcement ('the Enforcement Act'), Act No. I of 2012 on the Labour Code ('the Labour Code'), Act No. IV of 1959 on the Civil Code ('the Civil Code') as well as Act No. V of 2013 on the Civil Code ('the New Civil Code').

[47] Information from this section is taken from Zsolt Okányi and Gergely László's contributions to *EU Mediation Law and Practice*, edited by Professor Giuseppe De Palo and Professor Mary B. Trevor and also from Manuela Grosu's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille.

In the field of civil and commercial dispute resolution the use of professional mediation has yet to increase, though a number of institutions now include mediation among their services. One example is the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry 4 ('MKIK Arbitration Court'), which provides mediation services in commercial disputes. There are also several individual mediators acting in other fields (e.g., labor or family law disputes).

Court Referral to Mediation

In Hungarian law, the Civil Procedure Code provides that: 'The court—if there is a chance for its success, particularly if it is requested by a party—informs the parties about the main features of mediation, the possibility of its application and also the related rules governing the recess of the proceedings.' The Code thereby provides the legal framework for advising the parties about mediation at any stage of the litigation proceedings. Moreover, courts recently offer to litigant parties the services of dedicated court officers, who are trained mediators supervised by the court and the National Judiciary Office.

Confidentiality

Under Hungarian law, the confidentiality of mediation processes is ensured by Section 26 of the Mediation Act, which provides that unless otherwise provided by law, mediators must keep any and all facts and data obtained in relation to their mediator activity in confidentiality. In addition, it provides that mediators shall remain bound by this confidentiality obligation even after the expiration of the mediation.

With regard to mediators' confidentiality obligations vis-a-vis the parties, Section 32(4) of the Mediation Act provides that mediators may disclose to a party the information provided by the other party, unless the party providing the information explicitly requests that the information not be disclosed at all.

Enforcement of Mediation Agreements

The Mediation Act contains provisions related to the drawing up, correction and safeguarding of written agreements, but it does not address their enforceability. Nevertheless, if the parties wish to make their agreement enforceable, they are free to choose from among the options generally available for parties who wish to obtain an enforcement of an agreement.

Impact on Statutes of Limitations

The Mediation Act provides that the commencement of mediation disrupts the running of the prescription period. In other words, the calculation of the five-year statute of limitations restarts on the commencement date of the mediation, if the mediation is successful. Moreover, since there are also special limitation periods (prescribed either by law or contract) significantly shorter than five years and a mediation may last even longer than such periods, the Mediation Act also provides that successful termination of the mediation process (the signing date of the settlement agreement) also disrupts the run of the prescription period.

Under the Mediation Act, a mediation is deemed to be commenced when, at the first conciliation meeting, the parties sign a joint statement that they intend to pursue negotiations and agree on how the costs will be borne and what rules of confidentiality will apply. However, if the mediation process is not successful and no agreement is achieved, the prescription time is not considered to have been disrupted by the commencement of the

mediation. Nevertheless, the Mediation Act provides that the duration of the mediation is deemed a period in which the parties were unable to enforce their claims. Hence, they will have an additional one year (or three months, if the original prescription period did not exceed one year) period to initiate litigation or arbitration, even if the original prescription period has expired or less than one year (or three months) is left.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

There are no statutory requirements under Hungarian law for disputing parties and lawyers to consider mediation, but parties involved in various types of disputes are informed about the possibility of using mediation.

Requirements for Parties to Participate in Mediation

There are no statutory requirements under Hungarian law for disputing parties and lawyers to participate in mediation.

Accreditation requirements for mediators

Pursuant to Section 5(1) of the Mediation Act, an individual will be registered as a mediator if that person has obtained a degree in higher education (at least a BSc/BA or higher degree) and has at least five years of certified professional experience in the degree field subsequent to obtaining the degree. In addition, mediators must verify that they have obtained the three-year professional training prescribed in the Qualification and Training Decree. A mediator must have a clear criminal record and is not banned by court judgment from pursuing mediation. Lastly, a mediator must not be under partial or total guardianship and must have full legal capacity.

The professional requirements set out in the Qualification and Training Decree were adopted in late 2009. According to these requirements, applicants must attend 60 45-minute training sessions comprised of theoretical lectures (conflict-theory, psychology, bargaining theory, legal framework, methodology, etc.). In addition, applicants must also gain experience in the practice of mediation, either by mediating a simulated dispute (until a settlement agreement is reached) or by analyzing a mediated negotiation. In addition to the initial trainings, registered mediators must also regularly attend further mediation trainings in order to enhance and develop their professional skills.

Mediator Duties

In addition to confidentiality duties and training requirements, Section 3 of the Mediation Act in general, provides that mediators must act impartially, conscientiously, and according to their best knowledge. More specifically, it provides as follows:

a) mediators must respond within eight days to any written request for mediation;
b) in the beginning of the mediation process, mediators must inform the parties about any condition that could qualify as a conflict of interest (e.g., former representation of any party, or an employment or shareholder relationship that might influence the conduct of the mediation);
c) the mediator must also provide general information to the parties about the nature of mediation, the expected duration and costs, and the stages of the process;
d) the mediator must ensure that both parties receive equal treatment and have the opportunity to present their case;
e) at the end of a successful mediation, the mediator must put the agreement in writing;

f) the mediator must keep the documents from the mediation safe for ten years following the termination of the process.

Duties of legal representatives and other professional mediation participants

Based on Section 25(3) of the Mediation Act, unless the parties agree otherwise, a person involved in a mediation as mediator, legal representative of any party or expert witness may not, in any subsequent proceedings related to the subject matter of the mediated dispute, act as a legal representative, arbitrator or expert witness. This rule effectively excludes any overlap between the third party participants in a mediation and those in any subsequent legal proceedings.

Court-Annexed Mediation Programs

Courts are generally entitled to invite the parties to mediation or even to mediate the case themselves. Recently, the Mediation Act has been amended with new rules on "court mediation". However, such scheme merely qualifies as a specific sort of out-of-court mediation, where the mediator is a court officer who is trained for mediation. Therefore, Hungarian procedural laws still do not provide for any real interface between court proceedings and out-of-court mediation and it is not possible to involve an independent mediator (i.e., one who is not the judge in charge) in the proceeding. Litigants intending to reach an amicable solution via mediation must ask the court to stay the proceedings.

Ireland[48]

Mediation Legislation

Ireland implemented the Directive through the European Communities (Mediation) Regulations 2011 ('Mediation Regulations'). Further, the Law Reform Commission of Ireland (LRC) has developed a Draft Mediation and Conciliation Bill which sets out 108 final recommendations for legislation about mediation and conciliation. Another bill that resulted substantially from the LRC's work over the last four years, the Draft General Scheme of Mediation Bill 2012 (Draft Bill), was approved by the Irish government in March 2012; however, it does not include a number of substantial LRC amendments.

Court Referral to Mediation

Though not compulsory, mediation is encouraged in Ireland's court system. Court-based mediation may take place after parties have commenced litigation proceedings, or, by consent of the parties, the judge may refer them to such an outside mediation process and adjourn the proceedings pending the determination of such process.

Protections Provided to Ensure Confidentiality of Mediation Proceedings

In Ireland, the regulation for cross-border mediations states that 'a mediator or a person involved in the administration of a mediation shall not be compelled to give evidence in civil or commercial proceedings or an arbitration relating to a matter arising out of or connected with a mediation'. While this regulation appears to provide broad protection, Mediation

[48] Information in this section is taken from Nicola White's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from James Gilhooly's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Ms. Nicola White who provided assistance by reviewing the information in the country analysis.

Regulation 4(2) establishes a number of exceptions to this rule. In addition, Mediation Regulation 4(3), in line with the Directive, provides that 'where the parties to a mediation so consent in writing, a mediator or person involved in the administration of a mediation may give evidence in civil or commercial proceedings or an arbitration relating to a matter arising out of or connected to that mediation'. Statutory protection for confidentiality in mediation proceedings is very likely in pending legislation.

Enforceability of Mediation Agreements

Regulation 5(1) of the Mediation Regulations provides that where the parties enter into an agreement following mediation, they, or any one of them with the consent of the others, may apply to the court where the litigation began for an order making the agreement a rule of court and providing that such an order shall be enforceable against the parties or any one of them.

Where the mediation occurred before litigation started, a party, with the consent of the others, may apply to the Master of the High Court for the same type of order. Thus, agreements reached through mediation have the same finality as litigation.

Impact on Statutes of Limitations

The Mediation Regulations provide that any limitation period specified by the Statute of Limitations Act 1957 or the Statute of Limitations (Amendment) Act 1991 shall not be applicable from the day that the relevant dispute is referred to mediation until 30 days after the mediation process is concluded.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

The Mediation Regulations make no provision for parties and lawyers to consider mediation.

Requirements for Parties to Participate in Mediation

While mediation in Ireland is not compulsory, the coupling of a judicial recommendation to consider mediation with the possibility of a cost sanction for an unreasonable refusal to consider mediation acts as a strong catalyst for parties to attempt mediation. The Irish courts have established that, under the Civil Liability and Courts Act 2004, a judge may order the parties to mediation even if one party tells the court it does not wish to attempt mediation. Section 15 of the Act provides that mediation in a personal injury action may be initiated at the request of one of the parties if the court determines that mediation might 'assist' in reaching a settlement. However, the principle of voluntariness remains even where participation in mediation is required—because continued participation in mediation is not. Parties are free to withdraw from the process at any time they choose.

Accreditation Requirements for Mediators

The Mediation Regulations do not include any accreditation requirements for mediators. Any person may act as a mediator without being registered, certified or even trained and the professional title of 'mediator' is not protected by law. As a result, various individuals and bodies, using different standards, currently train and accredit mediators and conciliators.

Mediator Duties

As with the issue of accreditation, the Mediation Regulations do not have specific regulations about mediator duties.

Duties of Legal Representatives and Other Professional Participants

Outside counsel presence and/or representation during mediation sessions is allowed. Lawyers may play an important role in assisting the mediator and advising the parties in settlement. However, the presence of outside counsel is not mandatory.

Court-annexed mediation schemes

Ireland remains one of the few common law jurisdictions that has not established a court-annexed mediation scheme. However, in 2011, a pilot family mediation program was established at a district court in Dublin. This program resulted from collaboration between the Irish Courts Service, the Legal Aid Board, and the Family Mediation Service. It makes both mediation and legal aid services available at one location, with a view to encouraging more people to avail themselves of mediation services when seeking to resolve disputes relating to custody and access.

Latvia[49]

Mediation Legislation

Latvia implemented the Directive by making amendments to already existing Latvian laws. Since then, a working group of experts have finished a single comprehensive law ('the Mediation Law'), which it is believed will more effectively implement the provisions of the Directive. However, the Mediation Law has not been adopted yet, because the draft law still has to be discussed in the Cabinet of Ministers of Republic of Latvia ('the Cabinet') and then submitted to Parliament for adoption. The sections below discuss, as applicable, the current state of the law, the impact the Mediation Law will have if enacted, or both.

Court Referral to Mediation

In Latvia, the court may be able to invite parties to participate in mediation by fulfilling the requirements of articles in the current Civil Procedure Law (CPL). These articles establish the court's duty to try to reconcile the parties, to determine if they wish to settle the dispute, or if, appropriate, to refer them to arbitration. However, the articles do not use the term 'mediation' or establish a procedure for court referral to mediation.

Confidentiality

In accordance with the Mediation Law and generally accepted principles of confidentiality in mediation, all information obtained during mediation or related to it is confidential. This rule, however, is not absolute and the Mediation Law provides the right for the parties to mutually decide otherwise—to disclose, partially or fully, certain information. The

[49] Information in this section is taken from Sandis Bertaitis, Rada Matjusina and Irina Olevska's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Daiga Zivtina and Anete Dimitrovska's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Sandis Bertaitis who provided assistance by reviewing the information in the country analysis.

confidentiality requirement is imposed on the mediator as well. According to Article 4(2) of the Mediation Law the mediator must not disclose to the other party any information received from any of the parties, except with special permission.

Enforceability of Mediation Agreements

A mediated settlement in most cases will qualify as a binding settlement agreement between the involved parties, but the enforcement and execution is up to both parties. Currently, there is no specific procedure for enforcing settlements reached in mediation. Only the Law on Mediation, when it enters into force, will provide a legal framework for the conclusion of the mediated settlement and its enforcement.

Impact on Statutes of Limitations

Currently, participating in mediation has no impact on the running of statutes of limitation. Nevertheless, Draft Law on Mediation, Article 8, §1 stipulates that the running of such a limitation is suspended at the moment when the offer to undergo a mediation procedure is made. The running is renewed on the day that the offer to undergo a mediation procedure is denied or a mediation procedure is completed in accordance with the Draft Law on Mediation.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

There are no specific requirements for the parties and lawyers to consider mediation as a dispute resolution option in either current law or the Mediation Law.

Requirements for Parties to Participate in Mediation

Latvia has chosen to develop mediation as a completely voluntary process, so no sanctions and no requirements for the parties to participate in mediation have been established by law. But there are provisions in the law that provide incentives for the parties to pursue the mediation process, once started, in good faith. If one of the parties refuses to participate in mediation without a good reason or does not follow the terms and order established by the parties, the other party at any time may exercise the right to end the mediation process.

Accreditation Requirements for Mediators

The Mediation Law provides for two categories of mediators, mediators and certified mediators. A mediator is a person who manages the mediation process. A certified mediator is a mediator who has learned the mediation process through an established procedure prescribed by law and has obtained a certificate allowing inclusion in the list of certified mediators. The list contains information about practicing certified mediators, their certificates and their competence.

The Mediation Law does not provide rules or criteria for the accreditation of a simple mediator. However, Chapter V of the Mediation Law does provide the criteria that must be met to be qualified as a certified mediator:

a) he or she must be a natural person;
b) who has an impeccable reputation;
c) who has reached the age of 25;
d) who has received a higher education degree that is nationally recognized;
e) who is fluent in the official language at the highest level; and

f) who has completed the mediator training course, passed the exam for a certified mediator, and obtained the certificate.

Conversely, a person may not become a certified mediator if:

a) the person does not comply with the requirements mentioned above; or
b) the person is found guilty of committing an intentional criminal offence, or against whom criminal proceedings for committing an intentional crime against a person were terminated on non-rehabilitating grounds.

Mediator Duties

The Mediation Law includes a separate provision regarding duties and rights of mediators. In accordance with Article 10 of the Mediation Law, a mediator has the following general duties and rights:

a) before the initiation of mediation, the mediator must explain to the parties the mediator's functions, the rights and duties of the mediation participants during the mediation, and general mediation principles;
b) the mediator must manage the mediation in accordance with the treaty of mediation process, which in turn must comply with the provisions of the Mediation Law and with general mediation principles;
c) the mediator may meet with the parties together or with each of them individually;
d) the mediator must observe the rules of ethics (the rules of professional conduct for mediators).

Duties of Legal Representatives and Other Professional Mediation Participants

The Mediation Law creates a certain level of immunity for mediation participants, which allows them to refuse to give evidence about facts that became known to them during mediation or which are related to it. Otherwise, the Mediation Law does not regulate conduct, duties, or liability of legal representatives, experts, translators or other possible mediation participants.

Court-Annexed Mediation Schemes

The current draft of the Mediation Law does not contain any provisions regarding court-annexed mediation.

Lithuania[50]

Mediation Legislation

The Seimas (Parliament) of the Republic of Lithuania adopted its Law on Conciliatory Mediation in Civil Disputes in 2008 ('the 2008 Law') and modified it in 2011 ('the Mediation Law') to fully transpose the Directive. The Mediation Law is meant to apply to both non-judicial and judicial conciliatory mediation, but with exceptions, and it applies to both domestic and international civil disputes. Analysis of judicial conciliatory mediation requires not only evaluation of legal provisions in the Mediation Law, but also of the Judicial

[50] Information in this section is taken from Virgilijus Valancius' contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Assoc. Prof. PhD. Natalia Kaminskiene's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to the following experts who provided assistance by reviewing the information in the country analysis: Vladimir Muravjov and Jolanta Sondaite.

Mediation Rules (JMR) originally adopted in 2005 by the Council of Courts (later known as the Judicial Council) and subsequently amended to fully transpose the Directive.

Court Referral to Mediation

The Mediation Law allows a court hearing a civil case to suggest that the parties to a dispute attempt to resolve the dispute by way of conciliatory mediation. If the parties accept, the court adjourns the case. At this point, the parties may pursue either judicial or non-judicial mediation. Due to the way the law is structured, however, it will most likely be judicial mediation. Under the JMR, referral to judicial mediation may be initiated by the judge hearing the case or by any person participating in the dispute.

In other situations, the dispute is referred to judicial mediation by the judge hearing the case, who issues a special decision. Under the JMR, the court referral to judicial mediation always requires the written agreement of the parties to participate in this procedure, as well as the provision to the parties of all information relevant to this procedure.

Confidentiality

Article 7(1) of the Mediation Law establishes the principle that all information regarding conciliatory mediation and related issues must be held in strict confidence. This principle applies to the parties to a dispute, mediator(s) and administrators of conciliatory mediation services. Confidentiality protection does not apply when information is required to enforce a conciliation agreement or when failure to disclose information would contravene the public interest (particularly where a child's interests need to be safeguarded or where damage to the health or life of a natural person needs to be prevented). Mediators may not disclose confidential information revealed to them by one party in a dispute to the other part(ies) unless the party providing the information gives its consent.

Enforcement of Mediation Agreements

Lithuanian law provides for two types of agreements: the conciliatory mediation agreement, which states the parties' initial agreement to participate in mediation to resolve their dispute; and the conciliation agreement, the final agreement, if any, reached by the parties upon the termination of the mediation. The Mediation Law focuses on the conciliation agreement.

Article 6(2) of the Mediation Law provides that a conciliation agreement reached as the result of conciliatory mediation is enforceable. Under Article 6(3), the parties, or one party with the written consent of the other party or parties, may submit the conciliation agreement to a court for endorsement in accordance with the summary procedure set forth in Chapter XXXIX of the Code of Civil Procedure as long as the dispute is not simultaneously being heard in court. Article 6.985 of the Civil Code complements the Mediation Law provisions; it establishes that an amicable settlement agreement, upon approval by the court, has the effect of a final judgment (*res judicata*).

Impact on Statute of Limitations

Article 8(1) of the Mediation Law suspends limitation periods when conciliatory mediation starts. Under Article 8(2), mediation is considered to 'start' on the day one party to a dispute directly sends a written proposal to the other party to resolve the dispute by way of conciliatory mediation. In instances in which the other party does not agree to the proposal, under Article 9(1), termination of conciliatory mediation is considered to be the earlier of the following: the day a party to the dispute, upon receiving the proposal from another

party, sends out a written statement objecting to the dispute being resolved by way of conciliatory mediation, or one month after the day the proposal for conciliatory mediation is sent out if, within that time, the other party has not given written consent to the proposal.
In general, under Article 8(3) of the Mediation Law, if conciliatory mediation terminates without the parties entering into a conciliation agreement, the period of limitation restarts and the remaining period of limitation is extended. Suspended prescription resumes its run from the day when the circumstance which activated the suspension ceases to exist. Upon resumption, the remaining part of the time limit is prolonged by six months; if the time limit of prescription is shorter than six months, it is prolonged by the whole duration of the time limit.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

The Mediation Law does not require disputing parties to consider using mediation for its resolution. However, the Lithuanian Code of Civil Procedure includes provisions encouraging the use of ADR. According to its Article 231(1), once a court determines the substance of a dispute in the course of a preliminary hearing, the court may suggest that the parties attempt to reach an amicable agreement to resolve the dispute. The civil procedure provisions, however, constitute the extent of any sort of legal obligation, and they apply only to judicial mediation. There are no requirements for the parties to consider non-judicial mediation as a dispute resolution option, nor can any be deduced from other legal provisions.

Requirements for parties to participate in mediation

Neither the Mediation Law nor the JMR requires parties to participate in mediation. The Mediation Law does recognize the possibility of mandatory referral to conciliatory mediation by a court when allowed by the law, but these instances involve international civil disputes where the governing law is not clear.

Accreditation Requirements for Mediators

The Mediation Law does not specify any requirements for the professional qualifications of mediators. Nor does it contain explicit provisions about the training of mediators. Article 2(5) simply defines a mediator in civil disputes as a third party, impartial, natural person who assists in resolving a civil dispute between other persons with a view to reaching a conciliation agreement.

Judicial mediators are required to demonstrate certain qualifications. Under the current JMR, judicial mediation is performed by judges, assistants to judges, or other people possessing appropriate qualifications, if they are specially trained and enrolled in the list of mediators approved by the working group of the Judicial Council. To qualify for enrolment in the list, the applicant must present the working group of the Judicial Council with, *inter alia*, a certificate that verifies participation in judicial mediation courses. The other requirements are, largely, formalities, such as the provision of a written request for enrolment, a *curriculum vitae*, a motivation letter, documentation confirming identity and documentation confirming education.

Mediator Duties

Various legal acts regulating conciliatory mediation generally, and judicial mediation specifically, establish requirements for a person acting as a mediator. These requirements include the obligations to be impartial, to act in good faith, to follow confidentiality requirements, and to act in accordance with the ECCM. Furthermore, the mediator is obligated not to accept a proposal to conduct conciliatory mediation or continue conducting conciliatory mediation until after informing the parties of any known circumstances that could raise doubts regarding impartiality.

Mediators may not act as arbitrator or judge in a dispute for which they have conducted, or are conducting, conciliatory mediation unless the parties give their written consent to the appointment and the mediator has no objection. A mediator is also prohibited from acting as counsel or other representative for any party in a dispute for which the mediator conducted, or is conducting, conciliatory mediation.

Finally, a mediator is permitted to terminate the mediation if the conciliation agreement is or will be, in the mediator's opinion, unattainable or illegal. Termination is also permitted if the mediator acknowledges that the dispute is unlikely to be amicably resolved even if conciliatory mediation continues. The JMR include several specific duties of the mediator concerning the execution of judicial mediation. For example, according to Article 18 a mediator may determine the duration of judicial mediation as long as an exact time limit is established and the parties are informed.

Duties of Legal Representatives and Other Professional Mediation Participants

The Mediation Law establishes no specific duties for legal representatives and other professional mediation participants. However, Article 13 of the JMR requires the parties to the dispute to cooperate among themselves and collaborate with the mediator in the course of the judicial mediation process. These rules, and others, also suggest that these requirements entail an obligation for the people involved in the process to act in good faith.

Court-Annexed Mediation Schemes

The most important step towards the implementation and application of judicial mediation in Lithuania was made by the then-named Council of Courts when it adopted Resolution No. 13P-348 on the Pilot Project of Judicial Mediation ('the Pilot Project') on 20 May 2005. The aim of the Pilot Project was to create a system of judicial mediation in civil cases and to test-drive its application in the Second District Court of Vilnius City. On 28 January 2011, the Judicial Council (the former Council of Courts) approved the extension of judicial mediation to all courts in Lithuania in order to guarantee recourse to mediation irrespective of the region. The judicial mediation in the Pilot Project is performed in accordance with the Mediation Law, JMR and the Code of Civil Procedure.

Luxembourg[51]

Mediation Legislation

Luxembourg has made two attempts to enact mediation legislation, the first in 2002, which was not as successful as the second attempt in 2012. The recent, more successful attempt involved implementation of the Directive, through the enactment of a law of 24 February 2012 ('the Law'). This resulted in a detailed statutory basis for civil and commercial mediation, in addition to the already existing penal and family mediation practice. The Law added 24 new statutory provisions (Articles 1251-1 to 1251-24) to the national Civil Procedure Code.

Court Referral to Mediation (judicial mediation — *médiation judiciaire*)

A judge may, at any time during the proceeding, invite the parties to use mediation under Article 1251-12, and the judge may do so on the his or her own initiative (with consent of parties) or at the request of both parties, with the time for the mediation not exceeding three months. If the period expires without settlement, the judge will order the court proceedings to be resumed at the next hearing unless the parties petition to extend mediation for one month. The judge is in charge of the case through the entire procedure and may take measures deemed necessary. Should the settlement attempt fail, the court proceedings continue.

The Law provides for a special form of judicial mediation, family mediation for divorce, separation of property and other family law affairs under Article 1251-17 ff. This area gives the judge the authority to require the parties to take part in a free but mandatory information meeting about mediation.

Confidentiality

Globally, the Law meets the Directive Requirements. Articles 1251-6 and 1251-7 of the Law govern confidentiality, stating that all documents, communications, and declarations revealed during (or related to) mediation are confidential. These materials must not, subject to court-ordered payment of compensatory damages and interest, be used in a subsequent court procedure or as evidence, subject to some exceptions for execution requirements and imperative public order issues.

Enforcement of Mediation Agreements

Under Article 1251-21, mediation agreements are enforceable if at least one party requests approval by a competent president of a district court in a process called homologation. The president of the district court will reject this process in cases where the agreement would violate the public order or where the dispute is not the type of matter for which Article 1251-21 allows the use of mediation (e.g., matters involving government liability).

The Law provides special enforceability rules for family mediation. For example, the competent judge for the homologation procedure must be the judge in charge of the related court procedure.

[51] Information in this section is taken from François Moyse and Dr. Jan Kayser's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Alain Grosjean, Julia Senior and Guy Arendt's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Dr. Jan Kayser who provided assistance by reviewing the information in the country analysis.

Impact on Statutes of Limitations

Under Article 1251-9, limitation periods are suspended when the parties sign a mediation agreement. Under Article 1251-5, the judge then adjourns the court procedure until the parties (or one of them) notify the court's registry and other parties that the mediation has finished. If no resolution is reached, the limitation period resumes one month after either notification to the mediator and other party by a registered letter of a party's intention to abandon the mediation procedure, or the mediator terminates the process because it has not led to dispute resolution.

Requirements for Parties and Lawyers to Consider Mediation as an Alternative Dispute Resolution Option

Other than the mandatory informational meeting on mediation for family disputes, there is no requirement for the parties to consider mediation. Mediation centres, such as the CMCC (Centre de Médiation Civile et Commerciale), have assumed the obligation to provide information about mediation to the general public as required under Article 9 of the Directive. As noted below, lawyers must consider all possibilities when representing clients and should thus include mediation within the range of options they look at.

Requirements for Parties to Participate in Mediation

Mediation is completely subject to the parties' approval and cannot be imposed on them.

Accreditation Requirements for Mediators

There is no accreditation requirement for mediators who do not work with the courts, and parties are free to choose the mediator wanted.

Judicial mediators must be accredited by the Minister of Justice, unless exempted in exceptional circumstances. Under Article 1251-3, the candidate must have qualities that would guarantee honourability, independence and impartiality. Qualifications must also be proven and may be established by obtaining a master's degree in mediation; a three-year professional experience completed by a specific mediation formation, the content of which is governed by Grand-Ducal Regulation; or a mediation formation accepted in any EU Member State to become a mediator in civil and commercial mediation in that Member State.

Mediator Duties

Under Article 1251-2 a mediator is a third person able to conduct a mediation procedure within the terms of the Directive and the Law in an efficient, impartial and competent way. Under Articles 1251-6 and 1251-7, mediators are subject to confidentiality. Additionally, the mediator must keep the judge informed about the progress of the mediation proceeding.

Duties of Legal Representative and Other Professional Mediation Participants

Under the national rules for members of the bar, lawyers must consider all possibilities for resolving a dispute when advising clients, and they should, if applicable, provide information about using mediation. Further, confidentiality requirements also apply to legal representatives and other persons participating in the administration of the process.

Court-Annexed Mediation Programs

The Law does not provide for any court-annexed mediation conducted by judges.

Malta[52]

Mediation Legislation

Malta implemented the Directive via amendments to the 2004 Mediation Act ('the Mediation Act') (Chapter 474 of the Laws of Malta). The amendments added Act IX of 2010 and brought existing legislation up to the Directive requirements by including specific provisions addressing cross-border disputes, enforceability of mediation agreements, confidentiality and the effect of mediation on limitation and prescription periods.

Article 3 of the Mediation Act uniquely delegates responsibility for mediation to a separate legal entity, the Malta Mediation Centre ('the Centre'), which is run by a Board of Governors organized under particular articles of the Act (dealing with membership, quorum and other requirements). The Mediation Act also governs the Board's finances. Although the Centre is an independent entity, it has a close relationship with the Ministry of Justice; for example, under the Mediation Act, its Board must meet financial and tax reporting requirements to the Minister for Justice.

The Board is responsible for setting Mediator requirements, fees, developing a code of conduct, and ensuring that the 2004 Mediation Act and its amendments are implemented in domestic and cross-border mediations. The Board also has powers to take disciplinary action against mediators who violate their duties under the Code of Conduct for Mediators (Article 14).

Court Referral to Mediation

A court has the authority to stay adjudicative proceedings so that the parties may participate in mediation. Article 18 of the Mediation Act provides that referral to mediation is made by a joint request by the parties or by judge referral, as appropriate, and the court also may determine the appropriate timeline for the mediation. If the case is referred, the parties must keep the court informed of whether the case settles; if not, the court will continue to manage the case. Mandatory mediation exists in Malta only for family law court proceedings.

Protections Provided to Ensure Confidentiality

Article 27 covers confidentiality of mediation and protects confidentiality of evidence acquired 'in the course of, or pursuant to' mediation proceedings. Evidence acquired in this manner, as well as communications and settlement discussions between mediation participants, is not admissible or compellable in subsequent proceedings. The mediator may not be called in any subsequent judicial proceeding to give evidence, beyond reporting whether an agreement was reached. The Code of Conduct for Mediators creates further confidentiality duties during the mediation proceedings for privileged information. Article 27 does state certain exceptions to confidentiality requirements.

Enforcement of Mediation Agreements

The Mediation Act's 2010 amendment of Article 17 states that a single party, with consent of the other, may request that the content of an agreement reached in mediation be made

[52] Information in this section is taken from Lauren R. Keller's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Oscar Grech's contribution to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Oscar Grech who provided assistance by reviewing the information in the country analysis.

enforceable via the appropriate provisions of the Code of Organization and Civil Procedure (as long as not contrary to national law and public policy).

Once ratified, a final mediation agreement is classified as an executive title under Maltese law, Code of Organization and Civil Procedure, Title VII, Sub-Title I, Article 253(f). The final agreement is equivalent to a judgment by a court of law, and under Article 264(2) of the same Code, is 'enforceable by the court competent to take cognizance of the subject matter thereof'.

Impact on Statutes of Limitations

The Mediation Act IX of 2010, Article 27A, protects the parties from losing their ability to litigate or arbitrate a case if they opt first to participate in mediation proceedings. Malta does not set a time period for the mediation, and the statute of limitations period is suspended for the duration of the mediation process and recommences once the mediation procedure is deemed 'terminated' under certain conditions. In cross-border cases, this suspension will not prejudice international agreements to which Malta and the other Member State involved are signatories.

Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

The Centre makes information regarding mediation available to the public (via the publication of reports), but neither parties nor lawyers are required to consider mediation as a dispute resolution option in general civil cases.

Requirements for Parties to Participate in Mediation

Article 17 of the Mediation Act provides that disputes may be referred to the Centre for Mediation:

i. voluntarily, that is following a decision made by the disputing parties; or
ii. by the Court or other adjudicatory authority or by the parties to the proceedings after litigation proceedings have already commenced; or
iii. by law, that is to say by any authority not being an adjudicatory authority or through the execution of a clause in a contract requiring the parties to submit to mediation any dispute arising under or out of the terms of the contract.

As noted above, mediation is mandatory by law in family law court proceedings.

Accreditation Requirements for Mediators

The Malta Mediation Centre is responsible for verifying the accreditation requirements for mediators in both domestic and cross-border cases. Under Article 19 of the Mediation Act, the Centre maintains a list of accredited mediators. The Malta Mediation Directory is a list of accredited mediators maintained by the Centre; it currently contains 51 mediators, with indicated areas of specialty for each mediator.

The role of the mediator is extensively defined under Maltese law. Many requirements are defined and enforced by the Malta Mediation Centre's Code of Conduct for Mediators, which clearly defines the role of the mediator by establishing ground rules intended to guide the mediator's professional role. The Code is applicable to all mediators acting in Malta, and its goals are to enhance mediators' performance and ensure the integrity and utility of mediation as a dispute resolution process. Article 2 of the Code allows a mediator to provide

services only after the Board of the Centre has determined that the person has the requisite qualifications, and meets basic accreditation requirements.

Mediator Duties

The Mediation Act, Article 21(1), states that before accepting a case, a mediator must make a declaration of impartiality following a reasonable investigation into the facts of the dispute, and must inform the parties of any issues that might interfere with the mediator's impartiality. Article 3 of the Code emphasizes the importance of impartiality and requires mediators to endeavour always to maintain the appearance of impartiality, not only with the parties but also with their representatives. Article 10 of the Code establishes the mediator's duty to inform parties when a conflict of interest arises at any point in the mediation procedure, and the parties have the right to refuse to appear before a mediator whose impartiality or independence has been called into question (in which case the mediator should withdraw).

The Mediation Act, Article 20(2), allows the mediator complete discretion to accept or decline the dispute, but once the mediator accepts the role, the mediator has a duty under Article 8 of the Code to start the process immediately. Article 3 of the Code requires the mediator to establish and communicate the dates, venues and mediation session appointments to the parties and, if applicable, their representatives.

Article 5 of the Code states that the mediator should ensure that the parties understand the terms of the Agreement to Mediate as well as the process and procedure of the mediation. And Article 6 of the Code assigns a facilitative role to the mediator, who has a duty to explain the mediator role to assist the parties in finding a resolution to their dispute.

The mediator must also ensure the fairness of the procedure and ensure that each party has an opportunity to be involved in the process (Code of Conduct, Article 9). If the mediator determines that the process is not fair, the mediator is entitled to terminate the mediation according to the Mediation Act, Article 28(b) and (c).

Article 11 of the Code states that the mediator must not give the parties professional advice. The mediator must advise the parties of this restriction and encourage them to seek the advice of a legal professional before signing and executing the mediation agreement.

Article 12 of the Code indicates that it is not the mediator's role to draft the settlement agreement following a settlement reached through mediation. Any agreement reached must be drawn up by the mediation parties' lawyers or by the parties themselves. If the parties are not represented by lawyers at mediation, the mediator shall adjourn the mediation in order to enable the parties to seek legal assistance in drafting the final agreement.

Article 13 of the Code establishes that, 'Qualification to mediate does not in any way confer on a mediator a permanent right'. The Centre may remove a person from the list of mediators if in its considered opinion such a person is unfit to continue in office, or if any of the circumstances mentioned in the Act arise.

Duties of Legal Representatives and Other Professional Mediation Participants

Article 25 of the Act states that a party may 'be assisted by an advocate, legal procurator or any individual designated by him before or during the mediation'. In court-referred mediations, however, the party may only be represented by an advocate (an attorney). There are no specific requirements for the attorney under Maltese mediation law, but the attorney must act in accordance with the professional duties of attorneys.

Court-Annexed Mediation Programs

Because all mediation procedures are conducted through the Malta Mediation Centre, there is no court-annexed mediation scheme.

Portugal[53]

Mediation Legislation

Even before the Directive, Portugal had addressed mediation legislatively, and legislation concerning mediation has continued over the years. Before the Directive, the Civil Code already included several provisions designed to encourage settlement between mediation parties. Article 1248 of the Code contained provisions concerning a settlement contract, defined as one in which the parties avoid or settle a dispute through reciprocal concessions.

In recent years, Portugal has continued to enact laws addressing mediation. Its legislation to transpose the Directive, Inventory Law No. 29/2009, was enacted on 29 June 2009. Article 79 of this law modified the Civil Procedure Code (CPC) to add three articles about the regulation of mediation concerning, in the main, pre-trial mediation and the suspension of prescription terms, the homologation (court confirmation) of agreements obtained in pre-court mediation, confidentiality and the suspension of court proceedings by the judge.

These 2009 provisions, however, were recently revoked by Law No. 29/2013 of 19 April 2013 ('the Mediation Law'), which established general principles applicable to Portuguese mediation as well as some specific provisions for different types of mediation. Shortly after, on 26 June 2013, Law No. 41/2013 made substantial changes to the Portuguese Civil Procedure Code (CPC). Its Article 273 now complements the Mediation Law. Finally, Law No. 78/2001 of 13 July, as amended by Law No. 54/2013, established the legal framework for a public mediation system attached to a small claims procedure. It is also called the law of the Julgados de Paz (Justices of the Peace).

With the enactment of these laws, the general principles of mediation are now recognized formally as part of the Portuguese legal system.

Court Referral to Mediation

Article 273 of the CPC (formerly Article 279-A of the CPC), has several subsections covering different aspects of court referral to mediation. Article 273-1 provides that, at any stage of the proceedings, the judge may order the remittance of the dispute to mediation unless any of the parties expressly opposes the remittance. While the article does not expressly require the judge to obtain the consent of the parties before remitting the case, the voluntary nature of mediation is still preserved because any party may oppose the remittance through express notification.

Voluntariness is intended to be a core characteristic of mediation in Portugal, and no form of mandatory mediation has been created. While Article 533, Section 1 of the CPC empowers the judge to remit the dispute to mediation, the Mediation Law states in its Article 4 that the mediation process is voluntary. This provision is applicable to any civil and commercial mediations taking place in Portugal, whether private or through the public systems.

[53] Information in this section is taken from Ana Maria Maia Gonçalves and Thomas Gaultier's contributions to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor; as well as from Ana Maria Maia Gonçalves and Thomas Gaultier's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille; and from Ana Maria Maia Gonçalves and Thomas Gaultier's comments in preparation for this work.

Article 533 of the CPC further states that when it is settled that mediation will be used, either privately or through the public systems, the suspension of court proceedings is automatic. Section 2 of the Article states broadly that 'notwithstanding the provisions of the preceding paragraph, the parties may, jointly, opt to resolve the dispute through mediation, agreeing to the suspension of the instance in the terms and for the maximum period foreseen in Paragraph 4 of the previous article'. The suspension could in fact be for up to three months, providing it does not result in a postponement of the final hearing.

Protections Provided to Ensure Confidentiality of Mediation

Under Article 5 of the Mediation Law, mediation is confidential by nature. But there is an exception to confidentiality, pursuant to this same article, in situations when public policy interests are at stake.

Enforceability of Mediation Agreements

Prior to the Mediation Law, a mediation agreement could only be enforceable if it gained the status of an enforceable title or if it was confirmed by a judge.

Enforcing a mediation agreement as an enforceable title, which required it to be signed by the debtor and contain the constitution or the recognition of a pecuniary obligation, is still possible under the new CPC, pursuant to Article 703.

Another way was to have the agreement confirmed by a judge pursuant to former Article 249-B of the CPC. This possibility remains pursuant to Article 290 of the new CPC.

Article 9 of the Mediation Law also created a new provision on the enforceability of mediation agreements. It provides that such agreements are automatically enforceable, without the need for homologation by a court, if they fulfil certain requirements. First, a mediation agreement is automatically enforceable if the law does not require homologation for that type of dispute. One example of this is the situation where the agreement reached fulfils the requirements of an enforceable title, as mentioned above. Second, parties must have legal capacity to execute the mediation agreement. This requirement is consistent with the fact that mediation agreements are in essence merely private contracts. The next two requirements are that the mediation was carried out under the terms provided by law, and that the settlement agreement does not violate public policy. Finally, the mediator must be on the list of mediators published by the Ministry of Justice. Therefore, if a foreign mediator not registered on that list facilitates a mediation in Portugal, even if otherwise done under the terms of the Mediation Law, the settlement agreement cannot be automatically enforceable and will need to be confirmed by a judge.

The Impact of Mediation Statutes of Limitations

Under Article 13 of the Mediation Law, the running of the statute of limitations is suspended during the mediation process, from the date the agreement to mediate is signed to the date the one of the parties no longer wishes to take part in mediation.

Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

There is no requirement for the parties to consider mediation. With regard to lawyers, there is also no explicit requirement. But the Portuguese Bar Association Regulations (*Estatuto da Ordem dos Advogados*) provide in Article 106 that lawyers have a duty to cooperate, always to the benefit of their respective clients, in order to avoid unnecessary claims. Article 95 of

the same regulations provides that lawyers must advise their clients towards a just and equitable settlement.

Requirements for Parties to Participate in Mediation

In Portugal, mediation is a voluntary (usually facilitative) process between the parties, and is never mandatory. All of the mediation systems in the Portuguese legal framework therefore function on a voluntary basis, and the refusal by one of the parties to participate in mediation simply ends the process. Law 78/2001, Article 55 of the Justices of the Peace law, provides that withdrawal from the mediation process by the parties is permissible at any time.

A potentially significant development with regard to voluntariness came when a Decree-Law (No. 34/2008, of 26 February 2009) entered into force amending the CPC with regard to the Regulation of Procedural Costs, which was later revoked by Law 41/2013 but nevertheless remains in substance. Law No. 41/2013, in its Article 533 (4) and (5), provides that when a claimant has the possibility of using ADR, but chooses to pursue judicial resolution instead, the claimant will bear the judicial fees. Specifically, the article sections provide:

Article 533 (4): The claimant who, while being eligible to use alternative dispute resolution structures, opts to go before the judicial court will bear its own judicial costs, regardless of the result of the lawsuit, except when the other party has jeopardized the use of such means of alternative dispute resolution.

Article 533 (5): The alternative dispute resolution structures mentioned in the previous number are to be provided by an Ordinance of the member of Government responsible for the area of justice.

Accreditation Requirements for Mediators

In Portugal, private parties provide mediation training. Indeed, generally, mediators are not directly certified or accredited; instead, the Ministry of Justice approves certain mediation training courses as providing the training needed to be a mediator in the public mediation systems. Thus, mediators are not certified, and are usually called mediators simply if they take one of the mediation courses approved by the Ministry of Justice. Generally, such courses include 190 hours, which are divided into an initial standard mediation training of 40 hours, followed by 150 hours of specialized training in family, labor or penal mediation.

The ICFML – Instituto de Certificação e Formação de Mediadores Lusófonos, has created the first Portuguese mediator certification course which may lead to IMI (International Mediation Institute) certification in addition to recognition by the Ministry of Justice.

Mediator Duties

No particular steps were taken with regard to mediator duties in the years immediately after the Directive's entry into force. However, the more recent Mediation Law includes an extensive list of mediator duties in its Article 26.

Beyond the intrinsic duties inherent to the mediation process itself, such as impartiality, independence, confidentiality and diligence, Article 26 also provides that mediators must:

a) inform the parties as to the nature, finality, fundamental principles, and procedural phases of mediation, as well as the rules to abide by;

b) refrain from imposing any agreement on the parties, or from making promises or giving guarantees about the result of the process. The mediator must adopt a responsible attitude of true collaboration with the parties;
c) ensure themselves that the parties have legitimacy and may properly participate in the mediation process, through obtaining their informed consent;
d) guarantee the confidentiality of information they will obtain through the process;
e) suggest to the parties to use or seek advice from experts whenever such clarification may be necessary or useful;
f) reveal any information or relationships that may call into question their independence and impartiality, and not carry on with the mediation in such cases;
g) only accept mediations in which they feel they have the required personal and technical skills according to the principles and norms they adhere to;
h) ensure the quality of the service and their training and qualification level;
i) Act with decency towards parties, those managing the public mediation systems, and towards other mediators;
j) not interfere in mediations that are being handled by other mediators, save in the case they are asked to, in case of co-mediation, or in otherwise justified cases;
k) act in accordance to the ethical deontological norms provided by the European Code of Conduct for Mediators.

Duties of Legal Representatives and Other Professional Mediation Participants

Alongside mediator duties, the only duty by law for other mediation participants is the requirement for the parties to be physically present at the mediation session for mediations conducted within the Justices of the Peace system and Criminal Mediation systems.

Court-Annexed Mediation Schemes

There are four existing court-annexed mediation schemes in the public mediation system, the Justice of the Peace System, the Family Mediation System, the Workplace Mediation System and the Criminal Mediation System.

Slovakia[54]

Mediation Legislation

Mediation in Slovakia is a voluntary process between the parties. Slovakia enacted legislation concerning mediation well before the release of the Directive. In its 2004 adoption of the Mediation Act No. 420/2004 Coll. on mediation ('the Mediation Act'), Slovakia joined other European countries that already had acted to implement legislation addressing mediation. In Article 2(1) of the Mediation Act, mediation in civil law is defined as follows: 'extra-judicial action in which the parties settle a dispute, arising from or concerning their contract or other legal relationship, through a mediator'.

Mediation has become an integral part of the Slovak legal order and is now established by a number of laws and forms. Since its 2004 adoption, the Mediation Act has been subject to amendments, the most significant of which occurred in 2010 for the purpose of implementing the Directive. Other amendments have extended the coverage of the Mediation Act to cross-border cases, regulated the obligation of confidentiality, changed the

[54] Information for this section is taken from František Kutlik's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Martin Magál and Nora Šajbidor's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Peter Agner who provided assistance by reviewing the information in the country analysis.

provisions relating to the commencement of mediation, and introduced the obligation for continuing education of mediators.

While the Mediation Act generally governs mediation procedure, the CCP governs mediation or other settlement attempts that take place in connection with court proceedings before or during the trial.

Court Referral to Mediation

Courts may refer cases to mediation, but cannot obligate the parties to do so. Under CCP Section 99(1), courts should always explore the possibility of settlement. One approach to settlement is conciliation, addressed in CCP Section 67: the court can propose to the parties that they attempt conciliation before litigation, and, if the parties reach an agreement, the court can approve it. Another approach is mediation: CCP Section 99(1) refers specifically to the court's ability, when the court thinks the circumstances are appropriate, to suggest that the parties attempt to settle the dispute through mediation and invite the parties to attend an information meeting with a mediator listed in the register of mediators. Additionally, Section 99 now authorizes the court to approve a mediation agreement as conciliation.

Protections Provided to Ensure Confidentiality of Mediation Proceedings

Slovak law regulates confidentiality. Article 5 of the Mediation Act requires the mediator, the parties involved in the mediator and other individuals attending the mediation to make a commitment that they will not reveal information obtained during the mediation process. The law does provide for certain exceptions to confidentiality when there is a threat to life or health or the public order. Another exception involves situations in which a claim for breach is brought against a mediator where otherwise confidential information may be revealed to the extent necessary to determine the validity of the breach claim.

Enforceability of Mediation Agreements

Slovak law recognizes 'mediation agreement' as referring either to an agreement between the parties to mediate, or to an agreement that the parties reach as a result of mediation. With regard to agreements to mediate, Article 7(1) of the Mediation Act authorizes the parties to agree to resolve any disputes arising from their contractual relations via mediation. Under Article 13(4) of the Mediation Act, the parties may further agree that their dispute will be addressed by a particular mediation centre. Under Article 7(1), the agreement to mediate should meet conditions established in Article 15(1), and if the mediation agreement meets these requirements, it can be made binding for the parties.

To ensure the enforceability of the agreement, the parties must follow the requirements of Article 15(2) of the Mediation Act. It states that an authorized party to the agreement may file a petition to enforce the mediation agreement or to carry out its execution if the mediation agreement (a) is executed in the form of a notarial deed, or (b) has been approved as a conciliation by a court or arbitration body pursuant to conditions stipulated in special regulations.

The Impact of Mediation on Statutes of Limitations

Under Article 14(2) of the amended Mediation Act, mediation is initiated by filing a written agreement to mediate the dispute in the Notarial Central Register of Deeds ('the registry list'). The effect of this filing is the same as that of filing an action in court: the prescription period stops running.

Article 14(3) addresses the impact on limitation and prescription periods when mediation was conducted in another EU Member State before a court or arbitration proceeding was initiated. In such a case, the determination of whether any limitation or prescription period expired will be based on the law of the Member State where the mediation was carried out. This provision is important in order to avoid the expiration of prescription or limitation periods when the mediation was not carried out in a way that complies with Slovak law about such expirations, and the court or arbitration proceedings are to be conducted under Slovak law.

Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

The judge presiding over a case may ask the parties if they are willing to resolve the dispute by conciliation, a proceeding in which the judge tries to reconcile the parties and bring them to a mutually agreeable decision. Alternatively, the judge may recommend that the parties participate in mediation, in which a separate and independent mediator handles the case. The judge is only required to inform the parties about the publicly available list of mediators on the Slovak Ministry of Justice (the 'Ministry') website.

Requirements for Parties to Participate in Mediation

There is no general obligation in Slovak law for parties to participate in mediation. However, the parties can obligate themselves to resolve any disputes arising from contractual relations through mediation by incorporating a mediation clause into their contract.

Accreditation Requirements for Mediators

Accreditation for mediators in Slovakia is determined by public regulation. Under the Mediation Act a mediator will be registered with the Ministry upon fulfilling requirements set by the Act. The mediator must take a training course that includes education about the Slovak legal order, interpersonal communication, conflict resolution and rules of conduct. The training concludes with an exam at an accredited institution. The Ministry keeps a register of accredited mediation educational institutions.

Under the Mediation Act, basic training consists of 100 hours (with an exception for law graduates). The Act also requires a registered mediator to attend at least two mediation educational seminars in a five year period as part of continuing professional development.

Mediator Duties

Under Article 4(2) of the Mediation Act mediators are obliged to perform their activities independently, impartially, consistently and with due professional care. Mediators must instruct the parties to mediation about the rights that might be affected by mediation. If questions as to the mediator's impartiality are raised, the mediator must, without unreasonable delay, inform the parties to the mediation about all facts that could be the basis for excluding the mediator from the mediation. Under Civil Code Sections 415–450, if the mediator violates this obligation or other duties prescribed by law, the mediator is liable to the mediating parties for the damage caused, as determined according to general provisions addressing liability for damage.

Duties of Legal Representatives and Other Professional Mediation Participants

Unless the parties agree otherwise, all parties and other individuals invited by the mediator or parties are obligated to keep confidential all the facts they learn in the context of the mediation.

Court-Annexed Mediation Schemes

Under the current wording of the CCP, the court has the option to advise the parties to attempt to settle their dispute by mediation. A proposal has been made to amend CCP Section 99 to make the court's provision of information about mediation obligatory. Notably, the current wording of CCP Section 68(2), about conciliation before the court, provides that the judge shall use appropriate means of educating the parties to use conciliation.

Spain[55]

Mediation Legislation

Civil and commercial mediation in Spain is a voluntary process between the parties. The Spanish Government approved Real Decreto - ley 5/2012 on mediation in civil and commercial matters, dated 5 March 2012, to implement the Directive. This Royal Decree was updated by Law 5/2012 dated 6 July 2012, ('Law 5/2012'), which became effective on 28 July, 2012. Law 5/2012 provides for voluntary party submission for participation in mediation, mediation confidentiality, the interruption of any statute of limitations periods and mediator training requirements.

Court Referral to Mediation

Law 5/2012 includes an amendment to Article 414 of the Civil Procedure Act (*Ley de Enjuiciamiento Civil*, (LEC)), requiring the court to inform the parties of the possibility of resolving their dispute through negotiation, including mediation. The parties ultimately decide whether to use mediation, but the court may nevertheless invite the parties to try to reach an agreement through mediation, urging them to attend an information session.

The parties may request suspension of the court hearing by agreement (Article 415 LEC as amended by Law 5/2012) in order to proceed to mediation. In the event the mediation ends without a resolution, either of the parties may request cancellation of the suspension and the resumption of court proceedings.

Protections Provided to Ensure Confidentiality of Mediation Proceedings

Confidentiality of mediation in Spain is regulated by law. Law 5/2012 provides in Article 9.1 that the mediation process and the documents used during the process are confidential. Under Article 9.2, mediators and parties involved may not be compelled to provide testimony or produce documents in a judicial or arbitral proceeding concerning information obtained in or related to the mediation. The only exceptions under Article 9.2 are express, written approval by the parties, or a reasoned court order issued by a criminal court. Article 9.3 provides that any party or mediator breaching the confidentiality obligation shall be liable for damages pursuant to the general principles established by law.

Enforceability of Mediation Agreements

Enforcement of Spanish settlement agreements may be effected by way of ordinary judicial procedure, or by expedited procedure if the mediation settlement agreement is notarized. Article 25 states that the parties may notarize the mediation settlement agreement (giving

[55] Information for this section is taken from Antonio Sanchez-Pedreño's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Mercedes Tarrazón and Marian Gili Saldaña's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Antonio Sanchez- Pedreño who provided assistance by reviewing the information in the country analysis.

it executive force), and it sets out the requirements for a proper notarization process. If the mediation settlement agreement is reached after the start of a judicial proceeding, under Article 25.4 the parties may request its recognition *(homologación*) by the court.

Under Article 25.3, if a mediation settlement agreement is to be enforced in a foreign state, it must be notarized in Spain and fulfil any additional requirements established in international conventions to which Spain is a party or in any EU legal provisions.

Under Article 27.1, subject to applicable EU legislation and international treaties in force in Spain, a mediation settlement agreement with executive force in another state may be directly enforceable in Spain, but only if the authorizing authorities in that state perform equivalent functions to those of the relevant Spanish authorities (e.g., a notary public). If a foreign mediation settlement agreement has not been declared by a foreign authority to have executive force, it will only be directly enforceable in Spain if the mediation settlement agreement is notarized before a Spanish notary public at the request of all parties, or at the request of one of them with the express consent of all others. A foreign mediation settlement agreement will not be enforceable in any case if it is manifestly contrary to Spanish public order.

The Impact of Mediation on Statutes of Limitations

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

Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

Other than as suggested by a court, Law 5/2012 does not impose any obligations on parties, lawyers, or any other professionals to consider mediation as a dispute option.

Requirements for Parties to Participate in Mediation

Articles 16-23 lay out the requirements for parties and participants in the mediation process, as well as other procedurally important mandates. There are no requirements for parties to participate in mediation if no prior agreement to mediate exists. When a prior agreement does exist and is brought to the court's attention by a party, a court will not process any claims subject to the mediation obligation raised by another party. While the mediation is in effect the parties may not initiate any judicial or extrajudicial claim related to the claims being addressed in the mediation (Article 10.2).

If a party to an agreement with a mediation clause initiates a court or arbitral proceeding without having attempted mediation, the other party may claim that mediation should be initiated. In this case, the court will stay all proceedings until the mediation process has been duly observed. If the plaintiff has attempted mediation before filing the claim, the defendant will be considered as acting in bad faith if it should then accept the claim before presenting its statement of defence. In this case, the defendant shall be liable for the costs.

Once notice of mediation is presented to the mediator or the mediation institution, Article 17.1 directs the mediator or mediation institution to call the parties to an information session (unless agreed otherwise by the parties). Pursuant to the same article, a party's

failure to attend the information session without justification is considered a rejection of the mediation. The information as to which parties failed to attend is not confidential.

Accreditation Requirements for Mediators

In Article 11, Law 5/2012 establishes the following requirements to be a mediator: to be in the full exercise of a citizen's civil rights, to be able to act as mediators without any constraints imposed by the requirements of any professional endeavours, to have a university degree or equivalent technical/professional studies, to have acquired specific training to act as a mediator and to contract professional insurance to cover any liability arising as a result of the services provided.

Article 11.2 provides that mediators must have specific training in mediation, which should be acquired through one or more courses provided by duly accredited training institutions. Law 5/2012 does not provide any guidance on the length and content of the training courses, nor on the nature of the accredited institutions that may offer the training courses. Final Disposition Eighth of Law 5/2012 states that the government may, at the initiative of the Ministry of Justice, determine the length and minimum content of the training courses that mediators must take prior to providing mediation services. It may also create a Registry of Mediators and Mediation Institutions. As of 15 October 2013, a draft regulation is being considered by the Government requiring mediation courses to have a minimum duration of 90 hours.

Law 5/2012 does not provide any guidance as to the type or amount of insurance the mediator must obtain. Final Disposition Eighth of Law 5/2012 states that the government may determine the content of the insurance obligation of mediators by regulation. The current draft regulation reiterates the obligation to have insurance, but does not establish a minimum amount.

Mediator Duties

The initial element that determines the existence of mediation subject to the provisions Law 5/2012 is the presence of a mediator. Under Article 11, every mediator must have no legal impediment to acting as a mediator, complete specific training by an accredited institution and obtain insurance. The mediator also has duties under various other articles of the Law 5/2012: impartiality and balanced approach to all parties (Article 7); neutrality that allows the parties to reach a conclusion by themselves (Article 8); facilitation of communication between the parties (Article 13); and refusal to mediate when concerns regarding impartiality arise (Article 13). Article 21 provides that the mediator must give due notice of each session to the parties and facilitate the communication of their positions in an equal and balanced manner. Further, the mediator (or institution) must keep all documents that do not have to be returned to the parties for a period of four months after termination of the mediation (Article 22.1) and the mediator must keep a signed copy of the settlement agreement (Article 23.3).

Under Article 5.1, mediation institutions must ensure transparency in the designation of mediators and will assume jointly any liability arising from the mediation services provided by the mediators. Article 5.2 requires institutions, among other obligations, to establish electronic mediation systems, especially for conflicts concerning monetary obligations.

Pursuant to Article 14, the mediator must comply dutifully with the services contracted for, and failure to do so may generate liability for damages. The injured party may bring a claim against the mediator and the mediation institution (if applicable).

Duties of Legal Representative and Other Professional Mediation Participants

Article 10 states that, during the mediation, the parties must act in accordance with the principles of good faith and mutual respect, and provide continuous cooperation with, and support to, the activities of the mediator.

Court-Annexed Mediation Schemes

Law 5/2012 does not contain any reference to court-annexed mediation schemes. Several judicial jurisdictions, however, notably Catalonia, Madrid, Basque Country and Valencia, are beginning to institute their own pilot court programs through which parties may be encouraged to mediate.

Sweden[56]

Mediation Legislation

Sweden implemented the Directive by, *inter alia*, enacting a new Act on Mediation in Certain Civil and Commercial Disputes ('the Mediation Act') on 16 June 2011 (in force as of 1 August 2011). Together with the enactment of the Mediation Act, the legislature made several amendments to other procedural rules, both to introduce references to the Mediation Act and to revise the existing court-annexed mediation schemes.

The Mediation Act includes 12 sections. The first Section of the Mediation Act provides that it applies only to civil disputes in which the parties are allowed to reach a settlement out of court. Article 3(a)(2), Section 1(2), further states that the Act does not apply to mediation or settlement procedures for a matter before the courts, authorities, or arbitral tribunals. This effectively means that the Mediation Act only applies to private mediation, enforcement of mediation agreements entered into in Sweden after private mediation, and mediation agreements entered into in other Member States.

Court Referral to Mediation

In Sweden, the courts may refer parties to mediation, but only in disputes where the parties are allowed to reach a settlement out of court. Parties can agree to court-arranged mediation, whereby the court can order the parties to appear before a mediator appointed by the court under the Code of Judicial Procedure ('CJP') Section 17(2).

Protections Provided to Ensure Confidentiality of Mediation Proceedings

Consistent with the Directive, Section 5 of the Mediation Act provides that neither a mediator nor an associate of the mediator may disclose or use knowledge gained in connection with the mediation. Corresponding amendments have been made to other procedural rules to ensure that all mediation proceedings are protected by confidentiality.

Under Section 5 of the Mediation Act, the duty of confidentiality extends to mediators and their associates; breach of this duty may lead to liability. A mediator has the right to refuse to provide information that could cause a breach of confidentiality, but cannot refuse to give testimony otherwise. The mediator is permitted to provide confidential information to defend him or herself from a claim for damages or criminal prosecution.

[56] Information in this section is taken from Erik Ficks' contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor, as well as from Simon Arvmyren and Christer Holm's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille. We are also grateful to Mr. Erik Ficks who provided assistance by reviewing the information in the country analysis.

Court-annexed mediation created special challenges with regard to confidentiality. Court hearings in Sweden are open to the public unless otherwise directed by the court in exceptional cases. Instead of introducing specific exemptions from the public rule, the legislature chose the approach that any conferences during private, court-referred special mediation proceedings would not be considered 'court hearings' subject to the public rule. The legislature also introduced, for this type of mediation, rules about secrecy of a party's information stating that a party could specifically request that information be kept secret by the courts. The courts preserve such secrecy for up to 20 years.

In contrast, settlement negotiations conducted by the presiding judge are court hearings and are open to the public. The legislature determined there was no reason to close such settlement negotiations to the public.

Enforceability of Mediation Agreements

In Sweden, Sections 7–12 of the Mediation Act address the enforceability of mediation agreements. If a settlement is reached after judicial proceedings have been initiated, regardless of whether there was assistance from the court, Chapter 17, Section 6 of the CJP governs and establishes that the court shall confirm the settlement in a judgment (stadsfäst förlikning) if requested by both parties. Chapter 3, Section 1 of the Enforcement Code (Utsöningsbalk), (SFS 1981:774) provides that once the judgment is confirmed, it may be enforced the way ordinary judgments are enforced. The court's confirmations of settlements are considered to be covered by the Brussels I Regulation and are thus recognizable and enforceable in the EU.

With regard to the recognition and enforcement of other, non-court-annexed mediation agreements made in Sweden, the Mediation Act governs enforcement. It provides that mediation agreements achieved through non-court-annexed mediation may be declared enforceable by the district courts. The competent district court is the one that has ordinary jurisdiction over one of the parties, based on where the party is domiciled or habitually resident. If none of the parties is domiciled or habitually resident in Sweden, the District Court of Varmland (Värmlands tingsrätt) is the competent court. A district court may, upon request, declare a mediation agreement enforceable in a specific order called an 'enforceability declaration' (verk ställbarhetsförklaring).

Under Sections 1–2 of the Mediation Act, mediation agreements that may be declared enforceable are (i) mediation agreements entered into after private mediation in Sweden (regardless of whether the parties are Swedish), (ii) mediation agreements entered into with a legal entity or private person domiciled or habitually resident in Sweden (regardless of whether the agreement is entered into in Sweden or abroad) and (iii) mediation agreements in cross-border disputes.

To have a mediation agreement declared enforceable, the parties to the agreement must jointly apply, or one or more parties must apply with the others' consent. The application must be made in writing. Section 9(1) of the Mediation Act details the information about the parties and the dispute, and identifies the documents, that must be included in the application. According to Section 12 of the Mediation Act, applications for enforceability declarations are not handled under the CJP but, instead, under the Act on Court Matters (Lag om domstolsärenden, SFS 1996:242). Under Section 10 of the Mediation Act, the district courts will issue an enforceability declaration upon request, provided, as addressed in Article 6(1) of the Directive, that the mediation agreement includes an obligation of the kind that may be enforced in Sweden.

All parties to the mediation agreement may appeal a decision on an application for an enforceability declaration, even though this is not explicitly stated in the Mediation Act. However, Section 11 of the Mediation Act explicitly states that to have the mediation agreement declared enforceable, the district courts must inform all parties to the mediation agreement of the outcome of the application.

The Impact of Mediation on Statutes of Limitations

Section 6 of the Mediation Act provides that if a limitation or prescription period is running at the time the mediation is commenced, the period will not expire earlier than one month after the termination of the mediation (unless otherwise required under any international agreement to which Sweden is a party). The time extension applies to all parties having claims subject to the statute of limitations and not merely the ones participating in the mediation. Court-annexed mediations require no such rule because such mediations are conditioned upon initiating judicial proceedings.

Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

There is no specific requirement for parties or their lawyers to consider mediation. But efforts have been made in Sweden to publicize the mediation option. When it transposed the Directive, the legislature made the Swedish National Courts Administration (Domstolsverket), a state authority reporting to the government and functioning as a service organization for the Swedish courts, responsible for providing information about mediation and the availability of codes of conduct for mediators. The legislature also relied on the different websites about EU law to provide information about mediation and also supposed that private mediation providers in Sweden would increase their marketing efforts and thereby provide the general public with information about mediation.

Requirements for Parties to Participate in Mediation

Mediation in Sweden is a voluntary process between the parties. When implementing the Directive in Sweden, the legislature considered making mediation compulsory, but it ultimately decided that making mediation voluntary would make it more attractive for the parties and would encourage increased use of mediation. There are no clear incentives in Swedish mediation law for parties to participate in mediation, other than if it is found useful for both parties for trying to reach a settlement. No cost incentives or sanction rules have been discussed by the Swedish legislature.

Section 4 of the Mediation Act states that, unless participation in mediation has been required by a duty under the law or by order or encouragement of a foreign court, mediation is only 'commenced' under the Act when the parties have agreed on mediation after the dispute arises. It can be assumed that contractual agreements to mediate are not enforceable under Swedish law.

Accreditation Requirements for Mediators

The Mediation Act contains no provisions addressing how to ensure the quality of mediation. There is no official scheme to certify mediators. However, the legislature has given the Swedish National Courts Administration the task of ensuring the quality of mediation. The Administration has been asked to keep a list of mediators and to decide how that list should be kept.

The legislature considers it to be the responsibility of private mediation providers to provide information about the code of conduct for mediators in marketing its services. For example,

to ensure that there is a sufficient pool of trained mediators in Sweden, the SCC Mediation Institute has offered a training program to certify mediators since 2009.

Mediator Duties

Apart from confidentiality, Swedish mediation law imposes no specific duties on mediators. However, attorneys who are members of the Swedish Bar Association ('SBA') are bound by the SBA's Code of Professional Conduct when acting as mediators, including the Code's rules on conflicts of interest. The only exception to the Code's application in this respect is when an attorney is, instead, subject to specific conflict of interest rules as an arbitrator or a judge in a court of law.

Mediators can offer both binding and non-binding opinions if so requested by the parties.

Duties of Legal Representatives and Other Professional Mediation Participants

Apart from the duty of confidentiality for 'the mediator's associates' (in addition to the mediator), there are no specific duties for legal representatives or other professional mediation participants under Swedish mediation law. However, attorneys who are members of the SBA are bound by the SBA's Code of Professional Conduct when representing a client during mediation, just as they are when representing a client during litigation.

Court-Annexed Mediation Schemes

For more than 20 years, Sweden has had two different procedures for court-annexed mediation. First, district courts must conduct settlement negotiations. Chapter 42, Section 17(2), of the CJP establishes negotiation as the preferred approach: the court is required to identify a specific reason not to conduct settlement negotiations, instead of the old requirement that the court should conduct settlement negotiations only when 'appropriate'.

Secondly, the district courts are now required to consider recourse to special mediation in all cases. Special mediation allows the court to direct the parties to appear at a mediation session with a mediator. Previously, such a procedure was only to be considered if deemed more appropriate than settlement negotiations. To provide further transparency, several rules on special mediation have been made explicit: first, the parties should consent to special mediation. Second, the court should set an appropriate time limit within which the special mediation shall be concluded and the dispute referred back to the court if not settled (the time limit can be extended by the court if there is any specific reason therefore). Third, the mediator should be appointed by the district court.

Due to an amendment to the procedural rules, the courts of appeal now may conduct settlement negotiations in much the same manner as the district courts. The rules governing these courts will be the same as those of the district courts.

3.2. Questionnaire responses

3.2.1. Estimate of the Current Mediation Market (Questionnaire Part I)

The lack of significant development of mediation in the EU, in spite of its high success and satisfaction rates when used, had been named the 'EU Civil and Commercial Mediation

Paradox'.[57] This broad scope of the paradox is even clearer when the magnitude of the savings that would be generated by more frequent mediation use is considered. Of course, the amount of the potential savings is relative to what is available as an alternative to mediation, namely the court-run proceedings. The reality in the EU, as recently presented in the context of the 2012 CEPEJ report titled 'Efficiency and Quality of Justice', is that 'The trend in Western and Northern European states would be globally in favour of limiting the number of courts, mainly for budgetary reasons, but sometime also for seeking more efficiency through specialisation and economies of scales'.[58] The conclusion also highlights that 'The number of Member States where the budgets [of judicial systems] have decreased is more important than in 2008. The effects of the financial and economic crisis can be felt in several states'. Emphasizing the actual savings potential of mediation against the background of the public justice system becoming financially weaker (and therefore less likely to address the needs of its users in a timely and effective manner) is extremely important, because it provides additional motivation and support with regard to the policy options to promote mediation.[59]

In light of the study *Quantifying the Costs of Non-ADR,* the research team determined that is was worthwhile to inquire into the amount of savings realized as a result of using mediation before litigation in each Member State.[60] This study from 2009 used information from the World Bank *Doing Business* methodology and data to compare the use of mediation, in time and cost, to litigation. In May 2011, a revised version of this study was presented at the European Parliament to expose the losses incurred by EU citizens and businesses as a consequence of not using mediation. According to the data from that presentation, a mediation success rate as modest as (on average) 25% would yield savings in both time and money. Considering that the reported success of mediation is normally at least double that percentage, the amount of actual savings could be enormous.

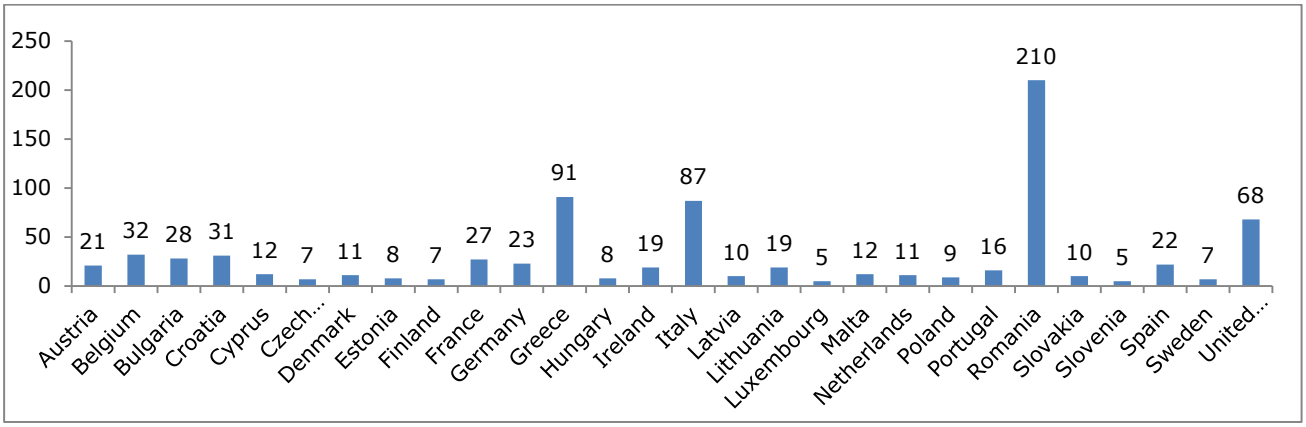
Part I of the questionnaire provides an update to the previously-mentioned study. Below the reader will find a discussion for questions 1-6, which inquired into the respondents' estimation of the current mediation market in their countries. In addition, a chart details the average response to questions 1-6 for each Member State.

1. Please indicate your country.[61]

We received enough valid responses from each of the 28 EU Member States to effectively analyse the data. Most notable are the overwhelming number of responses from Romania, followed by Greece, Italy and the UK, which could indicate a great interest in the mediation market in those nations.

[57] While the percentage varies greatly by country, on a world-wide mediation is reported to be successful in about 70% of the cases.
[58] CEPEJ, The European Commission for the Efficiency of Justice, is a judicial body composed of experts from the Member States of the Council of Europe. CEPEJ aims to improve the efficiency and functioning of justice in the Member States.
[59] Interestingly enough, the CEPEJ Report concludes that: 'Access to justice may also be facilitated through the promotion of Alternative Dispute Resolution (ADR). They contribute to limiting the need to bring issues before a court and to involving professionals other than judges in the process.'
[60] See: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.
[61] The numbering of this and the following questions reflects the numbers of the questionnaire.

Figure 1: Number of Responses to Questionnaire



2. Estimate the number of mediations that occur in your country annually.[62]

(a) Less than 500
(b) Between 500 and 2 000
(c) Between 2 000 and 5 000
(d) Between 5 000 and 10 000
(e) More than 10 000
(f) I don't know

In the absence of any reliable official statistics on the number of mediations in each country, we asked the respondents to make their best estimate by choosing among five ranges of numbers.[63] For each country we have taken the most frequently indicated range of the number of mediations into consideration; however the 'I don't know' option was selected by the majority of respondents.

Figure 2: Average Estimate of the Number of Mediations

Number of mediations	Countries	Nr. of countries	% of countries
More than 10 000	Germany, Italy, Netherlands, UK	4	14%
Between 5 000 and 10 000	Hungary, Poland	2	7%
Between 2 000 and 5 000	Belgium, France, Slovenia	3	11%
Between 500 and 2 000	Austria, Denmark, Ireland, Romania Slovakia, Spain	6	21%
Less than 500	Bulgaria, Croatia, Cyprus, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal Sweden	13	46%

[62] For the purposes of this questionnaire, the 'mediation market' was defined for the participants as the total number of civil and commercial mediations falling within the scope of the 2008 Mediation Directive (Directive 2008/52/EC).
[63] Official statistics on the number of mediations are not available except in Italy. This is partly due to certain features of the mediation process, notably, confidentiality. Thus, respondents were asked to estimate the number of mediations in their Member State.

It is not a surprise that 19 Member States (representing 67% of the EU members) have less than 2 000 mediations per year. More than 10 000 mediations were reported only in Germany, the Netherlands and the UK due to their long traditions of mediation, and in Italy due to the recent legislative reform that introduced a form of mandatory mediation. Except for Italy, it should be noted that a number of respondents in the other three countries reported an occurrence of less than 10 000 mediations. This suggest that the total number of mediations in each of these three countries might not actually exceed 10 000 annually, or not exceed this number substantially. To the contrary, Italy alone reported in excess of 200 000 mediations in 2012.[64]

3. In your country today, do you think a 'balanced relationship between mediation and judicial proceedings', as requested by Article 1 of the EU Mediation Directive, exists in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually?

95% of the total respondents answered 'No' to this question. Of the remaining 5% of respondents, over half were blank answers and only 39 answers were 'Yes' to this question. Moreover, the average response for each Member State indicated that the respondents do not think there is a balanced relationship between the number of mediations and litigations in their respective countries. This data confirms the hypothesis that regardless of the absolute number of mediations, even in countries such as Germany, Italy, the Netherlands and the UK, those in the ADR sector believe that this number is not sufficient in comparison to the number of litigations that occur.

4. Based on your answer to Question 2, please estimate the average monetary value of mediations in your country (i.e., the average claim made by the plaintiff, regardless of the average resulting settlement).

(a) Less than €25 000
(b) Between €25 000 and €50 000
(c) Between €50 000 and €100 000
(d) More than €100 000
(e) I don't know

By cross-analysing the answers to questions seeking the number of mediations and the average value of mediations, it seems that there is no correlation between the two. For example, Italy and Germany, with high numbers of mediations per year, have respectively a high and a low average monetary value of mediations. This seems to suggest that mediation is viable regardless of the amount being disputed.

[64] See http://webstat.giustizia.it/AreaPubblica/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf

Figure 3: Average Estimate of the Average Monetary Value of Mediations

Average monetary value of mediations	Countries	Nr. of countries	% of countries
More than € 100 000	Netherlands	1	4%
Between € 50 000 and € 100 000	Belgium, Ireland	2	7%
Between € 25 000 and 50 000	Cyprus, Denmark, France, Germany, Hungary, Italy, Poland, Slovakia, UK	9	32%
Less than € 25 000	Austria, Bulgaria, Croatia, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, Spain, Sweden	16	57%

5. SKIP this question if above you have answered 'I don't know'. For a dispute of average value, as you estimated it above, what is the average cost in Euros to be split by the parties involved, including mediation and administrative fees (if applicable), but excluding lawyers' fees (where present)? Please indicate the total without spaces or commas (e.g., if your estimate is three-thousand Euro, please insert '3 000').

6. SKIP this question if above you have answered 'I don't know'. For the same dispute of average value, what is the average duration of a mediation (in days) from the moment the request for mediation is filed until the end of the process? For the purposes of data collection and computation, please indicate an exact number, rather than a range.

After the data analysis began, it became clear that a few more questions needed to be answered in place of questions 5 and 6. The researchers created an additional questionnaire entitled, 'Cost and Time of Mediation in the EU', which was sent to the emails provided by the respondents from the first questionnaire.

Cost and Time of Mediation in the EU

Although this aspect was not offered in the Terms of Reference, the research team determined that exploring the impact of the time and cost of mediation versus litigation was an important aspect for analysis. In order to compare 28 different jurisdictions, the research team has used the same well-known methodology used by the World Bank in the Report 'Doing Business' for the index 'Enforcement Contract' based on the same litigation case. This methodology allowed for the comparison of the costs and time of mediation versus those of litigation for the same case, as calculated by the researchers of the World Bank. The questionnaire, which can also be found in Annex 4, included the following questions:

Please estimate the time and the cost of a mediation process in your country, based on the following scenario adapted from the World Bank - Doing Business 2013.

The dispute: *Seller sells goods to Buyer. Buyer alleges that the goods are of inadequate quality and refuses to pay. Seller, however, insists that the goods are of*

adequate quality. Moreover, because the goods were custom-made for Buyer, Seller cannot sell them to anyone else. Seller therefore demands full payment and threats to sue Buyer.

Value in dispute: *The value of the dispute equals 200% of the economy's income per capita as follows:*

Figure 4: Average Value of the Dispute in Each Member State

Country	Value of the dispute	Country	Value of the dispute
Austria	€ 72 632	Italy	€ 53 128
Belgium	€ 69 414	Latvia	€ 18 571
Bulgaria	€ 9 850	Lithuania	€ 18 466
Croatia	€ 20 827	Luxembourg	€ 117 489
Cyprus	€ 45 971	Malta	€ 31 621
Czech Republic	€ 27 850	Netherlands	€ 74 782
Denmark	€ 90 812	Poland	€ 18 767
Estonia	€ 22 857	Portugal	€ 31 955
Finland	€ 72 812	Romania	€ 11 895
France	€ 63 789	Slovakia	€ 9 128
Germany	€ 66 135	Slovenia	€ 35 504
Greece	€ 37 639	Spain	€ 46 602
Hungary	€ 19 143	Sweden	€ 80 045
Ireland	€ 58 015	UK	€ 56 812

Mediation: *Before going to court, the parties begin a mediation procedure with the most popular mediation provider of the capital city (in order to estimate time and cost, you may consult its website or call for information).*

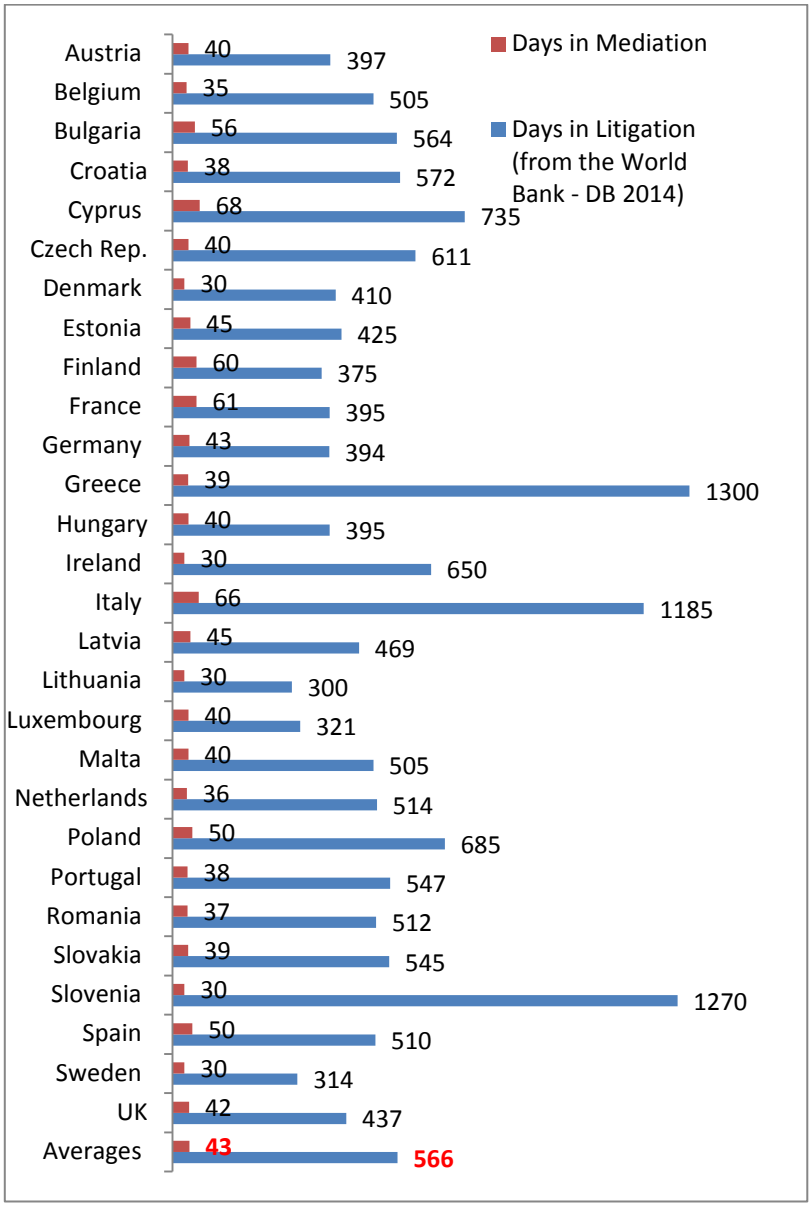
1) ***Time - Duration of a mediation process in days****. Please indicate the average number of calendar days of the mediation process from the day of the deposit of the mediation request to the day of its end.*

2) ***Cost - Mediation costs****. Please indicate the cost in Euro only for the Plaintiff charged by the mediation centre for administering this mediation, including: mediator fees, administration costs (if any) and any applicable taxes, such as VAT.*

3) ***Cost - Attorney fees****. Please indicate the attorney fee in Euro charged by an average local firm (including value added tax and other applicable taxes) to assist the Plaintiff in this mediation.*

Given that scenario, and having averaged the responses by country, the average duration of a mediation in the EU is 43 days compared with 566 for litigating the same dispute, which has been calculated in the Doing Business 2014 Report of the World Bank. As it is noted in Figure 5, the duration of a mediation can vary from 30 days up to 68 days, while a litigation in court have a much wider variation from 300 days in Lithuania to 1300 days in Greece.

Figure 5 : Average Number of Days in Mediation versus Litigation



The research team also determined that this data could be compared to the results of the above mentioned 'The Costs of Non-ADR'. Using the methodology from the original study, the data generated from the additional questions regarding the time saved using mediation provided an update to the 2011 study. The data was compared using the average time of two different approaches. The first approach occurs when litigants go directly to the court to resolve the dispute through litigation (i.e., a one-step approach). The second approach occurs when litigants must first attempt to mediate, and if the mediation fails, the parties then go to court to resolve the dispute through litigation (i.e., a two-step approach). This second approach can be required by law or a court program, or it can be voluntary. In calculating the average time of the two-step approach, it is extremely important to set the assumption of the mediation success rate. The formula is the following:

(Mediation Time x Success Rate) + [(Litigation Time x Unsuccessful Rate) + (Mediation Time x Unsuccessful Rate)] = days

With a conservative 50% mediation success rate, the average duration of a dispute in the EU decreases from 566 days to 326 days.

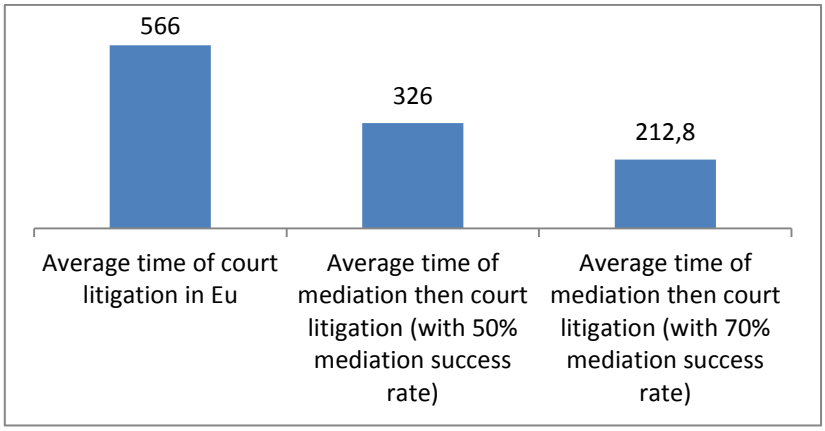
$$(43 \times 0.5) + [(566 \times 0.5) + (43 \times 0.5)] = 326 \text{ days}$$

With a 70% mediation success rate, the average duration of a dispute in the EU decreases from 566 days to 212,8 days.

$$(43 \times 0.7) + [(566 \times 0.3) + (43 \times 0.3)] = 212.8 \text{ days}$$

For the duration of the time between a one-step approach (only litigation) and a two-step approach (mediation then litigation) to be equal, the mediation success rate should decrease to about 9%. This data, which supports and updates the data from the 2011 study, shows that mediation saves a significant amount of time for those involved. In fact, even at a low success rate, this data shows that mediation is beneficial because of its savings of both time and cost.

Figure 6 : Average Number of Days in Litigation versus Mediation then Litigation



By adding the costs of the mediator and the lawyer fees and comparing this number with the equivalent costs for a litigation in court, the difference is considerable in most of the EU countries, which can be seen in Figure 7.

Figure 7 : Average Cost of Litigation Compared to Mediation

	A. Court Cost	B. Mediation Cost	C. Lawyer Cost in Court	D. Lawyer Cost in Mediation	E. Total Cost in Court *	F. Total Cost in Mediation
Austria	€ 2.978	€ 5.000	€ 9.863	€ 5.000	€ 13.095	€ 10.000
Belgium	€ 3.818	€ 1.812	€ 6.733	€ 1.667	€ 12.286	€ 3.478
Bulgaria	€ 553	€ 120	€ 985	€ 300	€ 2.345	€ 420
Croatia	€ 542	€ 367	€ 1.791	€ 933	€ 2.874	€ 1.300
Cyprus	€ 1.200	€ 1.300	€ 3.990	€ 900	€ 7.535	€ 2.200
Czech Rep.	€ 1.365	€ 1.000	€ 3.643	€ 2.000	€ 9.185	€ 3.000
Denmark	€ 2.997	€ 3.500	€ 4.541	€ 3.000	€ 21.159	€ 6.500
Estonia	€ 2.811	€ 2.833	€ 2.057	€ 2.867	€ 5.097	€ 5.700
Finland	€ 2.228	€ 200	€ 7.281	€ 800	€ 9.655	€ 1.000
France	€ 1.722	€ 1.230	€ 6.825	€ 1.888	€ 11.099	€ 3.118
Germany	€ 3.571	€ 3.167	€ 4.352	€ 2.583	€ 9.510	€ 5.750
Greece	€ 1.016	€ 2.377	€ 3.764	€ 1.260	€ 5.420	€ 3.637
Hungary	€ 1.531	€ 800	€ 957	€ 400	€ 2.871	€ 1.200
Ireland	€ 1.334	€ 750	€ 10.907	€ 500	€ 15.606	€ 1.250
Italy	€ 1.541	€ 1.231	€ 11.582	€ 1.847	€ 15.885	€ 3.078
Latvia	€ 1.190	€ 2.500	€ 2.656	€ 1.500	€ 4.290	€ 4.000
Lithuania	€ 1.108	€ 290	€ 1.588	€ 844	€ 4.358	€ 1.134
Luxembourg	€ 2.232	€ 2.000	€ 8.048	€ 3.000	€ 11.338	€ 5.000
Malta	€ 949	€ 300,0	€ 9.992	€ 2.500	€ 11.352	€ 2.800
Netherlands	€ 3.739	€ 2.000	€ 10.245	€ 3.150	€ 17.873	€ 5.150
Poland	€ 938	€ 1.200	€ 938	€ 1.250	€ 2.252	€ 2.450
Portugal	€ 575	€ 1.375	€ 3.400	€ 3.750	€ 4.138	€ 5.125
Romania	€ 1.332	€ 397	€ 916	€ 899	€ 3.438	€ 1.296
Slovakia	€ 548	€ 688	€ 1.278	€ 1.232	€ 2.738	€ 1.920
Slovenia	€ 1.243	€ 900	€ 2.712	€ 525	€ 4.513	€ 1.425
Spain	€ 2.097	€ 700	€ 5.918	€ 1.133	€ 8.015	€ 1.833
Sweden	€ 2.481	€ 3.600	€ 22.413	€ 4.200	€ 24.974	€ 7.800
UK	€ 1.477	€ 1.306	€ 11.931	€ 1.518	€ 14.101	€ 2.824
Averages	**€ 1.754**	**€ 1.534**	**€ 5.761**	**€ 1.837**	**€ 9.179**	**€ 3.371**

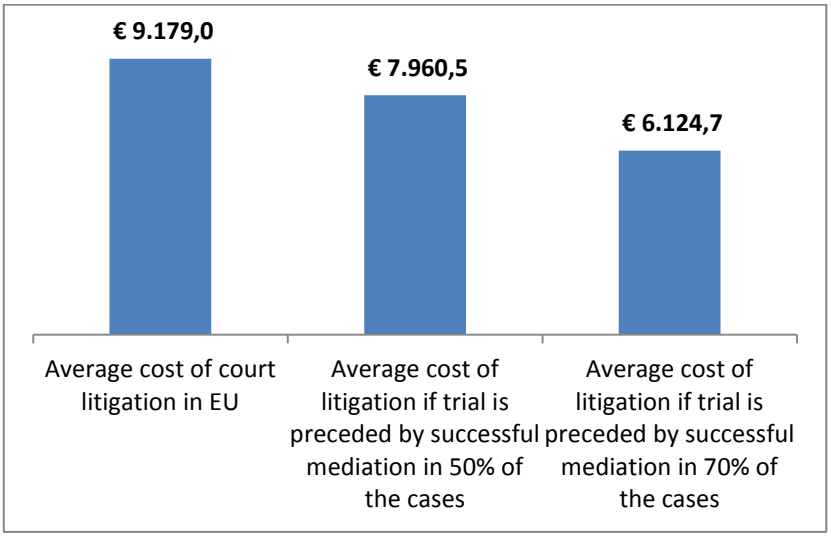
This comparison clearly shows an average cost savings of about 60% in favour of mediation. Using the same methodology used for time, with a conservative 50% mediation success rate, the average cost of a dispute in the EU decreases from 9 179 Euro to 7 960,5 Euro.

$$(3\ 371 \times 0.5) + [(9\ 179 \times 0{,}5) + (3\ 371 \times 0.5)] = 7\ 960{,}5 \text{ Euro}$$

With a 70% mediation success rate, the average cost of a dispute in the EU decreases from 9 179 Euro to 6 124,7 Euro.

$$(3\ 371 \times 0.7) + [(9\ 179 \times 0.3) + (3\ 371 \times 0.3)] = 6\ 124{,}7 \text{ Euro}$$

Figure 8 : Average Cost of Litigation versus Mediation then Litigation



Conclusion for Estimate of the Current Mediation Market

From the data, it can be seen that the number of mediations in the EU Member States falls short of what it should be. The respondents believe that more mediations should be occurring. In addition to providing this information, the responses from the additional questions confirm the data from 'The Costs of Non-ADR' study. As seen from that and several other studies, mediation saves parties a significant amount in both time and cost when compared to the time and cost of litigation. It is important to note that the research team followed the same methodology of the World Bank survey; however, a different sample dispute was used. Nonetheless, this exercise supports the argument that regardless of which policy tool is used to encourage mediation, even at a low success rate of less than 30%, mediation saves parties significant amounts of time and money.

Figure 9 : Average Responses to Questions 2-6 in Part I

	2. Estimate the number of mediations that occur in your country annually.	**3. Do you think a 'balanced relationship between mediation and judicial proceedings' exists in your country?**	**4. Average monetary value of mediations in your country.**	**5. For a dispute of average value, what is the average cost in Euros?**	**6. What is the average duration of a mediation (in days)?**
Austria	Between 500 and 2 000	No	Less than €25 000	€ 3 025	98
Belgium	Between 2 000 and 5 000	No	Between €50 000 and €100 000	€ 1 944	56
Bulgaria	Less than 500	No	Less than €25 000	€ 1 050	39
Croatia	Less than 500	No	Less than €25 000	€ 961	63
Cyprus	Less than 500	No	Between €25 000 and €50 000	€ 2 440	26
Czech Rep.	Less than 500	No	Less than €25 000	€ 325	75
Denmark	Between 500 and 2 000	No	Between €25 000 and €50 000	€ 3 267	56

Estonia	Less than 500	No	Less than €25 000	€ 8 000	104
Finland	Less than 500	No	Less than €25 000	€ 4 750	98
France	Between 2 000 and 5 000	No	Between €25 000 and €50 000	€ 2 900	81
Germany	More than 10 000	No	Between €25 000 and €50 000	€ 2 164	58
Greece	Less than 500	No	Less than €25,000	€ 1.802	17
Hungary	Between 5 000 and 10 000	No	Between €25 000 and €50 000	€ 200	40
Ireland	Between 500 and 2 000	No	Between €50 000 and €100 000	€ 4 333	26
Italy	More than 10 000	No	Between €25 000 and €50 000	€ 2 531	85
Latvia	Less than 500	No	Less than €25 000	€ 1 675	55
Lithuania	Less than 500	No	Less than €25 000	€ 750	6
Luxembourg	Less than 500	No	Less than €25 000	€ 2 333	31
Malta	Less than 500	No	Less than €25 000	€ 4 000	400
Netherlands	More than 10 000	No	More than €100 000	€ 2 694	53
Poland	Between 5 000 and 10 000	No	Between €25 000 and €50 000	€ 1 257	39
Portugal	Less than 500	No	Less than €25 000	€ 519	40
Romania	Between 500 and 2 000	No	Less than €25 000	€ 1 278	19
Slovakia	Between 500 and 2 000	No	Between €25 000 and €50 000	€ 1 520	44
Slovenia	Between 2 000 and 5 000	No	Less than €25 000	€ 200	97
Spain	Between 500 and 2 000	No	Less than €25 000	€ 1 857	55
Sweden	Less than 500	No	Less than €25 000	€ 2 050	30
UK	More than 10 000	No	Between €25 000 and €50 000	€ 4 764	22

3.2.2. Assessment of the Existing Law in EU Member States (Questionnaire Part II)

The goal of Part II is to obtain information about the perspectives of mediation experts in the EU regarding the current mediation legislation in their countries. By comparing this information to that of Part I, the team was able to see possible correlations between the estimated numbers of mediations that occur in a particular country and its current mediation legislation. These comparisons have the potential to show correlations, and what areas of legislation may increase or inhibit the use of mediations in a particular nation. In addition, by comparing this information to the country analyses completed by the team

members,[65] the team was able to observe where there may be possible misunderstandings or a range of interpretations of the law in the Member States. If the experts in a country provided significantly different answers to a particular question, this may be an indication that there needs to be an increase in the education regarding mediation legislation of mediators and attorneys in that particular country. Alternatively, a range of answers could simply show that the law is unclear.

The sections below include discussions of the average responses for the Member States to questions 7-11 and then 12-16, as well as discussions of interesting answers provided from within specific Member States. For a more in-depth discussion of the responses within each Member State, please see Annex 1. Below, you will also find two charts detailing the average response of questions 7-11 and then 12-16 for each Member State.

7. What is the extent of confidentiality of the entire mediation process?

(a) Assured with several exceptions
(b) Assured with few exceptions
(c) Guaranteed in all cases
(d) Other: Please specify_____

The respondents from one Member State indicated that confidentiality is assured with several exceptions, and respondents from eighteen of the Member States indicated that confidentiality is assured with few exceptions. Of the twenty-eight countries, the respondents from nine of the Member States indicated that confidentiality is guaranteed in all cases.

Of the four Member States whose respondents reported the highest estimated number of mediations in their countries (Germany, Italy, the Netherlands and the United Kingdom), the strongest feature of confidentiality, 'guaranteed in all cases', was reported by Italy. For Germany, the Netherlands and the United Kingdom, the respondents indicated that confidentiality is assured with few exceptions. Of the two Member States (Hungary and Poland) whose respondents indicated an occurrence of between 5 000 to 10 000 mediations annually, the respondents indicated 'assured with few exceptions.' Interestingly, three of the nine responses with the strongest protection of confidentiality indicated by respondents also have the lowest number of mediations that occur annually. At first sight, this could indicate that a strong degree of confidentiality may decrease the number of mediations. However, this conclusion would run contrary to the fundamental tenet that strong confidentiality protection is key to the development of mediation. Much more likely, therefore, the foregoing correlation may be due to the fact that these countries are much smaller and therefore would have a smaller number of annual mediations regardless of the extent of confidentiality.

Some Member States have a similar approach to confidentiality, but the experts reported different answers. Some Member States, for example, have transposed the Directive in a way that meets the requirements of the Directive's recommendations for confidentiality, which includes exceptions to confidentiality for public policy (i.e., 'to ensure the best interests for children or to prevent harm to the physical or psychological integrity of a person') and for the enforcement of the agreement. In Italy, the respondents' average answer indicated that confidentiality is guaranteed in all cases. In Italy, confidentiality is guaranteed in all cases as determined by the Directive, which means that the two previously stated exceptions are included. Finally, the experts in both France and Greece, which have

[65] Please see Chapter 3.1.1 and 3.1.2 for an analysis of the existing legislation in each Member State.

transposed Article 7 of the Directive (concerning confidentiality) in the same way, the respondents' average answer stated that confidentiality is 'assured with few exceptions'.

Within some Member States, such as in France, some respondents provided a wide array of responses. This discrepancy may be due to the fact that the respondents have interpreted the law or the question differently, as may be the case with Italy, France and Germany. Please see Annex 1 for a discussion of the responses within each Member State.
In sum, there seems to be no significant correlation between the extent of confidentiality and the number of mediations in a particular Member State.

8. To what extent do the courts refer cases to mediation?

(a) The courts mention possible referral
(b) The courts encourage referral to mediation
(c) The courts are proactive in referring individual cases to mediation
(d) Other: Please specify_____

Respondents from fourteen of the Member States indicated that the courts mention possible referral, and respondents from twelve of the Member States indicated that the courts encourage mediation. Of the twenty-eight countries, respondents from two of the Member States indicated the strongest extent of referrals, specifically, that the courts are proactive in referring individual cases to mediation.

Notably, one of the two countries for which respondents indicated the strongest extent of referrals, Italy, has one of the highest numbers of annual mediations reported. In addition, based on average answers, Member States which have under 500 annual mediations also have the lowest extent of referrals. These two correlations seem to support the intuitive cause and effect relationship between the number of referrals and that of mediations. Still, Sweden, the other country where a significant number of referrals occur, has one of the lowest number of annual mediations reported. As a result, after carefully reviewing the data, the importance of court referrals should not be overestimated.[66]

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?

(a) Enforced only through extensive measures
(b) Enforced only with court approval
(c) Automatically enforceable
(d) Other: Please specify_____

Respondents for five of the Member States indicated that mediated agreements are enforced only though extensive further measures, and respondents for twenty of the Member States indicated that mediated agreements are enforceable only with court approval. Three of the twenty-eight Member States (Croatia, Italy, and Slovakia) have an average answer indicated by the respondents of 'automatically enforceable'.

Interestingly, these three Member States each have a variety in terms of the reported number of annual mediations. Specifically, the respondents in Croatia reported fewer than 500 cases, the respondents in Slovakia reported between 500 and 2 000 mediations, and the respondents in Italy reported over 10 000 cases.

[66] At least as far as Italy is concerned, of over 200 000 mediations initiated in 2012 only 2.7% originated from referrals. Close to 80% came from mandates, while the balance originated from contract clauses and were started voluntarily by the parties.

Within some individual Member States, the respondents indicated an array of answers. In Portugal, for example, the majority of the respondents stated that mediated agreements are enforced only with court approval, and the other respondents indicated a split between the other two options. It is apparent that there is some extensive disagreement as to the interpretation of the extent of enforceability of mediated agreements in Portugal. Additionally, respondents in Slovakia displayed an interesting split in answers, with the majority stating that mediated agreements are automatically enforceable and a strong minority stating that they are enforced only through extensive further measures. In Ireland, the respondents' answers were scattered.

In light of this, there seems to be no significant correlation between the extent of the enforcement of mediated agreements and the number of mediations that occur annually in a particular nation.

10. To what extent is there a mediator accreditation system?

(a) No accreditation system
(b) Accreditation based on market standards, which are defined as those standards implicitly approved by users and providers of mediation services
(c) Accreditation based on statutory standards, including state exams or other forms of licensing by a public authority
(d) Other: Please specify_____

Respondents for nine of the Member States reported that there is no current mediator accreditation system. Respondents in the six other Member States reported that accreditation is based on market standards. For thirteen of the twenty-eight Member States, the respondents indicated that accreditation is based on statutory standards.

Notably, the three Member States with the highest number of reported mediations all have different averages for this question. For Germany, the average indicated answer from the respondents is that there is no existing accreditation system. In Italy, the respondents indicated that accreditation is based on statutory standards. For the Netherlands, the respondents indicated that accreditation is based on market standards.

The results within the Member States often showed a discrepancy among the responses, as in Bulgaria, the Netherlands and Portugal. In Bulgaria and the Netherlands, for example, the respondents provided mixed answers, with some indicating that mediator accreditation is based on market standards and others indicating that they are based on statutory standards. Perhaps some respondents are uninformed of recent changes in legislation, or there is a lack of education in a particular Member State.

From the data analysis, there does not seem to be a significant correlation between the type of mediator accreditation system and the number of mediations in a particular Member State.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?

(a) No incentives
(b) Modest incentives
(c) Strong incentives
(d) Other: Please specify_____

Respondents for nineteen of the Member States indicated that there are no incentives for parties to use mediation. Respondents for the other nine Member States reported that there are modest incentives for parties to use mediation in their nations. No Member States reported, on average, responses that indicated that respondents believe there are strong incentives for parties to use mediation.

In possibly significant correlations, a large majority of the Member States whose average respondents indicated the lowest number of annual mediations have no incentives for parties to participate in mediation. Also, many of the nations where a high number of mediations, in light of their size, occur annually (such as Italy, Poland, Romania and Spain) do, in fact, have incentives that the average respondents characterize as 'modest'.

Within the Member States, some respondents provided an interesting array of responses. In Portugal, for example, a majority of the responses stated that there are no economic incentives for litigants to participate in mediation, which is not in line with the current 2013 law, in which economic incentives do appear. Specifically, Portugal's Law No 41/2013 provides that when a claimant has the choice of using ADR, but opts to pursue judicial resolution instead, the claimant will bear the judicial fees. This interesting discrepancy of interpretation, both for this question and others, suggests that this incentive, and other aspects of mediation legislation, may not currently be widely known within Portugal's ADR community.

From the data analysis, there appears to be a possible correlation between the existence of incentives for parties to use mediation and the number of mediations that occur in a particular Member State. Still, incentives alone do not appear to have produced, where they have long been in existence, significant results.

Figure 10 : Average Responses to Part II (Questions 7-11)

	7. What is the extent of confidentiality?	**8. To what extent do the courts refer cases to mediation?**	**9. How are mediated agreements enforced…?**	**10. To what extent is there a mediator accreditation system?**	**11. To what extent are there economic incentives for mediation, such as…?**
Austria	Guaranteed in all cases	The courts encourage mediation	Enforced only through extensive further measures	Accreditation based on statutory standards	No incentives
Belgium	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	Accreditation based on statutory standards	No incentives
Bulgaria	Guaranteed in all cases	The courts encourage mediation	Enforced only through extensive further measures	Accreditation based on statutory standards	Modest incentives
Croatia	Guaranteed in all cases	The courts mention possible referral	Automatically enforceable	Accreditation based on statutory standards	No incentives
Cyprus	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	Accreditation based on statutory standards	No incentives
Czech Rep.	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	Accreditation based on statutory standards	No incentives
Denmark	Guaranteed in all cases	The courts mention possible referral	Enforced only with court approval	Accreditation based on market standards	No incentives
Estonia	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	No accreditation system	No incentives

Finland	Assured with few exceptions	The courts encourage mediation	Enforced only with court approval	No accreditation system	No incentives
France	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	No accreditation system	No incentives
Germany	Assured with few exceptions	The courts encourage mediation	Enforced only through extensive further measures	No accreditation system	No incentives
Greece	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	Accreditation based on statutory standards	No incentives
Hungary	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	Accreditation based on statutory standards	No incentives
Ireland	Assured with few exceptions	The courts encourage mediation	Enforced only with court approval	Accreditation based on market standards	No incentives
Italy	Guaranteed in all cases	The courts are proactive in referring individual cases to mediation	Automatically enforceable	Accreditation based on statutory standards	Modest incentives
Latvia	Assured with few exceptions	The courts encourage mediation	Enforced only with court approval	No accreditation system	Modest incentives
Lithuania	Guaranteed in all cases	The courts mention possible referral	Enforced only with court approval	No accreditation system	Modest incentives
Luxembourg	Assured with few exceptions	The courts encourage mediation	Enforced only with court approval	Accreditation based on statutory standards	No incentives
Malta	Assured with several exceptions	The courts mention possible referral	Enforced only through extensive further measures	No accreditation system	No incentives
Netherlands	Assured with few exceptions	The courts encourage mediation	Enforced only through extensive further measures	Accreditation based on market standards	No incentives
Poland	Assured with few exceptions	The courts encourage mediation	Enforced only with court approval	Accreditation based on market standards	Modest incentives
Portugal	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	No accreditation system	No incentives
Romania	Guaranteed in all cases	The courts mention possible referral	Enforced only with court approval	Accreditation based on statutory standards	Modest incentives
Slovakia	Guaranteed in all cases	The courts encourage mediation	Automatically enforceable	Accreditation based on statutory standards	Modest incentives
Slovenia	Guaranteed in all cases	The courts encourage mediation	Enforced only with court approval	Accreditation based on statutory standards	Modest incentives
Spain	Assured with few exceptions	The courts mention possible referral	Enforced only with court approval	Accreditation based on market standards	Modest incentives
Sweden	Assured with few exceptions	The courts are proactive in referring individual cases to mediation	Enforced only with court approval	No accreditation system	No incentives
UK	Assured with few exceptions	The courts encourage mediation	Enforced only with court approval	Accreditation based on market standards	No incentives

12. To what extent are there mandates for (preliminary) mediation informational sessions?

(a) No preliminary mediation session required
(b) Preliminary mediation session required for some cases
(c) Preliminary mediation session required most cases (more than 50% of all cases)
(d) Other: Please specify_____

Respondents from eighteen of the Member States indicated that litigants are not required to attend preliminary mediation sessions. Respondents from nine of the Member States indicated that preliminary mediation sessions are required for some cases, and respondents from one Member State, Romania, indicated that preliminary mediation sessions are required for all cases.

Of the three Member States for which respondents indicated the highest occurrence of mediations, respondents from only one, Italy, indicated that preliminary mediation informational sessions are required for some cases. Respondents for Germany, the Netherlands and the UK indicated that preliminary mediation information sessions are not required. Of the thirteen Member States for which respondents indicated an occurrence of fewer than 500 mediations per year, the average response for seven States indicated that there is no current mandate requiring parties to attend a preliminary mediation informational session. This could show a correlation between a lack of mediation informational sessions, or a lack of awareness of mediation, and a low occurrence of mediations.

The data shows that there may be a correlation between mandates for preliminary mediation informational sessions and the occurrence of mediations. It is undisputed that an increase in awareness may increase parties' willingness to use mediation. However, the data obtained is not conclusive.

13. To what extent are there mandates for parties to use mediation?

(a) No mandates
(b) Mandates applicable to few cases
(c) Mandates applicable frequently (more than 20% of all cases)
(d) Other: Please specify_____

Respondents from twenty-one of the Member States indicated that there are no mandates for parties to use mediation. Respondents from six of the Member States indicated that mandates are applicable to a few cases, and respondents from one Member State, Italy, indicated that mandates are applicable to more than 20% of all cases. Italy is also the Member States with by far the highest occurrence of mediations. The statistics indicate that mandatory rules have a positive effect (more than 80%) on the number of mediations in Italy. Analysis for other countries raises more complicated questions: of the eight Member States for which respondents reported an occurrence of over 5 000 mediations per year, mandates are only applicable in two of these nations.[67]

Interestingly, the responses sometimes varied within the countries. For example, in the Netherlands, the respondents' answers were evenly split between the options stating that there are no mandates and that there are mandates for few cases.

[67] This may suggest that, in the absence of these mandates, which unlike Italy are limited in scope, the countries with more than 5 000 mediations would be even less.

It is undisputed that an increase in mandates for parties to use mediation would result in a higher number of mediations than before such a mandate. For a better understanding of this correlation, however, it may be more effective to analyse the number of mediations in Italy, and in the other nations that report mediations between 5 000 and 10 000 per year, by comparing current figures with the number of mediations that occurred prior to such mandates rather than simply looking at current numbers.[68]

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?

(a) Not present
(b) Present with minimal use (less than 5% of total mediated cases)
(c) Present with extensive use
(d) Other: Please specify_____

Respondents from half of the Member States indicated that online mediation is not an option in their nations; the other half indicated that it is an option, but one that is used only minimally. Because there is minimal use, and in only some nations, there is not enough data to determine whether there is a significant correlation between the availability of online mediation and the number of mediations that occur.

Within some individual Member States, such as Austria, Belgium, Bulgaria, Denmark, France, Portugal and Sweden, the respondents seemed to indicate a lack of awareness of the presence of online mediation where it does exist. In Portugal, for example, most respondents indicated that online tools are present with minimal use, and a minority indicated that online mediation is not present. With potentially less than 5% use as reported by the majority of experts, it is likely that the existence of such online mechanisms is likely not widespread in the mediation communities throughout Portugal, which could explain the discrepancy of the representative answers.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?

(a) No duty to inform
(b) Duty to inform with no specific sanction
(c) Duty to inform and specific sanctions for not informing client of mediation
(d) Other: Please specify_____

Respondents from nineteen of the Member States indicated that attorneys have no duty to inform their clients of the option of using mediation to resolve their disputes. Respondents from eight of the Member States indicated that attorneys do, in fact, have a duty to inform. Italy, one of the Member States with the highest occurrence of annual mediations, is the one nation with legislation requiring attorneys to inform their clients of mediation; it also includes sanctions for attorneys who fail to do so.

It is clear that there is a correlation between a duty to inform and the occurrence of mediation. Similar to the impact of the mediation informational sessions, this duty raises parties' awareness of and comfort with the process. In Germany, the Netherlands and the UK, the other three of the four Member States with the highest reported number of annual

[68] As stated previously, there are no official statistics available on the number of mediations, this includes statistics prior to such mandates. This comparison is done using numbers and statistics often referred to in the international mediation literature.

mediations, attorneys have a duty to inform. Most importantly and significantly, for nine of the eleven countries for which respondents reported an occurrence of fewer than 500 mediations per year, the legislation does not include a duty for attorneys to inform clients of mediation. In light of the significant difference in the number of mediations amongst these four countries, it cannot be inferred that the duty to inform the clients of mediation can alone improve greatly mediation use.

16. What is your assessment of the requirements to become a mediator in your country?

(a) Requirements are insufficient
(b) Requirements are acceptable
(c) Requirements are strong
(d) Other: Please specify_____

The level of satisfaction with current requirements split about fifty/fifty among the countries. Respondents from half of the twenty-eight Member States reported their assessment that the requirements for individuals to become mediators are acceptable. Respondents from the other half indicated dissatisfaction, with thirteen of the Member States reporting their view that the requirements are insufficient, and respondents from one Member State, Greece, reporting their view that requirements are excessive.

The responses within each Member State to this question varied widely. In Belgium, for example, half of the respondents indicated that the requirements are insufficient, and the other half indicated that requirements are acceptable. In the Czech Republic, Luxembourg and Portugal, respondents indicated a mix of the three options.

Within some countries, however, the majority of respondents indicated support for the current requirements. In Bulgaria, for example, a majority of respondents feel that the current requirements are acceptable, and a few respondents indicated that requirements are insufficient. This display of approval may indicate that the legislative means and the current regulations are satisfactory for a majority of the mediation experts in this country.

The respondents in Sweden, almost unanimously, stated that the country's current requirements are insufficient. Sweden is a country that has maintained a highly voluntary approach to mediation, valuing party autonomy, without strict mediator and mediation regulation. However, with such a strong response, it appears that many mediation experts in Sweden want more regulation.

Alternatively, some respondents expressed dissatisfaction with the current requirements, specifically indicating that they are excessive. In addition to the average of those from Greece, some respondents Slovakia indicated this opinion as well.

Figure 11 : Average Responses to Part II (Questions 12-16)

	12. To what extent are there mandates for (preliminary) mediation informational sessions?	13. To what extent are there mandates for parties to use mediation?	14. To what extent does online mediation exist?	15. To what extent do attorneys have a duty to inform parties of mediation…?	16. What is your assessment of the requirements to become a mediator…?
Austria	Preliminary mediation session required for some cases	Mandates applicable to few cases	Not present	No duty to inform	Requirements are acceptable
Belgium	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are insufficient
Bulgaria	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are acceptable
Croatia	Preliminary mediation session required for some cases	Mandates applicable to few cases	Not present	No duty to inform	Requirements are acceptable
Cyprus	Preliminary mediation session required for some cases	No mandates	Not present	No duty to inform	Requirements are insufficient
Czech Rep.	Preliminary mediation session required for some cases	No mandates	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are insufficient
Denmark	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are acceptable
Estonia	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are acceptable
Finland	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	Duty to inform	Requirements are insufficient
France	No preliminary mediation session required	Mandates applicable to few cases	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are insufficient
Germany	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	Duty to inform	Requirements are acceptable
Greece	No preliminary mediation session required	No mandates	Not present	Duty to inform	Requirements are excessive
Hungary	Preliminary mediation session required for some cases	No mandates	Not present	No duty to inform	Requirements are acceptable
Ireland	No preliminary mediation session required	Mandates applicable to few cases	Present with minimal use (less than 5% of total mediated cases)	Duty to inform	Requirements are insufficient
Italy	Preliminary mediation session required for some cases	Mandates applicable frequently (more than 20% of all cases)	Present with minimal use (less than 5% of total mediated cases)	Duty to inform and sanctions for not informing client of mediation	Requirements are insufficient
Latvia	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are acceptable

Lithuania	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are insufficient
Luxembourg	Preliminary mediation session required for some cases	Mandates applicable to few cases	Not present	No duty to inform	Requirements are insufficient
Malta	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are insufficient
Netherlands	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	Duty to inform	Requirements are acceptable
Poland	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are insufficient
Portugal	Preliminary mediation session required for some cases	No mandates	Present with minimal use (less than 5% of total mediated cases)	Duty to inform	Requirements are acceptable
Romania	Preliminary mediation session required for all cases	Mandates applicable to few cases	Not present	Duty to inform	Requirements are acceptable
Slovakia	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are acceptable
Slovenia	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are insufficient
Spain	Preliminary mediation session required for some cases	No mandates	Present with minimal use (less than 5% of total mediated cases)	No duty to inform	Requirements are acceptable
Sweden	No preliminary mediation session required	No mandates	Not present	No duty to inform	Requirements are insufficient
UK	No preliminary mediation session required	No mandates	Present with minimal use (less than 5% of total mediated cases)	Duty to inform	Requirements are acceptable

Conclusion for the Assessment of the Existing Law in EU Member States

Questions 7 to 16 of the study provided the respondents with three options on a spectrum, going from least powerful to most powerful, based on what extent the measure promotes mediation. Overall, as the respondents indicated mostly the second or third more powerful options, the answers tend to suggest that existing legislation promotes the use of mediation. Using the reported data from Part II and comparing it to the reported data of Part I, it is possible to attribute the occurrence or increase of mediation to certain legislative features, and to identify which appear to have had no impact on the occurrence of mediation in the Member States.

The responses to question 7 reveal that the level of confidentiality protection does not affect very significantly the number of mediations. In fact, a majority of the respondents indicated that confidentiality is guaranteed with few exceptions or in all cases. This measure has not proved effective, especially considering that almost half of the Member States have produced fewer than 500 mediations annually.

On average, the respondents indicated that their courts do promote, or at least mention, mediation. In Sweden, where respondents indicated that the courts are proactive in promoting mediation, the respondents also indicated an occurrence of less than 500 mediations annually. Because this promotional measure is not necessarily resulting in a high number of mediations, the study suggests that this measure is not the key to increasing the occurrence of mediations, or at least to increase it substantially.

In a significant number of Member States, the respondents have not reported of particulars issues in enforcing mediated agreements. In Croatia and Slovakia, for example, respondents indicated that the agreements are automatically approved. Still, these Member States are not producing a significant number of mediations. As a result, easy enforceability of mediated settlement does not appear to be the issue either.
For the mediator accreditation system, even those respondents who indicated that accreditation is based on statutory standards (Cyprus, the Czech Republic, Greece and Luxembourg), this most pro-mediation feature has not resulted in high numbers of mediations. Therefore, supposed deficiencies in the accreditation system, too, are not the issue.

Even in Member States for which respondents reported modest incentives for parties to use mediation, such as Bulgaria, Latvia, Lithuania, Romania and Spain, mediations are not frequent. As a consequence, assuming that the Member States have the ability to increase incentives, one should not expect an increase in incentives to result in a significant increase in mediations.

As indicated by the respondents, online mediation is rarely used or present. Even in those Member States where respondents indicated its availability, such as Italy, it has not resulted in a significant number of mediations. There is no evidence that it will bring about mediations if promoted further.

In the majority of Member States respondents indicated that litigants are not required to attend preliminary mediation informational sessions, as only ten States reported some type of requirement for information sessions. However, of those States that did not report a mandate, seven reported among the lowest occurrence of mediations.

Although the majority of Member States reported that there was no mandate for parties to use mediation, the respondents indicated that mandatory rules will have a positive effect on the number of mediations.

Lastly, some Member States reported a duty of counsel to inform the clients about mediation, yet the presence of this duty has not proven to result, in and of itself, in a significant number of cases.

In light of all these elements, it can be concluded that amongst the pro-mediation measures indicated by the Parliament as those which may have the greatest impact on the use of mediation are mandates for preliminary mediation informational sessions and mandates for mediation.

3.2.3. Assessment of Legislative Solutions and Non-Legislative Proposals

Part III aimed to obtain feedback from mediation experts regarding their opinions of particular approaches, both legislative (IIIA) and non-legislative (IIIB), to encourage the use of mediation in EU Member States. The participants were asked to rank the likely impact that each approach would have in their countries using the following scale:

1. Extremely negative impact
2. Negative impact
3. No significant impact
4. Positive impact
5. Extremely positive impact

The researchers were aware that some of the measures could have both positive and negative effects. For example, making mediation mandatory may increase its use, but it also might provoke resistance from lawyers, or it may not be suitable for a particular legal culture. As a result, the participants were asked to take any negative effects into consideration when determining their ranking.[69]

3.2.3.1. Legislative Solutions (Questionnaire Part IIIA)

Part IIIA lists possible legislative solutions that could be implemented at the European Union level in order to increase the use of mediation in EU Member States. A large sampling of local mediation experts were asked to rank, through a scaled response choice, potential legislative proposals to encourage the use of mediation. The local experts were asked to rank the likely impact that the following solutions and proposals would have in their respective countries. Even if the respective countries had already implemented one of the measures, it was still asked of the experts to rank the measure on the respective impact of such legislation.

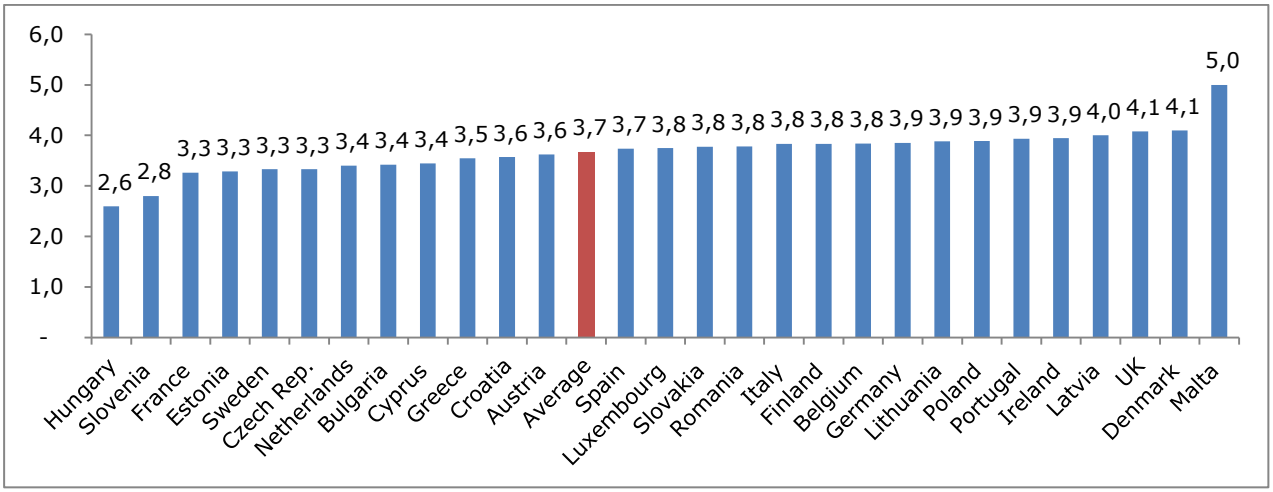
An average of answers for each of the following questions was then taken per each respective country's tally of responses on a scaled score between 1.0 and 5.0, with 1.0 equalling Extremely Negative Impact, and 5.0 equalling Extremely Positive Impact.

The results showed that some legislative measures are more popular than others. For instance, 86% of Member States surveyed supported legislative measures that would provide incentives for parties to choose mediation. In contrast, 54% of Member States opposed legislative measures requiring legal counsel to be present during mediations. Below is an in-depth discussion of the breakdown of the country average responses in relation to each legislative measure proposal.

[69] For example, if a participant thought that mandatory mediation might have an extremely positive impact on the number of mediations, but would also generate limited resistance, instead of ranking that measure with 'Extremely positive impact', they were asked to rank it with 'Positive impact'. If participants thought the resistance would be significant, and thus reduce the positive impact more significantly, they were asked to rank it with 'No significant impact' or even 'Negative impact'.

17. Require counsel to inform parties of mediation as an alternative to litigation and enforce penalties for lawyers who fail to do so

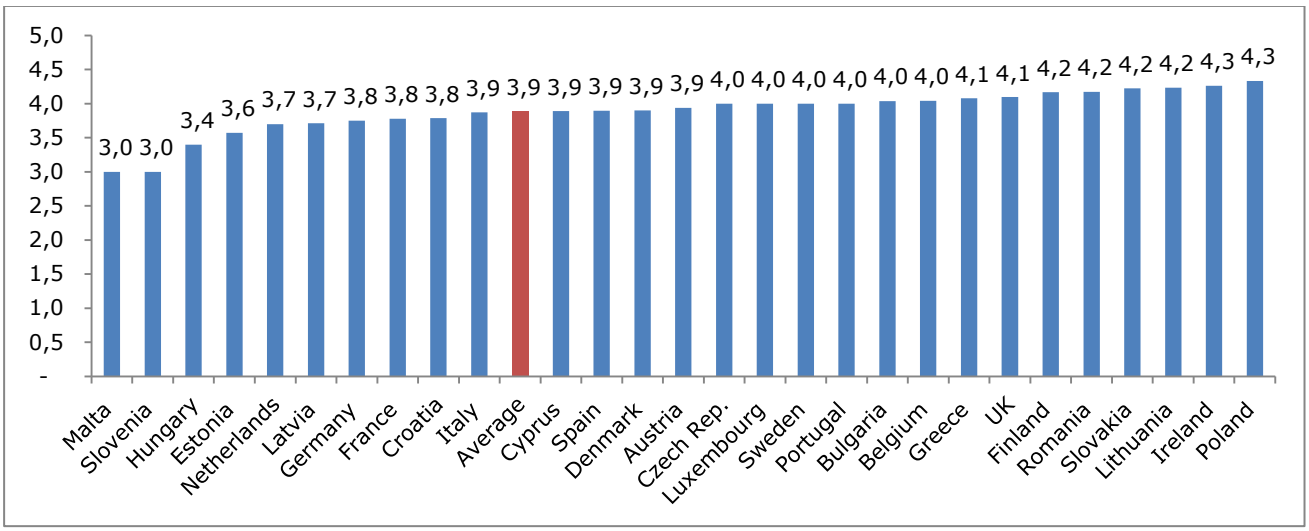
Figure 12 : Average Ranking of the Potential Impact of the Duty to Inform



The average score for the proposal to require counsel to inform parties about the option of mediation was 3.7, with 18 of 28 countries (64%) rating the legislation as having a positive or Extremely Positive Impact (3.6 and above) in encouraging the use of mediation. Latvia, the UK, Denmark and Malta, collectively, 14% of the representative sample, concluded the legislation would have a positive to Extremely Positive Impact. For the majority of countries, 22 of 28 (79%), averages fell within the 3.0-3.9 range, indicating that the legislation would not have a significant impact. Only Hungary and Slovenia (7%) rated this measure as having a negative impact. Overall, the 64% leaning towards the measure having a Positive Impact suggests an acceptance of the idea of requiring counsel to inform parties of mediation.

18. Require mandatory mediation information sessions before litigation proceedings

Figure 13 : Average Ranking of Preliminary Mandatory Information Sessions

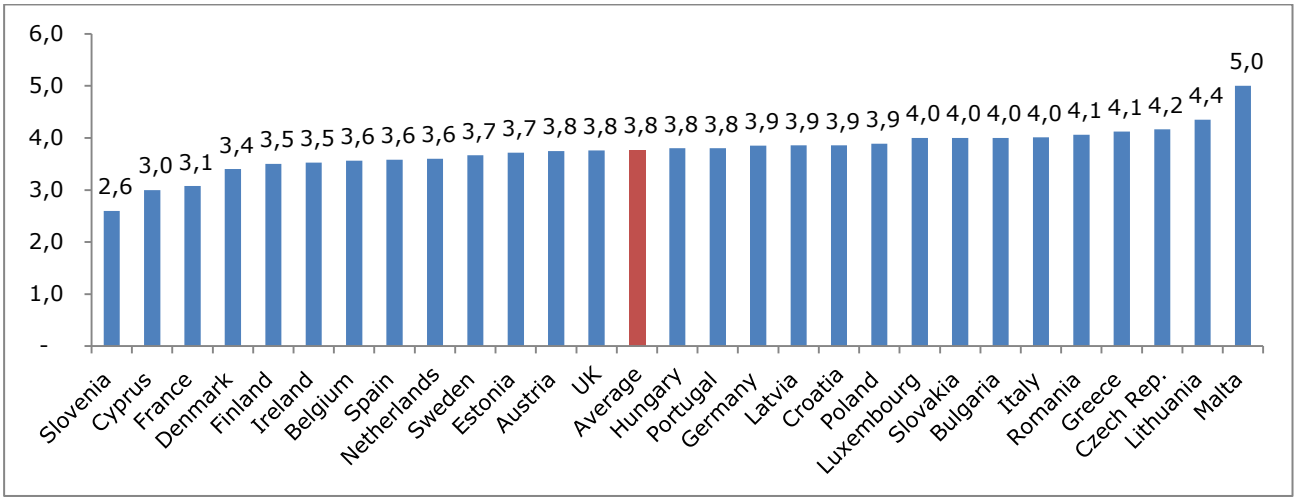


The average score about the proposal to require mandatory mediation information sessions before litigation proceedings was 3.9, indicating a strong tendency towards rating this

legislation as having a Positive Impact in encouraging the use of mediation in the EU. Fourteen of 28 countries (50%) support the legislation as having a Positive Impact. Only Malta, Slovenia and Hungary (11%) scored the legislative proposal below a 3.5, and no country indicated a negative impact. Thus, it may be deduced that this measure would enjoys general acceptance in the EU.[70]

19. Make mediation mandatory in certain categories of cases

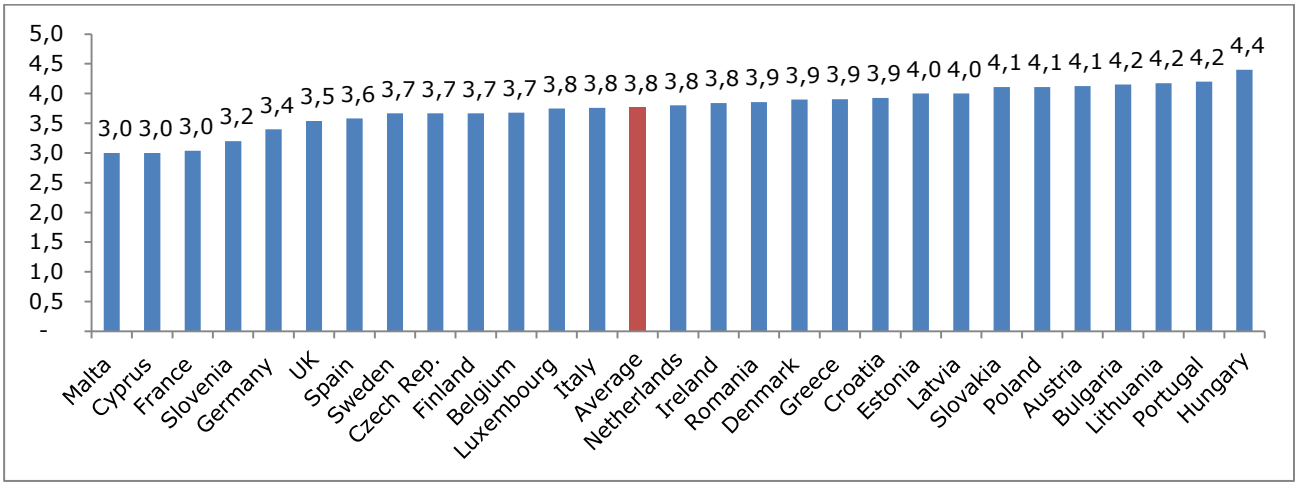
Figure 14: Average Ranking of Mandatory Mediation in Certain Categories of Cases



The average score received from Member States about the proposal to make mediation mandatory in certain categories of cases was 3.8. A majority of EU countries, (22, or 79%) had positive leanings (3.6 and above) towards implementing mandatory mediation legislation for certain categories of cases. Luxembourg, Slovakia, Bulgaria, Italy, Romania, Greece, the Czech Republic, Lithuania and Malta (32%) indicated the measure would have a positive or Extremely Positive Impact. Only Slovenia indicated the legislation would have a negative impact. While it remains to be seen what category of cases would require mandatory mediation, these answers suggest popular support for EU-wide implementation of this measure.

20. Make mediation mandatory in appropriate cases, with the ability to opt-out at little or no cost during the first meeting

Figure 15: Average Ranking of Mandatory Mediation with Opt-Out

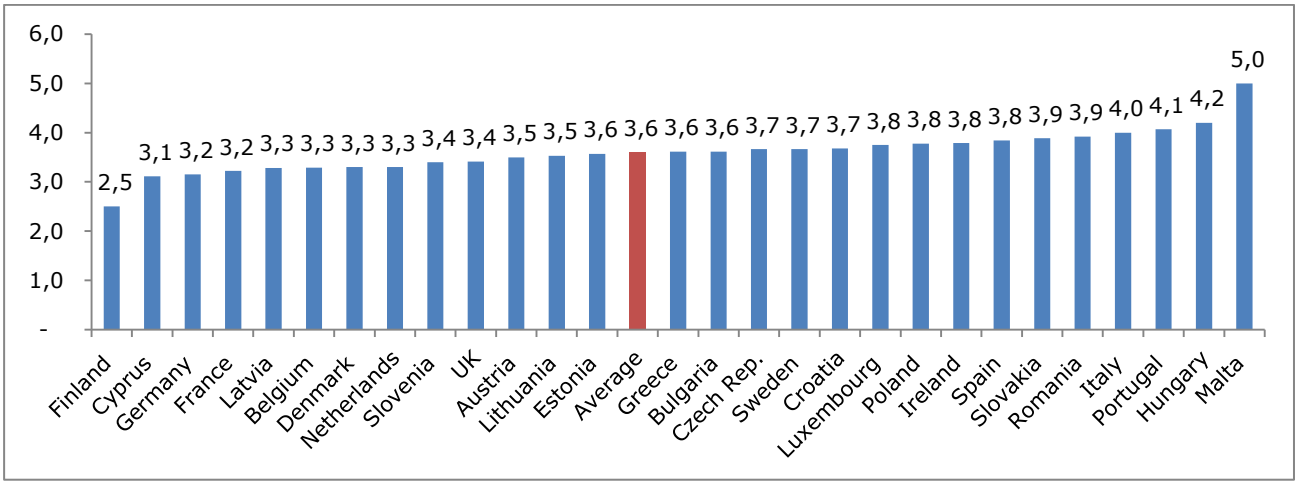


[70] Actually, as for Malta, in light of the strong preference for "pure" mandatory mediation, this relatively low score should probably be interpreted as a sign of weakness of the proposed measure.

Mandatory mediation with the ability for parties to opt-out also received substantial support from a majority of EU countries, with answers averaging 3.8. Seventeen countries (61%) scored this measure as 3.8 or higher. Estonia, Latvia, Slovakia, Poland, Austria, Bulgaria, Lithuania, Portugal and Hungary (36%) indicated the legislation would have a Positive Impact, and there was no indication the legislation would have a negative impact.[71] Accordingly, this, is also a strong legislative measure for the EU to consider.

21. Make mediation mandatory for the 'stronger' party, defined as the party in the position associated with greater bargaining or economic power (e.g., banks and insurance companies)

Figure 16: Average Ranking of Mandatory Mediation for the 'Stronger Party'

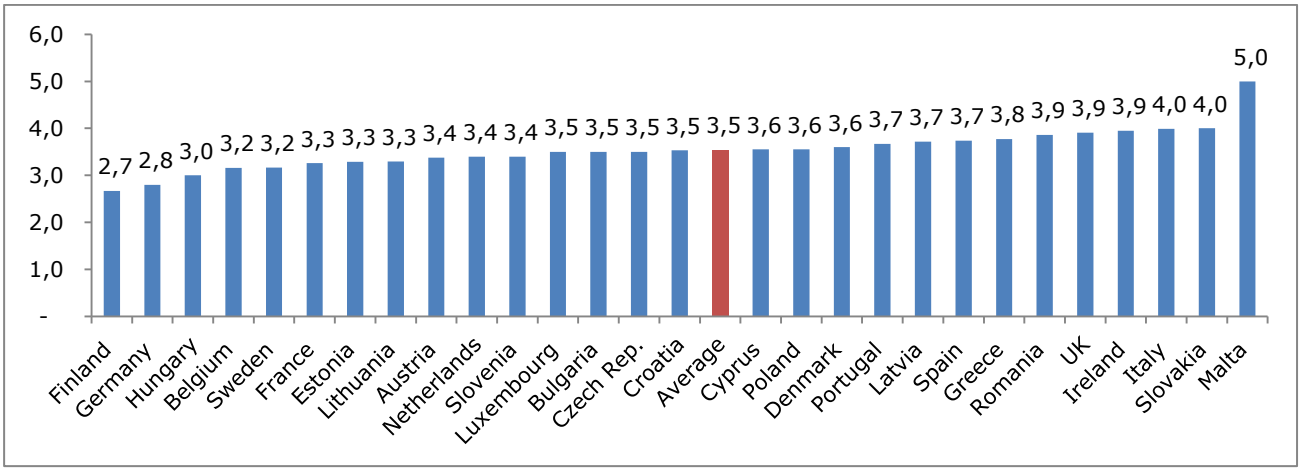


The average score for making mediation mandatory for the 'stronger' party was 3.6. Italy, Portugal, Hungary and Malta (14%) indicated the measure would have a Positive or Extremely Positive Impact while Finland (4%) indicated the measure would have a negative impact. Sixteen of 28 countries (57%) scored the measure 3.6 and above, while the remaining 43% scored the measure 3.5 or below. Thus, Member States are fairly supportive of this legislative measure.

[71] In addition, one should keep in mind that some of the countries providing the lowest ranking, especially Malta, are strongly in favour of the mandatory element. Hence, their scores might indicate that the opt-out system is seen as too weak.

22. Require 'stronger' parties who refuse to participate in mediation to provide a written reason for this refusal

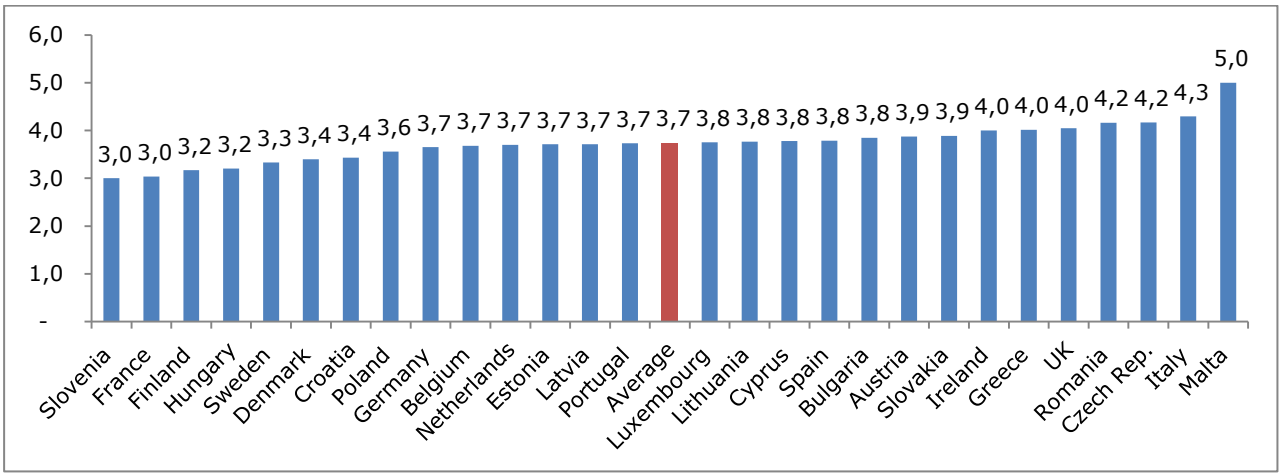
Figure 17: Average Ranking for Requiring 'Stronger' Parties to Explain Refusal



Requiring 'stronger' parties who refuse to participate in mediation to provide a written reason scored an average of 3.5. Notably, Italy, Slovakia and Malta (11%) indicated the measure had a Positive or Extremely Positive Impact. Conversely, only Finland and Germany (7%) indicated the legislation would have a negative impact. The averages of the remaining 23 Member States (82%) indicate that the legislation would not have a significant impact (3.0-3.9). In total 15 Member States (54%) rated the measure somewhat negatively (3.5 or below) and 13 Member States (46%) rated the measure somewhat positively (3.6 and above). Accordingly, this measure is neither clearly popular nor unpopular among Member States overall.

23. Grant judges the power to order litigants to mediation

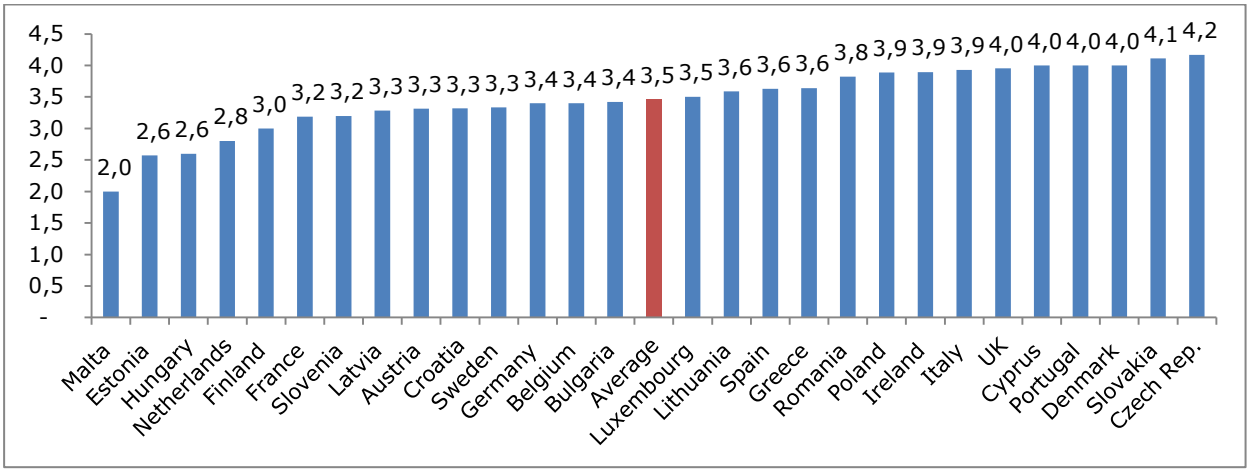
Figure 18: Average Ranking for Granting Judges the Power to Order



The measure to grant judges the power to order litigants to mediation enjoyed strong popularity among EU Member States, receiving an average score of 3.7. The measure was viewed as having a Positive or Extremely Positive Impact by 7 of the countries (25%) surveyed, while no country viewed the measure as having a negative impact. In terms of positive leanings (3.6 and above), 21 of the 28 countries favored the measure (75%). While 7 of the 28 countries scored the measure at 3.5 and below (25%), the measure shows promise for encouraging the use of mediation in the EU.

24. Require judges to explain why they did not refer a case to mediation

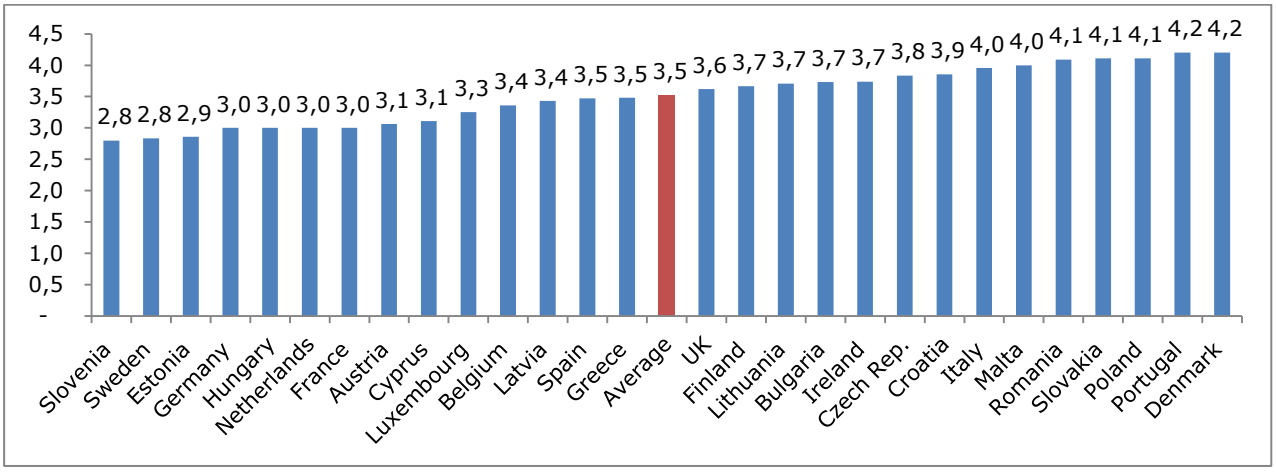
Figure 19: Average Ranking for Requiring Judges to Explain Non-Referral



Requiring judges to explain why they did not refer a case to mediation seems to have received rather polarized results. The UK, Cyprus, Portugal, Denmark, Slovakia and the Czech Republic (21%) all gave the measure scores of 4.0 or higher, indicating a Positive Impact. Malta, Estonia, Hungary and the Netherlands (14%) indicated the measure would have a negative impact. With such extremes on whether the measure would have a Negative Impact or a Positive Impact, the average was heavily influenced from the remaining 16 countries' scores. Eleven of the 16 remaining countries had negative assessments for the measure (3.5 or lower), leaving an average level of support for the measure at 3.5. Ordinarily, one could conclude this measure had only low popularity, but the fact that 21% of Member States indicated positive impressions prevents broad conclusions from being drawn. Furthermore, this measure would seem to boost judicial proactivity in referrals. Therefore, the low ranking received in countries that value judicial proactivity would appear to be somewhat contradictory.

25. Assess the productivity of judges based in part on the number of cases referred to mediation

Figure 20: Ranking for Assessing the Productivity of Judges also Based on Referrals

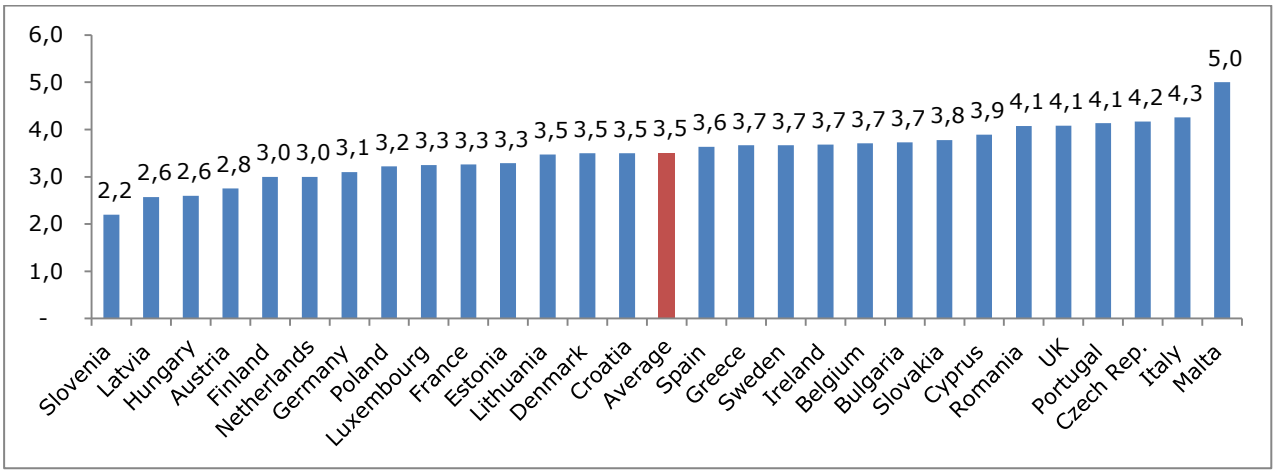


The average score of this measure stands directly in the middle of the spectrum at 3.5. Italy, Malta, Romania, Slovakia, Poland, Portugal and Denmark (25%) indicated the measure would have a Positive Impact. Slovenia, Sweden and Estonia (11%) indicated the

measure would have a negative impact. Fourteen countries (50%) rated the measure as positive leaning (3.6 and above) while the remaining 14 (50%) rated the measure negative leaning (3.5 and below). Due to the 25% of the sample who view this measure positively and the remaining 50% who have positive leanings, it seems this measure may help encourage the use of mediation in the EU.

26. Impose sanctions for parties' refusals to attend mandatory mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case

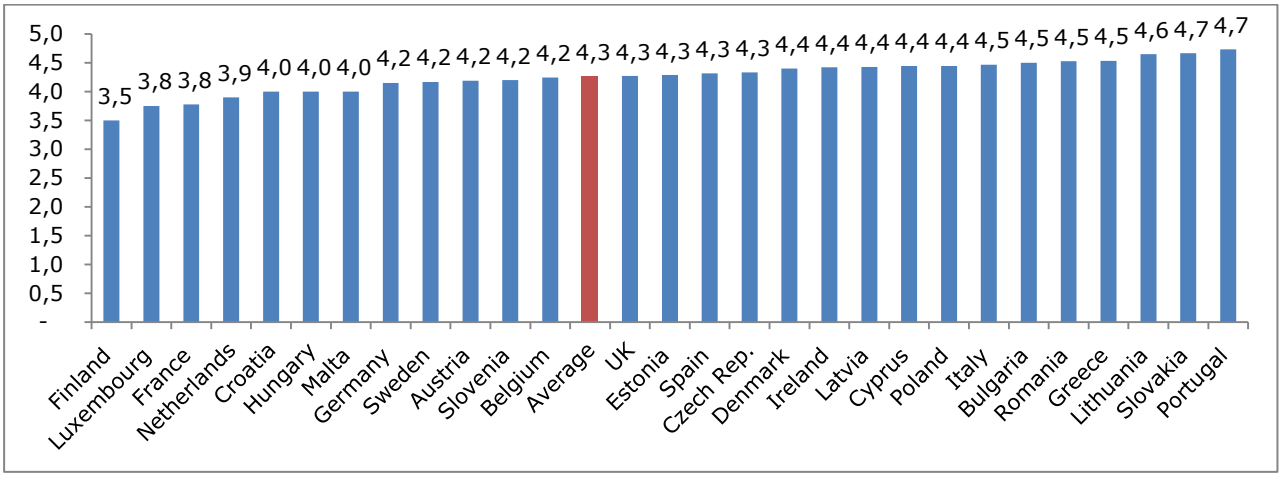
Figure 21: Average Ranking for Imposing Sanctions



Imposing sanctions for parties' refusals to attend mandatory mediation proceedings received an average score of 3.5. Romania, the UK, Portugal, Italy, the Czech Republic and Malta (21%) all indicated the measure would have a Positive-Extremely Positive Impact in encouraging the use of mediation in the EU. Conversely, Slovenia, Latvia, Hungary and Austria (14%) indicated the measure would have a negative impact. 43% of the countries surveyed had positive leanings (3.6 or higher) towards the measure, while 57% had negative leanings about the measure (3.5 or lower). Accordingly, though there are some Member States who strongly support this measure, it lacks broad popularity across the spectrum of EU Member States. It should however be noted that sanctions are both present, and supported, in countries such as in Italy where mandates to mediation exist.

27. Provide incentives for parties who chose to mediate, such as providing refunds of court fees or tax credits

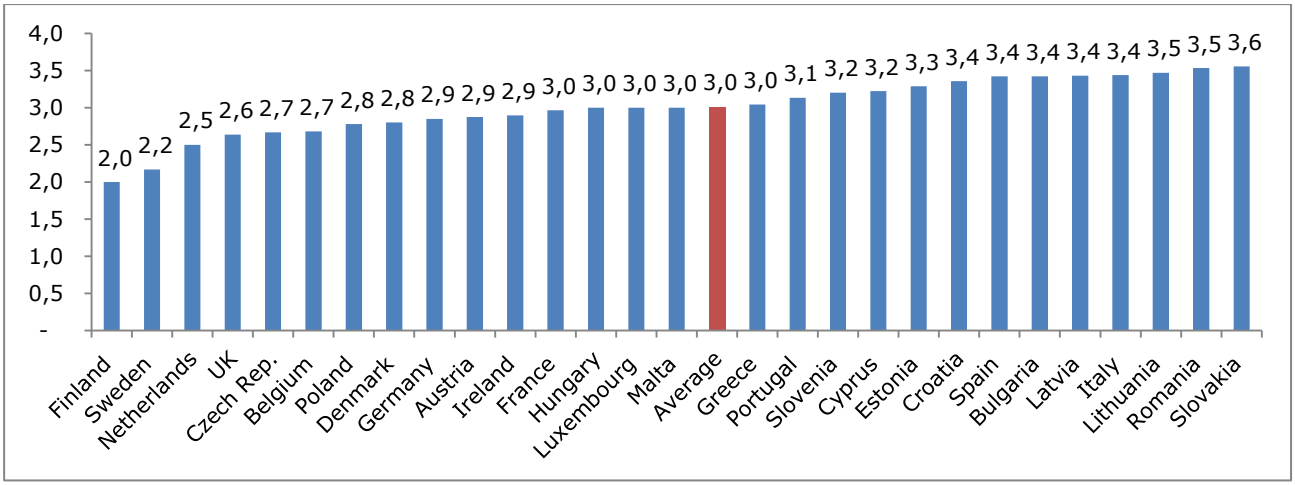
Figure 22: Average Ranking for Providing Incentives



The average score among Member States about providing incentives for parties who choose mediation was a striking 4.3. A full 24 of 28 countries (86%) indicate the measure would have a Positive Impact. The lowest score given was from Finland, at 3.5. Understandably, EU Member States support implementing incentives for parties who choose to mediate in order to encourage the use of mediation.

28. Require a third-party review of the mediation settlement focusing on violations of law, public policy or unconscionable stipulations

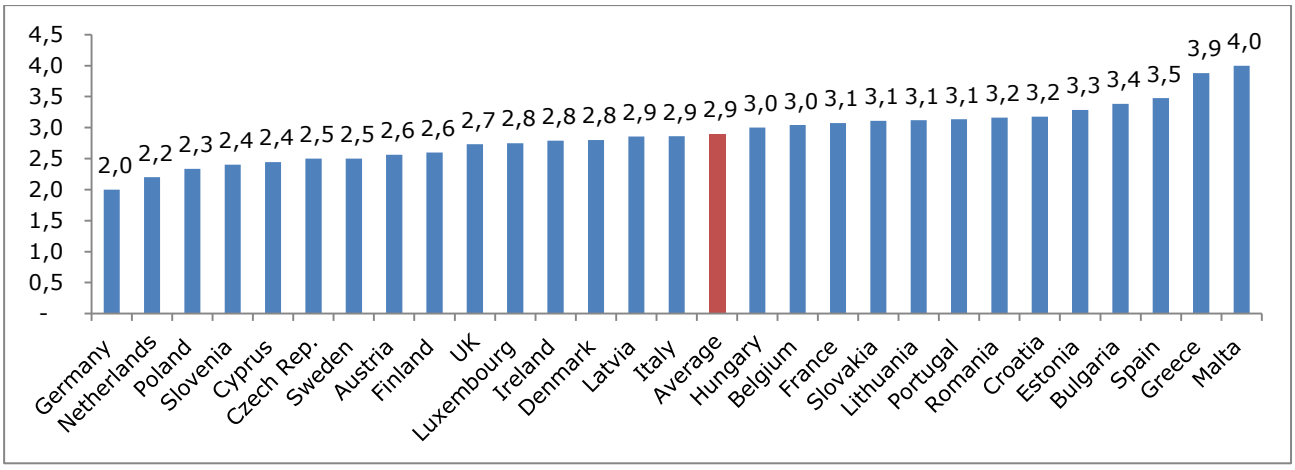
Figure 23: Average Ranking for a Third-Party Review



The average score for requiring a third-party to review mediation settlements stood at 3.0. No country indicated an overall Positive Impact while 11 countries (39%) indicated the measure would have a negative impact. Of the 17 countries who indicated the measure would have no impact, only Slovakia scored the measure above 3.5. Review of mediation settlements therefore does not appear to be a very popular legislative measure to implement in the EU.

29. Require that legal assistance be made mandatory to parties in mediation

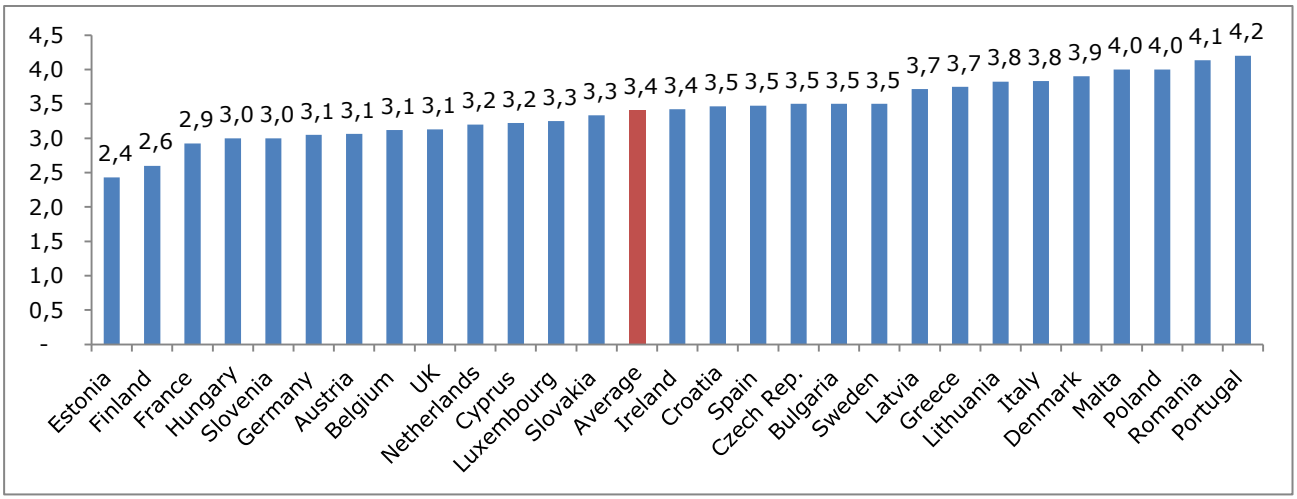
Figure 24: Average Ranking for Requiring Legal Assistance



With an average of 2.9, Member States' experts don't think legal assistance should be made mandatory in mediations. Malta, alone, viewed the measure as having a Positive Impact while fifteen countries (54%) viewed the measure as having a negative impact. It appears that EU Member States do not support mandatory legal assistance for mediation.

30. Require each Member State to designate a minimum number of cases to be mediated each year in order to achieve the objective of 'ensuring a balanced relationship between mediation and judicial proceedings' set forth in Article 1 of the 2008 Mediation Directive

Figure 25: Average Ranking for Designating a Number of Cases to be Mediated



A basic requirement for each Member State to designate a minimum number of cases to be mediated each year received a score of 3.4 on average. Malta, Poland, Romania and Portugal (14%) scored the measure as having a Positive Impact while Estonia, Finland and France (11%) scored the measure negatively. Nine of 28 countries (32%) had positive leanings (3.6 and above) toward the legislation, while 17 countries (61%) had negative leanings (3.5 and below) toward the legislation. Based on these results, it doesn't appear that designating a specific minimum of cases to be mediated is widely supported in the EU, although the measure is viewed positively by 21% of the respondent countries. In addition, given that 95% of the respondents stated that mediations are too few, it is surprising that they have not realized that, as a stated goal of the Mediation Directive, if properly interpreted, this measure could contribute to the increase of mediation use without any change to the existing EU legal framework.

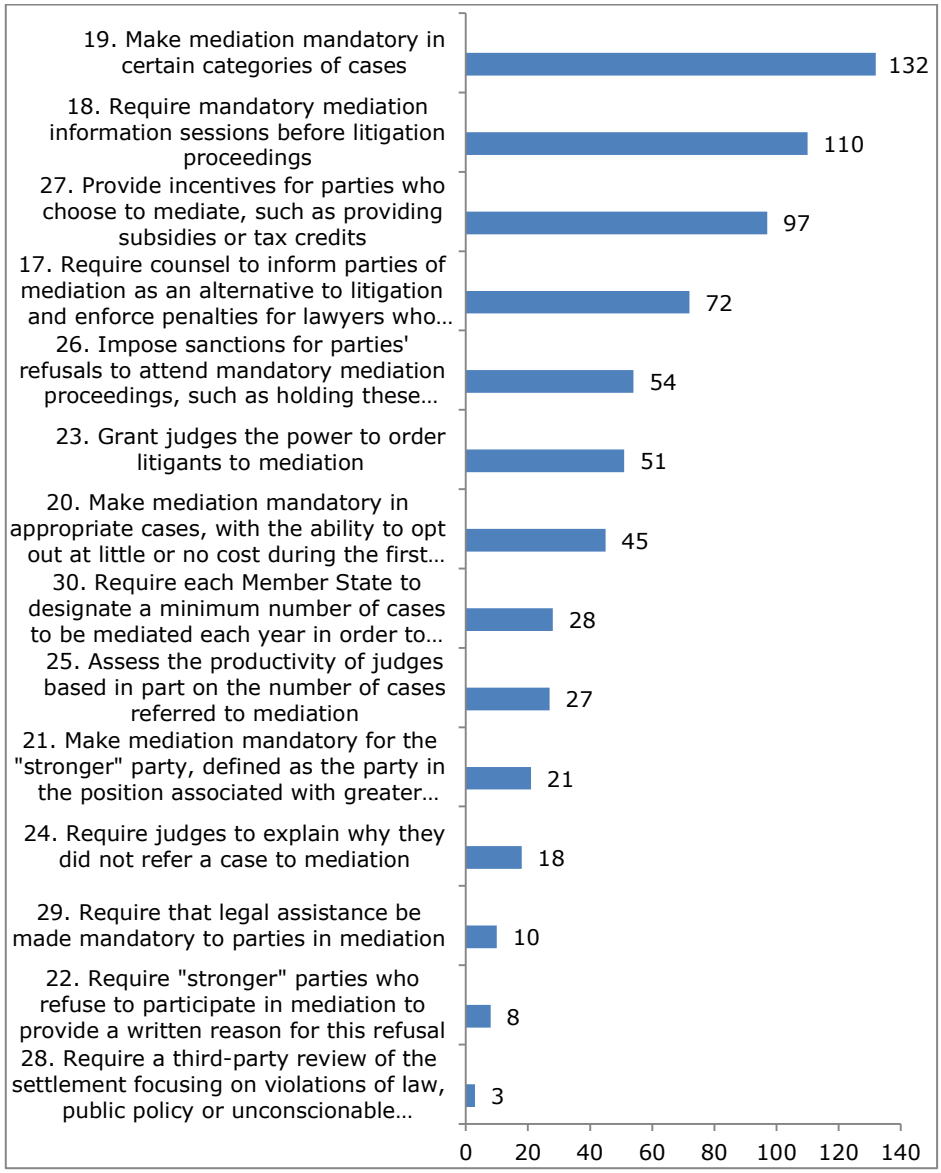
31. Other:

Many of the experts also were provided with a forum to leave comments regarding further suggestions for other measures. Even without a prompt for a theme, many of the experts' answers overlapped either with each other or with the proposed measures in this study.

Some consistent feedback focused on providing more financial support for mediation and mediation awareness generally in the court system; providing incentives such as tax and court fee refunds for cases settled through mediation or penalties for parties who refuse mediation; and developing a more structured mediation system including such measures as education for students and judges, national standards for mediators, and judicial reforms to improve the interface between courts and mediation.

32. Out of the list of legislative measures above, please identify the one solution that would have the single, most positive impact on the use of mediation in your country.

Figure 26: Average Responses for the Solution with Potential for Most Impact

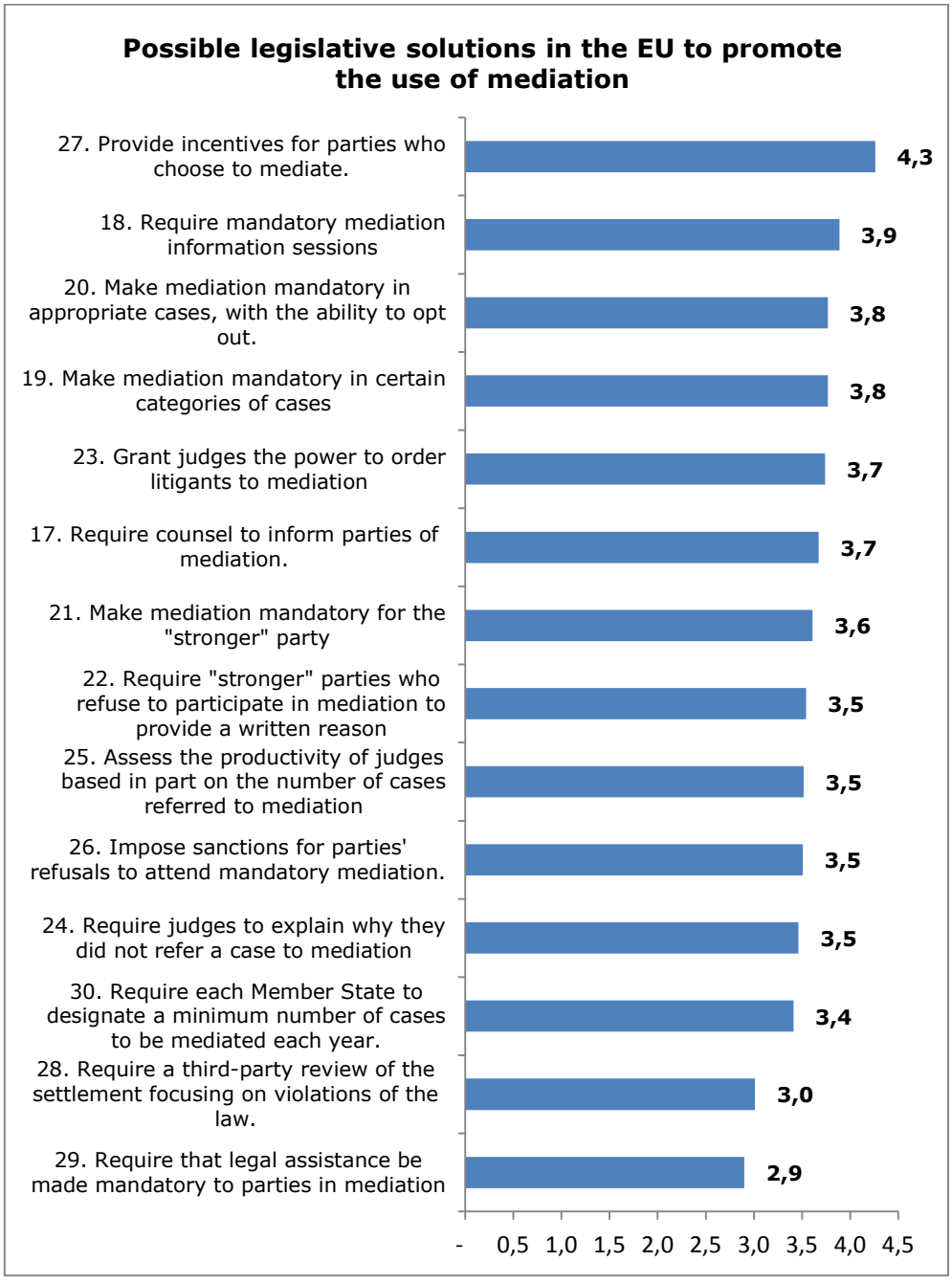


Mandatory mediation in certain categories of cases (q.18), scored the highest individual score when respondents were asked to narrow their choices. But notably, mandatory mediation information sessions (q.17), mandatory mediation with the ability to opt-out in appropriate cases (q.19), and providing incentives to parties who choose to mediate (q.26) all scored collectively higher in terms of having a Positive Impact.

Of these three next-most-popular categories, providing incentives for parties who choose mediation received the greatest support, with 86% of respondent countries indicating that the measure would have a Positive Impact. Mandatory mediation sessions were viewed as having a Positive Impact by 50% of respondents, while mandatory mediation with the ability to opt-out in appropriate cases received 36% support. None of these three categories were viewed as having a negative impact. Mandatory mediation in certain categories of cases was the fourth most supported measure with 32% of respondents indicating it would have a Positive Impact and only one country (4%) stating it would have a negative impact.

The requirement for counsel to inform parties (q.16), the fourth most popular single measure above, was viewed collectively in the questionnaire as having a Positive Impact by just 14% of countries while 7% indicated it would have a negative impact. In terms of having a negative impact, the questionnaire and the results above are rather similar. Third-party review of mediation settlements (q.27) was not viewed as having a Positive Impact by any of the countries surveyed and received 0.2% support above. Similarly, mandatory legal assistance (q.28) and requiring the 'stronger' party to provide a written refusal (q.21) were also all viewed as not having a Positive Impact or as having a negative impact in the questionnaire. These measures also scored the lowest when parties were asked to single out a legislative measure above.

Figure 27: Overall Ranking for Legislative Measures



Conclusion for the Assessment of Legislative Solutions

The results show that the respondents believe that in theory, all of the measures, aside from requiring a third-party review of the settlement and requiring legal assistance during mediation, could have a Positive Impact. In fact, overall, the respondents indicated higher than 'no significant impact', and in most cases 'positive impact', for every mandatory measure.

The comparison of the results from Part II and Part IIIA allows us not only to observe which measures are desired, but also to observe which measures have already proven to generate mediations in some Member States. The data from Part II shows that the sole measures that have proven to generate mediations is a combination of mandatory information sessions, mandatory mediation in certain categories of cases, and mandatory mediation in appropriate cases with the ability to opt-out.

Respondents from those countries who indicated that they prefer other measures showed a preference for measures that exist in other Member States, but that have proven to have an insignificant impact on the number of mediations. From the data, for example, it is clear that respondents favour incentives. However, this approach includes a broad range of options, and they are often not the most feasible options considering the nations' economies. Additionally, respondents may say that they favour incentives over other measures, but incentives currently present in Member States have produced an insignificant number of mediations. In Bulgaria, Latvia, Lithuania, Romania, Slovakia and Spain, for example, the respondents reported modest incentives. However, the number of mediations in these nations is low. The numbers hence suggest that increasing incentives is not likely to produce the desired result.

In addition to incentives, there are other favoured measures that have not increased mediations. The duty of counsel to inform parties about the option of mediation may promote awareness of mediation; however, the reports from Part II indicate that this awareness does not always generate a significant number of mediations, as shown in Finland, Greece, Ireland, Portugal and Romania.

Some respondents also favoured measures to grant judges the power to order litigants to mediation. However, as seen in Sweden, even if the courts are proactive in referring cases to mediation, this measure does not necessarily result in a high number of mediations. The only other measure favoured by a significant number of respondents, imposing sanctions, has also not been proven to produce mediations, as seen in Poland and Slovenia.

When combined, mandatory mediation informational sessions and mandatory mediation with the option to opt-out clearly produce a high number of mediations, as has been seen in Italy. For question 32, the combined total of the options of mandatory mediation in certain categories of cases (q. 19) and requiring mandatory mediation information sessions (q. 18), the Italian model, shows that 242 respondents favour this form of mandatory mediation.

In effect, the requirement for litigants to attend a mandatory mediation information session (q.18) is similar to mandatory mediation in appropriate cases with the ability to opt-out (q.20). In essence, both of these measures give litigants the opportunity to come together and consider mediation. The first option can be considered mandatory mediation with opt-in, and the latter can be considered mandatory mediation with opt-out. With that in mind, these two measures combined show that a total number of 155 respondents favour this form of mandatory mediation above any other legislative promotional measure, which is far above the desire for incentives with 97 respondents (q.27) and above the desire to make mediation mandatory in certain categories of cases (q.19).

The majority of the respondents who favoured measures other than mandatory mediation in certain categories of cases, mandatory mediation information sessions, and mandatory mediation in appropriate cases with the ability to opt-out, did not, however, determine that these three measures would be detrimental to their nations. Compared to the lowest-ranked measures, these three forms of mandatory mediation were actually favoured highly.

Ultimately, not all of the respondents favoured mandatory forms of mediation. However, for many of the Member States whose average response indicated no significant impact to Positive Impact for forms of mandatory mediation, respondents were more in favour of making mediation mandatory for the 'stronger' party, such as Cyprus, France, Ireland, Malta, Slovenia and Spain. This proves that there is still some interest for similar measures. Lastly, it has been proven, as discussed above, that the measures these countries do prefer are not effective.

In conclusion, the assessment of which measures generate mediations show that a mandatory element is necessary. Where these features exist in the law, mediations occur. In addition, a significant number of respondents gave their opinion that a mandatory element is necessary to increase the number of mediations in the EU: 287 of the 816 responses favoured some form of mandatory approach.

With this information in mind, the study suggests that the Parliament first consider requiring mandatory mediation in certain categories of cases with the ability to opt-out, or consider mandatory mediation information sessions before litigation proceedings ('opt-in' model). Indeed, as shown by the responses in favour of mandatory mediation in Romania, where the opt-in system of preliminary mediation information sessions exists, the Italian 'opt-out' model appears preferable.

As a general note, the results show that respondents believe in the importance of bringing the parties to the table to at least considering the option of mediation. To this end, it appears from several decades of mediation experience in the EU that parties need much more than simple encouragement.

3.2.3.2. Non-Legislative Proposals (Questionnaire Part IIIB)

In Part IIIB, national mediation experts were asked to rank, through a scaled response choice, the potential for non-legislative proposals to encourage the use of mediation. The experts were asked to rank the likely impact that the following proposals would have in their respective countries. Even if the respective countries had already implemented one of the measures, the experts were still asked to rank the likely impact of such non-legislative approaches.

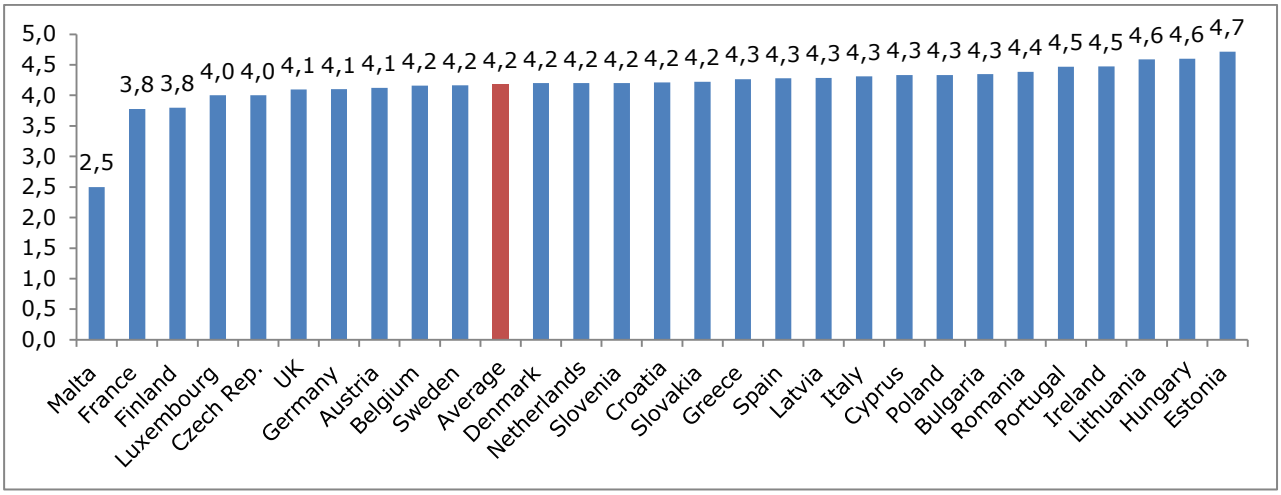
1. Extremely negative impact
2. Negative impact
3. No significant impact
4. Positive impact
5. Extremely positive impact

An average of the answers for each of the questions was then determined, using scores on a scale of 1.0 to 5.0, with 1.0 equalling Extremely Negative Impact, and 5.0 equalling Extremely Positive Impact.

Below is an in-depth discussion of the breakdown of the country average responses in relation to each non-legislative measure proposal.

33. Develop and implement pilot projects to encourage the use of civil and commercial mediation

Figure 28: Average Ranking for Pilot Projects

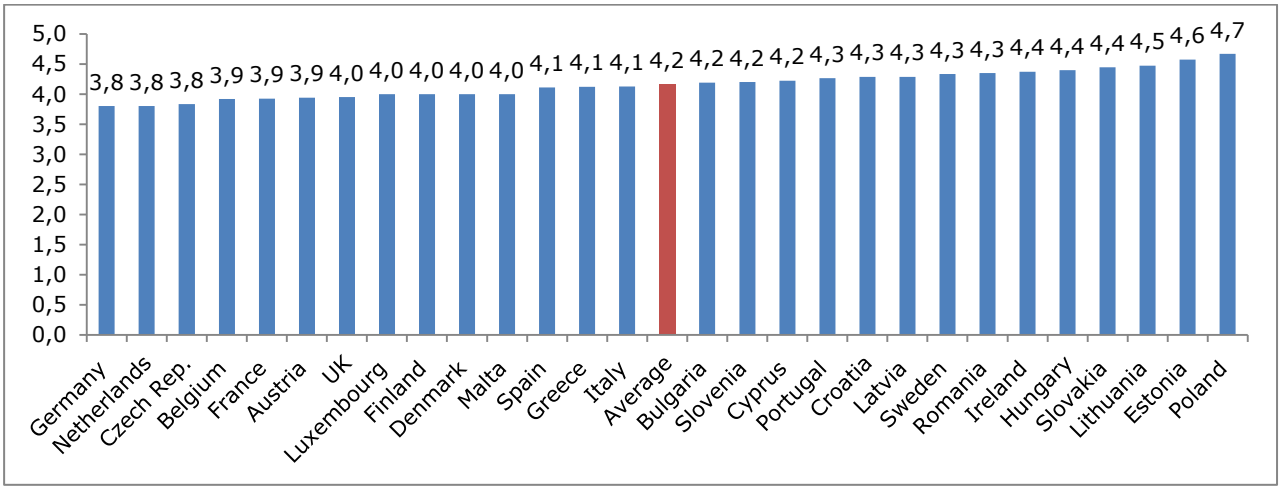


The average response for this question taking into account all Member States was a 4.2, indicating this measure would have a Positive Impact. Just under 90% of the response averages fell between 3.9 and 4.7; while 18% of the average responses were a value of 4.5 or higher.

Only one state (Malta) gave a response significantly lower than the majority of countries, with an average value of 2.5, a value between a Negative Impact (2.0) and No Significant Impact (3.0) for the measure. All but three countries (Malta, France, and Finland) scored an average of a 4.0 or higher, showing strong support for this measure as having a Positive Impact. Estonia was the highest on the scale, with a score average of 4.7, suggesting an Extremely Positive Impact.

34. Develop an EU-wide 'settlement week' program, aimed at exposing the benefits of mediation to the general public

Figure 29: Average Ranking for a 'Settlement Week'



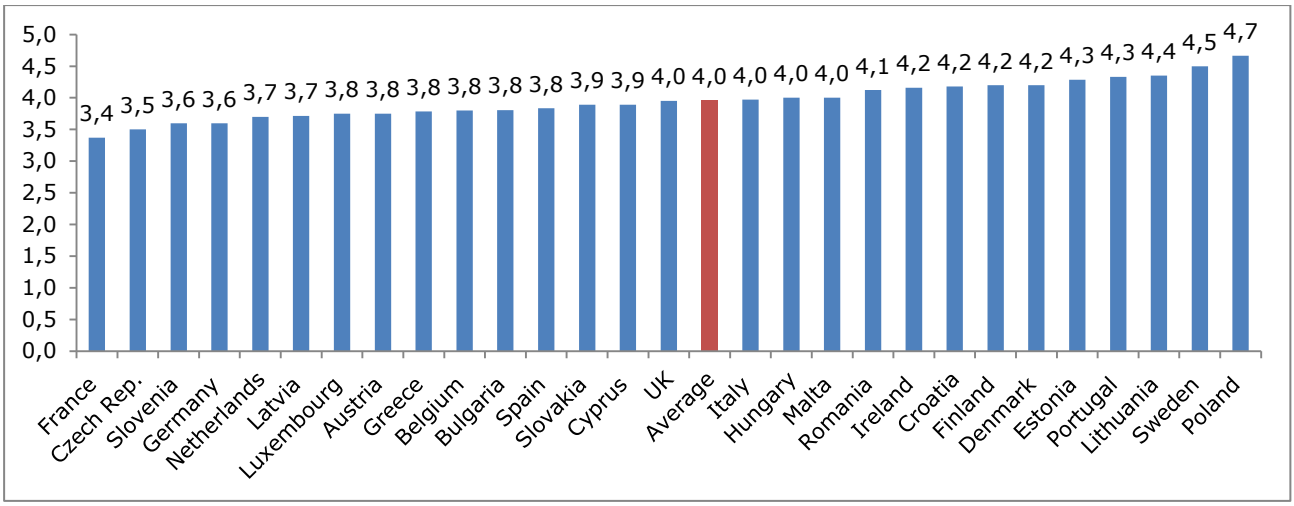
The average response to this question taking into account all Member States was 4.2, indicating this measure would have a Positive Impact. Significantly, 22 out of 28 country averages suggested that the development of an EU-wide settlement week would prove to have a Positive Impact (4.0 or higher). Further, 10.7% of Member States averaged a value

of 4.5 or higher, indicating a potential toward the higher end of the scale between Positive Impact (4.0) and Extremely Positive Impact (5.0).

This measure tied for the second most popular measure in terms of having a Positive Impact on both the respective Member States and the EU, and only a very few countries ranged in the lower percentiles, with 10.7% of countries having average scores of 3.8. Germany, the Czech Republic and the Netherlands all averaged scores of 3.8, but these scores still indicated a more positive than negative impact. The rest of Member States came in with scores between 3.9 and 4.7 (89.3%), while the scores from Lithuania, Poland and Estonia were even higher, ranging between 4.5 and 4.7 and indicating Extremely Positive Impact.

35. Designate national mediation champions or ambassadors, defined as public figures who support the use of mediation and educate others about its benefits

Figure 30: Average Ranking for National Mediation Champions or Ambassadors

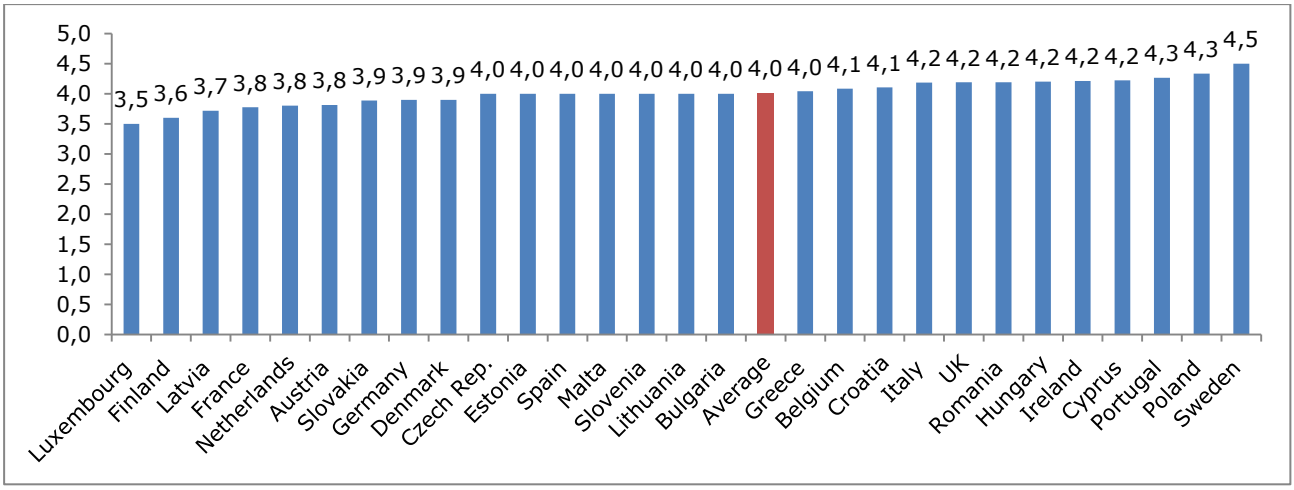


Respondents indicated that this measure was likely to have a Positive Impact, especially for some of the larger Member States, with scores averaging 4.0. For this question, 14 out of 28 country averages indicated that the designation of national mediation champions or ambassadors would have a Positive Impact (4.0) or higher. Well over 57% of the country averages fell within the range of 3.9 to 4.7, going from Positive Impact almost to Extremely Positive Impact. These countries were: Slovakia, Cyprus, the UK, Italy, Hungary, Malta, Romania, Ireland, Croatia, Finland, Denmark, Estonia, Portugal, Lithuania, Sweden, and Poland. Out of these, Sweden, and Poland, with average scores of 4.5 or higher, leaned toward Extremely Positive Impact.

43% of countries had a score of 3.8 or lower. The Czech Republic, France, Slovenia, Germany, the Netherlands, Latvia, Bulgaria, Luxembourg, Belgium, and Spain came in with averages that ranged between 3.4 and 3.8, indicating that such an implementation would have between No Significant Impact to a somewhat Positive Impact. France came in the lowest, with an average of 3.4, indicating that this measure would have no significant impact.

36. Create an EU-wide 'mediation pledge' for members of certain industries to pledge to use mediation as their dispute resolution process

Figure 31: Average Ranking for a 'Mediation Pledge'

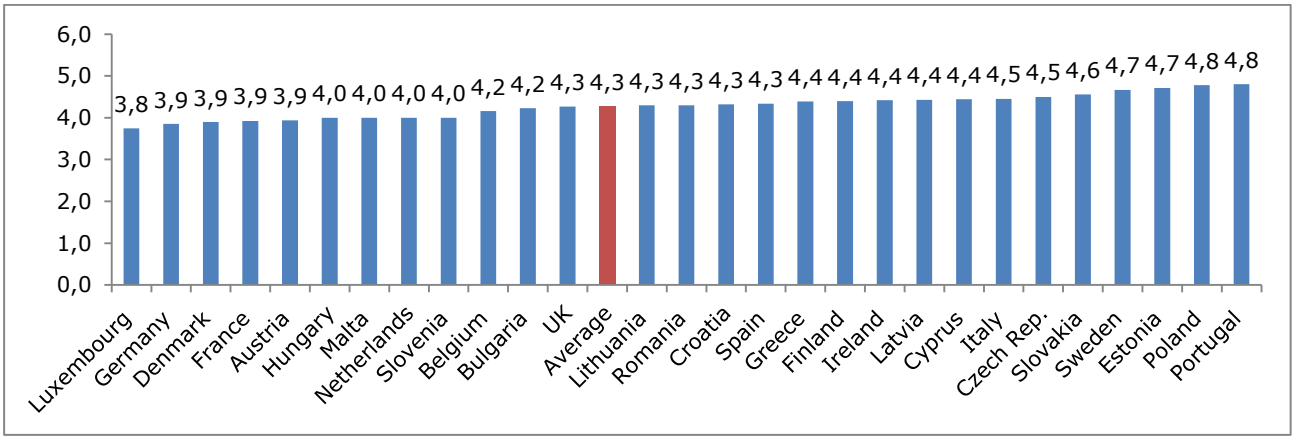


The averages for this measure fell about in the middle in terms of popularity among the proposed non-legislative measures, with a total average of 4.0, suggesting a Positive Impact. Nineteen out of 28 country averages reported that the creation of an EU-wide mediation pledge would have a Positive Impact (4.0 or higher). Well over 78.6% of countries reported scores between 3.9 and 4.5, indicating a range of positive to very positive. These countries were: Slovakia, Germany, Denmark, Czech Republic, Estonia, Spain, Malta, Slovenia, Lithuania, Bulgaria, Greece, Belgium, Croatia, Italy, the UK, Romania, Hungary, Ireland, Cyprus, Portugal, Poland, and Sweden.

Only one country reported an average value of 4.5 or higher (Sweden), indicating that an Extremely Positive Impact would result from the implementation of such a mediation pledge throughout the EU. And only 21.4% of country averages fell below a score of 3.8 or lower (3.5–3.8), indicating such an implementation would have between no significant impact to somewhat of a Positive Impact. These countries were: Luxembourg, Finland, Latvia, France, the Netherlands and Austria. Luxembourg reported the lowest average score, with a 3.5, indicating that the measure's impact would fall between no significant impact and a Positive Impact.

37. Establish a mediation advocacy education program for law schools, business schools and other higher educational facilities

Figure 32: Average Ranking for a Mediation Advocacy Education Program

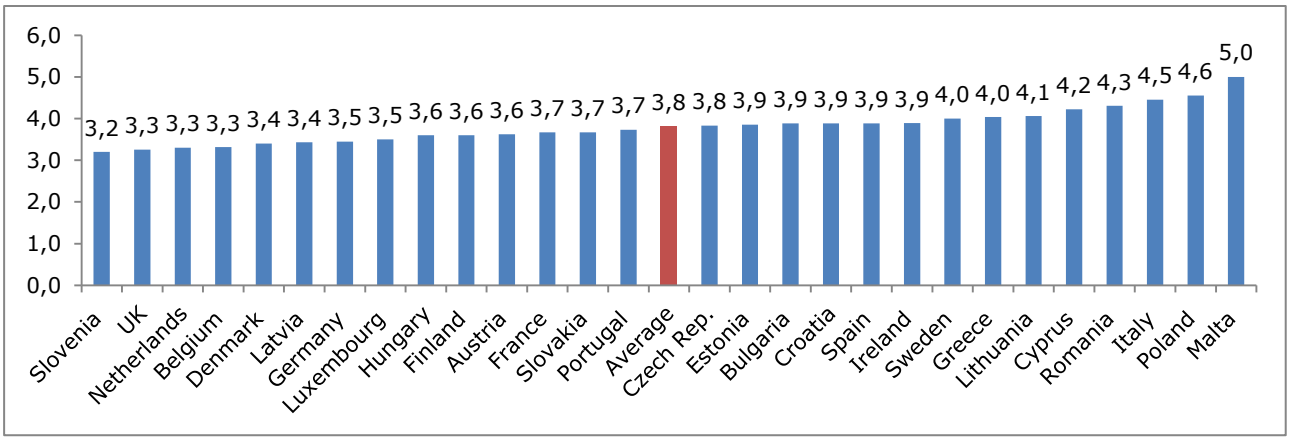


This measure had the strongest positive response from the majority of countries, with an average approval of a 4.3 for all Member States, indicating this measure would have a Positive Impact or higher. Significantly, 23 out of 28 country averages indicated that establishing a mediation advocacy education program for law schools, business schools, and other higher educational facilities would have a Positive Impact (4.0 or higher). Over 96% of the country averages fell between 3.9 and 4.8, indicating Positive Impact to an Extremely Positive Impact. In fact, 25% (7 countries) believed that such implementation would have a very significant impact, with average scores of 4.5 or higher (Italy, Czech Republic, Slovakia, Sweden, Estonia, Poland, Portugal).

Of these results, only one country (Luxembourg) had a score of 3.8, indicating a likelihood between No Significant Impact and a Positive Impact. Even as the lowest score in this section, it still leans more towards the positive than the negative impact.

38. Create a uniform certification of mediators at the EU level

Figure 33: Average Ranking for Mediator Certification at the EU Level

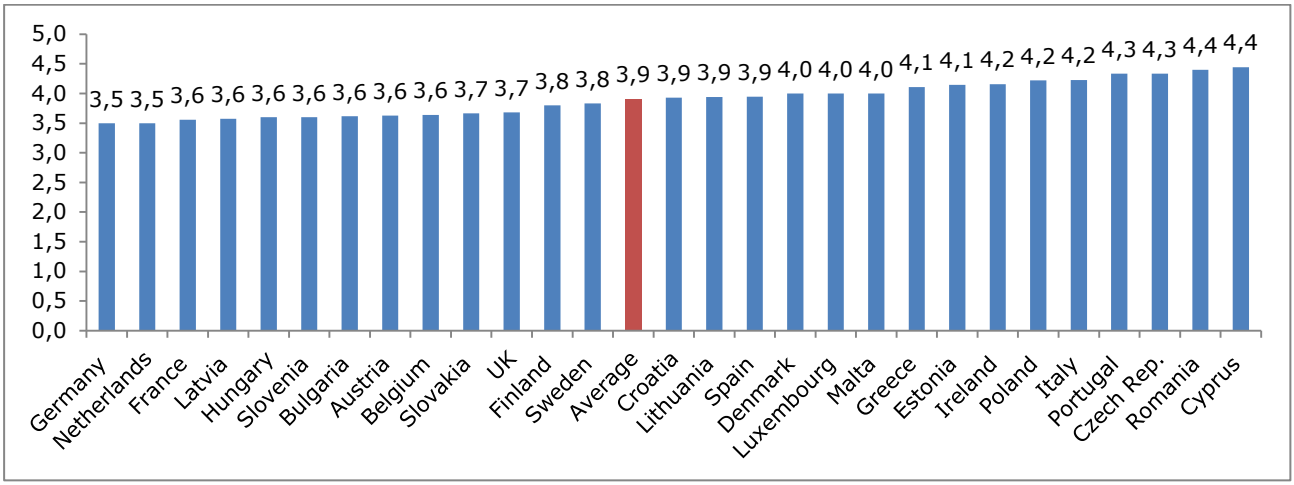


This was the measure with the least amount of support from the Member States, and showed a split of opinion overall. The overall average for this question was 3.8, indicating that this measure is seen as having some potential for a Positive Impact. But this score was the lowest of all non-legislative measures, indicating that this measure was the least popular measure among the Member States. Of the responses, 8 out of 28 country averages indicated that the creation of a uniform certification of mediators at the EU level would have a Positive Impact (with a score of 4.0 or higher). Over 46% of country averages fell between 3.9 and 5.0 (Estonia, Bulgaria, Croatia, Spain, Ireland, Sweden, Greece, Lithuania, Cyprus, Romania, Italy, Poland, and Malta), ranging from a somewhat Positive Impact to an Extremely Positive Impact. At the high end of the spectrum of approval, 10.7% of Member States (Italy, Poland, and Malta) indicated an average value of 4.5 or higher, showing high support ranging closer to an Extremely Positive Impact.

However, around 53% of countries had a score of 3.8 or lower, indicating No Significant Impact; with the averages ranged between 3.2 and 3.8. So although not completely believing such implementation would have a negative impact, a little over half of the Member State respondents believed that such implementation would carry no significant impact.

39. Create an EU Alternative Dispute Resolution Agency to promote mediation

Figure 34: Average Ranking for Creating an EU ADR Agency



The average score for this question, taking into account all Member States, was 3.9, indicating this measure is generally seen as having the potential for a Positive Impact, although not quite a unanimous Positive Impact. 12 out of 28 country averages indicated that the creation of an EU Alternative Dispute Resolution Agency to promote mediation would have a Positive Impact (4.0 or higher), with close to 54% of country average scores falling between 3.9 and 4.4, generally in the range of a Positive Impact.

On the lower end of the spectrum, 46% of the country averages reported a score of 3.8 or lower, with scores ranging between 3.5 and 3.8, indicating a range from No Significant Impact to having a Positive Impact.

40. Other:

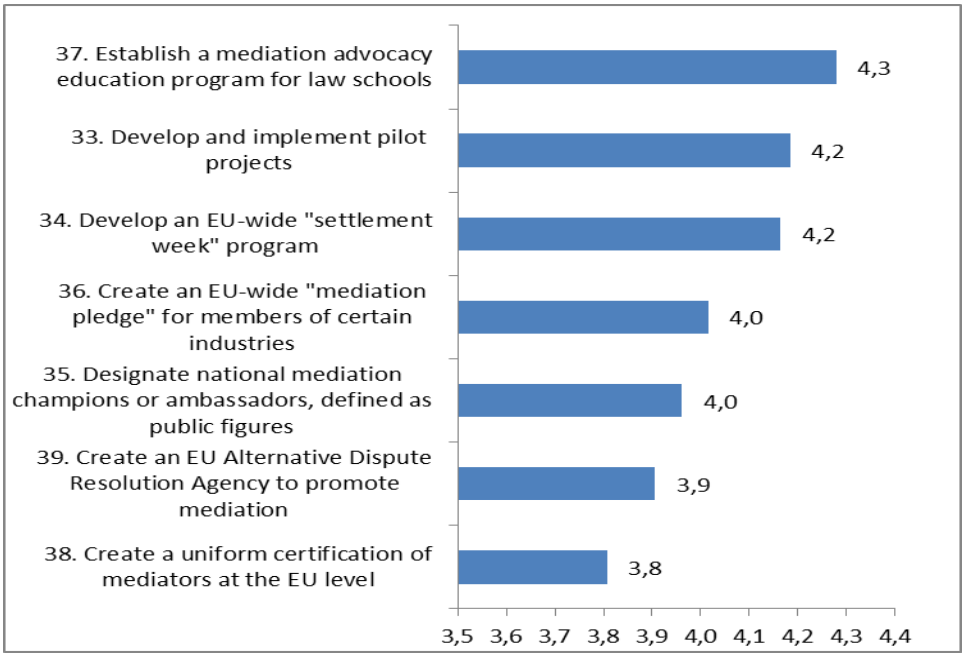
The experts were also provided with a forum to leave suggestions for other non-legislative measures. Without prompt or suggested theme, many of the experts' answers overlapped somewhat with each other, as well as with the proposed measures of this study.

The most consistent concern expressed by the experts is the lack of education available to the general public throughout the EU about mediation. Many suggestions included more proactive and aggressive publicity campaigns, utilizing different types of media. The need for education of mediators was also a significant recurring theme among the answers. Many experts mentioned the need for an EU educational advocacy competition, as well as more comprehensive mediation education and training opportunities at the university level.

Another recurring theme from the experts was the lack of uniformity. Many suggestions centred on the need for an EU advocacy centre or agency, and the need for EU funding for training of mediators and the promotion of mediation. Another suggestion was to organize an international conference in the EU for mediators to meet, with the purpose of discussing advancing best practices, providing uniform training, developing educational advancements, and creating a uniform standard or code for mediators.

41. Out of the list of non-legislative measures above, please identify the one proposal that would have the single, most positive impact on the use of mediation in your country.

Figure 35: Overall Ranking for Non-Legislative Proposals



The vast majority of the responses stated that establishing a mediation advocacy education program for law schools, business schools and other higher educational facilities in the respondent's state would be the measure that would have the single most Positive Impact for the use of mediation, with an overall average of 4.3.

The next highest measure to be supported, coming in at a close second, was to develop and implement pilot projects to encourage the use of civil and commercial mediation in the respondent's state. The overall average score was 4.2.

Coming in third place, with an overall average of 4.2, was the development of an EU-wide 'settlement week' program, aimed at exposing the general public to the benefits of mediation.

Fourth place, with an average score of 4.0, was a tie between a) creating an EU-wide 'mediation pledge' for members of certain industries to pledge to use mediation as their dispute resolution process, and b) the designating national mediation champions or ambassadors (defined as public figures who support the use of mediation and educate others about its benefits) in the Member States.

The fifth most popular measure, with an overall average of 3.9, was the creation of an EU Alternative Dispute Resolution Agency to promote mediation. Although this average was slightly below the 4.0 mark, the score still leans toward having a Positive Impact.

The least supported, but still with a 3.8 score leaning toward having a Positive Impact, was the creation of a uniform EU Specialist certification for mediators at the EU level.

Conclusion for the Assessment of Non-Legislative Proposals

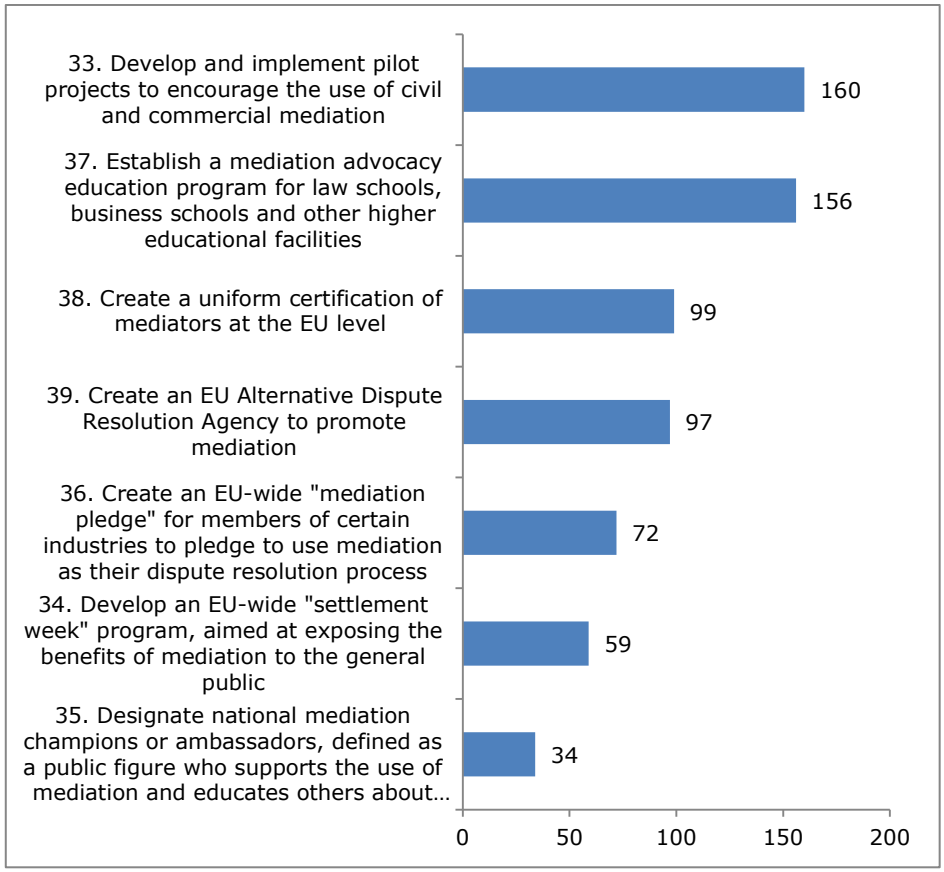
The results overall showed enthusiastic support for almost all of the non-legislative measures. In fact, none of the result averages indicated that any of the non-legislative proposals would have an adverse, negative, or extremely negative impact on the promotion of mediation use. Further, few of the proposals elicited scores indicating the likelihood No Significant Impact. Because of this enthusiastic support for all of the non-legislative measures, it is highly suggested that the Parliament support the implementation of many, if not all, of the proposed measures.

In light of their high approval, the four top-ranking measures (including the tied measures) have significant potential to attract experts, governments, and organizations willing to cooperate in their implementation. While these measures would require significant preparation and 'leg-work', they are likely to result in a significant return on investment by having a Positive Impact on mediation throughout the EU.

The Parliament should also seriously consider the final two measures, the creation of an ADR Agency and the creation of a uniform EU Specialist certification, for further discussion and possible implementation. Although their scores of 3.9 and 3.8, respectively, suggest the potential for some pushback, these scores still indicated an assessment close to 'Positive Impact', and they barely fall below the scale of the 4.0 mark. Scores at this level should not be ignored, because these results suggest the potential for a positive and significant impact on mediation in the EU.

In Annex 2 the reader will find a discussion of how some of these promotional measures have been put to work in various parts of the world.

Figure 36: Average Responses for the Non-Legislative Proposal with Potential for Most Impact



3.2.4. Opinions and suggestions received

42. If you have any comments, we would be delighted to hear them.[72]

As the final part of the questionnaire, the experts were asked to offer opinions or suggestions. Interestingly, and without any directing prompt, many of the experts made similar suggestions that also overlapped with themes that have recurred throughout this study.

The suggestions overall made it clear that a majority of experts believe that, in order for mediation to be successful throughout the EU, there must be some level of compulsion to use some aspect of the mediation process. Although several experts stated that the process should remain solely voluntary, most experts stated that lack of compulsion is the reason for the current low participation in mediation. Opinions varied as to what level of mediation—informational meetings only, certain types of disputes only, or even all disputes—should be mandated. But, regardless of the particular suggestion, many of the experts endorsed some level of mandatory mediation. There was also an overall consensus that the judiciary as a whole needs to refer, or even order, more cases to mediation.

One of the largest concerns for many of the experts is the lack of publicity, information, and, consequently, public knowledge, about mediation. This lack of knowledge, in their view, seriously hinders the use of mediation; throughout the EU, people do not understand mediation, and the benefits it offers. The experts suggested the need for an aggressive, large, and uniform publicity campaign to promote mediation. They also suggested that such a campaign will only succeed if it is uniform through all member-states as a funded EU initiative. Many of them expressed their willingness to help with such a campaign, if it were created.

Many of the experts stated that if incentives and/or sanctions were increased, mediations would probably become a more popular choice for the parties. Of concern, however, was the need to make sure that any such changes do not create an opportunity or excuse for parties simply to use delaying tactics. Several experts therefore expressed a desire in particular for provisions clarifying that sanctions are to be imposed on parties who have acted in bad faith during the process.

Uniformity was also a theme that the experts regularly mentioned. Many of the concerns regarded the enforcement of settlement agreements, especially in cross-border disputes. They suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector. Uniformity would also limit the likelihood of forum shopping among parties. One proposal envisioned a uniform European organization or agency to handle cross-border referrals, not only to help promote mediation, but also to manage and harmonize the framework of cross-border cases and settlement agreements. It is clear that the experts believe the Member States and EU need to come together to develop uniformity in certain areas, especially for cross-border disputes.

Even though, on average, the current systems for accreditation as mediators were considered satisfactory, the respondents placed great emphasis on further education. For example, several experts exclaimed that more university-level programs, aimed towards more areas of study than just the legal field, are necessary to accomplish better standards in education. Others believe that mediation education should be introduced even within secondary schools or earlier. Some experts suggested that the many judicial systems within

[72] Answers to questions 42-44 are not reported because they regard the respondents' personal data.

the Member States should also be required to have some component of mediation education, because currently the level of understanding and education of the process of mediation appears not up to par.

Other experts recognized the desire for autonomy in private industry, but still urged that mediators handling disputes in that arena should still be subject to some uniform standards of education and accreditation. Many concerns regarded cross-cultural disputes and the difference in education and accreditation between countries. A few experts expressed their desire for the formation of a uniform agency to deal with the regulation and mediation standards, and even suggested a uniform examination or other type of uniform testing. There were very few experts that stated that further regulation of the profession would have a counterproductive outcome.

Lastly, many of the experts were excited, and commended the EU and the research team for conducting this study. They offered to help in the promotion of any resulting measures, believing that the current status of mediation throughout the EU could vastly improve in the future. Although some experts fear that the complex cultural and governmental differences in the EU will prove a hurdle for increased mediation use, most experts feel that further steps by the EU should alleviate these concerns. It is apparent that most experts want the EU to take a firm lead in promoting the use of mediation throughout the EU.

CONCLUSION

The analysis of the regulatory framework for mediation in the 28 Member States reveals significant variations in the implementation of the Mediation Directive. For example, a number of states have opted to apply the Directive solely for cross-border disputes, thereby instituting a dual regulatory regime, while others have applied the Directive provisions, to a varying degree, to domestic disputes as well.

An even greater range of implementation approaches have resulted from the countries' efforts to achieve the delicate balance between the use of mediation and the use of litigation sought by the Directive. While Article 5 of the Directive allowed the Member States to introduce mandatory mediation elements, including sanctions, the EU tradition of a voluntary approach to mediation has largely prevailed at the legislative level. But those countries that have incorporated or considered mandatory elements have gone about it in different ways. Only one country, Italy, has mandated participation in mediation as a prerequisite to litigation in a fairly broadly defined range of disputes; another country, the UK, has tried it for disputes below a certain monetary value, but then withdrew; France is testing mandatory mediation in certain subject areas; and a number of countries have, instead, mandated attendance at informational meetings about mediation. Other countries have established financial incentives rather than mandates to encourage participation in mediation.[73]

One area of significant and disappointing consistency, however, is the information about the use of mediation in the Member States. The study's survey of the current market confirms that the number of mediations, on average less than 1% of all cases litigated in the EU, falls short of what it should be. This result is particularly disappointing because the survey also confirms the data contained in the 2011 'The Costs of Non-ADR' study. As seen from that and several other studies, mediation can save litigants a significant amount in both time and cost, when compared to the time and cost of litigation. Based on the average estimates provided by hundreds of national experts, if all civil cases in the EU went to mediation before going to trial, a mere 9% mediation success rate would yield time savings. This is because the small incremental time increase of each (failed) mediation turning into a trial is offset many times by the huge time saving of each (successful) mediation preventing a trial.

Almost all of the 816 respondents to the study questionnaire believe that more mediations should be occurring. The study discusses their assessment of certain key features of their respective laws' effectiveness in fostering the use of mediation. To obtain their assessments, the study asked each questionnaire respondent to rank the extent to which mediation regulation in their country promotes mediation. Each respondent chose one of three options on a spectrum going from least powerful to most powerful promotion. The purpose of this exercise was twofold. First, to provide additional views on the country analyses prepared by the study team on key aspects of each Member State's legislation. Second, to assess the existing measures in light of their produced results, so that the possible legislative changes advocated for in certain countries, and mentioned in the study's Terms of Reference, could be seen from that perspective.

Many answer choices revealed that existing legislative approaches do not tend to promote the use of mediation. For example, the level of confidentiality protection does not significantly affect the number of mediations. In fact, a majority of the respondents indicated that confidentiality is guaranteed with few exceptions or in all cases, even in countries where there are fewer than 500 mediations annually. Invitations to mediation by

[73] De Palo G. and Trevor M., *EU mediation law and practice*. (Oxford: Oxford University Press, 2012).

the courts, too, have normally generated very few mediations even where the judges are considered to have a very proactive approach towards mediation. Even where the domestic processes to enforce mediated settlements are deemed to be relatively easy, therefore dispelling the concern that litigants might not engage in mediation out of fear that enforcing its result might be too cumbersome, the number of mediations is low. The national mediator accreditation systems, too, do not appear to be a dispositive factor in leading the parties to mediation with the necessary confidence, as the systems are generally regarded as good enough; moreover, even where the accreditation standards are considered high there are few mediations. A number of countries providing greater incentives then others for people who choose mediation do not see many litigants resorting to this alternative to litigation; this suggests that, even assuming that important incentives could be provided at these difficult economic times, one should not expect a significant increase in mediations from incentives alone. Online mediation is still reported to be almost non-existent in most Member States, but even its availability, in certain countries, does not show any connection to frequent mediation use. In Member States where lawyers are required by law to inform their clients about mediation the number of mediations is not high for that single reason, and the same is generally true where litigants are required to attend a mediation information session before filing a lawsuit.

To sum up, all of these regulatory features, identified in the study Terms of Reference as the possible cause for the lack of the development of mediation in the EU, do not appear to be decisive factors in favouring mediation use, even where they are implemented to their maximum extent. To the contrary, there is evidence that the single regulatory feature likely to produce a significant increase in the use of mediation is the introduction of "mandatory mediation elements" in the legal systems of the Member States.

It is very significant that the sole EU country with over 200 000 mediations per year, Italy, only saw this increase (from maybe a few thousands annually) when mediation became a condition precedent to trial, in certain categories of cases. This direct connection is furthermore confirmed by what happened during the time period when mediation ceased to be mandatory there (October 2012 - September 2013): the number of mediations, both mandatory and voluntary, fell back to an extremely modest number. They only rose again, to tens of thousands per month, when the mandatory requirement was re-introduced.

Above and beyond the Italian experience, the sheer number of the study responses show that mandatory elements in mediation – something that in the recent past was by many regarded as a "taboo" – are now acceptable to the majority of people.[74]

In defining the extent to which mandatory elements should be introduced, the plain preference of the majority of the respondents would appear to be that of requiring litigants to try mediation before filing a lawsuit, albeit in certain categories of cases only (See Figure 26 on page 152). On closer inspection of the data, however, the study shows that a 'mitigated' form of mandatory mediation might be more appropriate. In particular, two mitigated forms of mandatory mediation – namely, compulsory attendance at information sessions and mandatory mediation with the ability to opt-out if litigants do not intend to continue with the process – register a higher preference when assessed in combination. The reason for assessing the scores of these two measures jointly is that they are both

[74] As this study is being finalized, a proposal to revise EU Directive 2002/92 on insurance mediation is still pending. The proposal would strengthen the former Article 11, by requiring (rather than encouraging) Member States to set up procedures and ensure participation in them. A similar approach is also being discussed in the 'Proposal for a Regulation of the European Parliament and of the Council on Key Information Document for Investment Products'. While it is not possible to know at this time whether these proposals will become law, they demonstrate that mandatory elements are starting to become part of the new EU dispute resolution policy approach. Interestingly, the idea of requiring the stronger party to participate in mediation – namely, insurance companies and financial institutions, in the instant cases – was not ranked highly by the study respondents.

centred on the idea of forcing the litigants to at least sit down together to consider mediation seriously. In addition, those who opposed the general idea of mandatory elements in mediation were less resistant to their mitigated forms.[75]

As for the choice between the two mitigated approaches, the data strongly suggest that mandatory mediation with opt out is the preferable one. In fact, countries where the other approach was adopted do not have a significant number of mediations; consequently, their national experts are advocating for stronger measures. Lastly, and perhaps most importantly, the model of mandatory mediation with opt-out has been proven to generate positive results, as evidenced by the high occurrence of mediations in Italy, where it is currently the law.

Based on the foregoing data and analysis, the study concludes that, at the legislative level, there are two possible courses of action. First, the legislators in the EU should consider requiring mandatory mediation in certain categories of cases with the ability to opt out. Second, the EU should affirm the theory of the 'Balanced Relationship Target Number'. Under this approach, which does not require a change in legislation, each Member State, using any pro-mediation policy of its choosing, will have to determine a clear target number representing a minimum percentage of mediations to take place every year. In light of the policies that have proven to generate mediations in the EU, it is likely that all the Member States will naturally converge in choosing similar ones.

Finally, the study shows that there is enthusiastic support for a series of well-defined non-legislative measures designed to promote mediation that the EU and the Member States should consider supporting right away. All of these measures focus on both increasing mediation information and actually leading litigants to experiment with mediation. The likely impact on the actual mediation use resulting from the implementation of these measures cannot, however, be accurately estimated. Overall, the study responses convey the message that the most effective way to put mediation on the EU litigants' map is better regulation—regulation that goes beyond simply inviting civil and commercial litigants to meet with a mediator first.

[75] Furthermore, respondents whose average response indicated no significant impact for forms of mandatory mediation were still in favour of making mediation mandatory for the 'stronger' party. This proves that support for some mandatory elements is present across the board.

REFERENCES

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

- Hopt K.J. and Steffek F. (2013), *Mediation: Principles and Regulation in Comparative Perspective,* Oxford University Press, Oxford.

- Schonewille F. and Schonewille M. (forthcoming), *The Variated Landscape of Mediation regulation,* Eleven International Publishing*,* The Hague*.*

- Steffek F. and Unberath H. (Ed.s) (2013), in cooperation with Genn H., Greger R. and Menkel-Meadow C. *Relating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford.

- Report of the project for *Judges in ADR: Improving On-line Resources and Trainings for Judicial Referral to Mediation in the EU*, JUST/2010/JCIV/AG/020-30-CE-0422174/00-59.

ANNEX 1: MEDIATION LEGISLATION DISCUSSED

Below is a discussion of the respondents' answers to Part II (questions 7-16 of the questionnaire) for each Member State.

Austria

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents stated that confidentiality is guaranteed in all cases, which is consistent with the current law, in which the mediator must keep confidential all party-confided facts, with breach opening liability for prosecution; the duty is absolute and is not waive-able. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The majority of respondents stated that the courts encourage mediation, while a strong minority of responses indicated that courts are proactive regarding the referral of individual cases to mediation. Both of the responses from the experts can actually exist and work in harmonization under the current law in Austria. As it seems under the law, the court may (in family and estate matters, must) assist parties with dispute settlement at any time during the proceedings, and when appropriate may inform the parties about institutions that are qualified for ADR. It seems that the courts are proactive in referring parties to mediation, and do so. The Austrian legal framework does encourage a dispute settlement at any time in the proceedings, and courts may also inform the parties about qualified dispute settlement institutions. Whether a judge works with the parties toward settlement or offers information about the institutions offering mediation services depends on the personal approach of the judge. Please see Chapter 3 for an in-depth discussion of this topic.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only through extensive further measures. This is consistent under the current law, which opens the possibility of judicial settlement to the parties, where parties may bring a mediation settlement agreement before any regional court in Austria and the court will approve it as long as it follows the law; the settlement is then legally enforceable.

10. To what extent is there a mediator accreditation system?
The majority of respondents selected that accreditation for mediators in Austria are based on statutory standards, which is consistent with the current law in Austria. The law states that applicants must meet specific requirements to be in the 'List of Registered Mediators' of the Federal Ministry of Justice, which ensures certain quality standards for mediators that can increase public confidence in mediation as a useful alternative to court proceedings. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of respondents stated that no incentives are provided, which is consistent with the current law in Austria. Because of the voluntariness of the mediation process, there are no negative consequences for a party if this party does not participate in the mediation. There are also no sanctions if mediation is not tried in good faith. Nor are there incentives if mediation is tried voluntarily before going to court.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The majority of respondents stated that preliminary mediation sessions are required for some cases, while a strong minority stated that there are no preliminary mediation sessions required for parties. It seems that under the current law, participation is generally voluntary for preliminary mediation sessions, however it also seems that for certain cases there are some mandates for these sessions. Please see Chapter 3 for an in-depth discussion of this topic.

13. To what extent are there mandates for parties to use mediation?
The majority response was that there are mandates that are applicable to a few cases within Austria, which is consistent with the law. Mediation in Austria is based on the voluntariness of the parties, yet, there are special cases where using mediation before instituting legal proceedings is compulsory. Please see Chapter 3 for an in-depth discussion of this topic.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are not present within Austria, while very few responses stated such tools are present with minimal use (less than 5% of total mediated cases). With potentially less than 5% use as reported by the majority of experts, it is likely that the existence of such online mechanisms is likely not known widespread throughout the mediation communities throughout Austria, which could indicate the discrepancy of the representative answers, especially in the majority. Although it is clear that such use is not being fully utilized according to the experts in this area.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of responses in the sample concluded that no duty to inform existed for attorneys to inform parties of mediation as an alternative to litigation, while a strong minority stated that such duty to inform does exist. Under the current situation in Austria, both answers can actually act in harmony. Austrian law specifically does not contain a general obligation for lawyers to advise clients about alternatives and their advantages and disadvantages before going to court, apart from the few fields in which the use of ADR is compulsory. However, the Guidelines for Practicing Lawyers (Richtlinien zur Ausübung des Rechts- anwaltsberufes) Article XII (Sections 63–65) describe the special relationship between mediation and the profession of law.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an interesting display of disagreement from across the spectrum of answers. The most popular answer was that the current requirements are acceptable. The next most selected answer was that the current requirements are excessive. And the third most popular answer was that the current requirements are insufficient currently in Austria. This interesting display of variety shows that perhaps there is a situation where not everyone can be pleased with any one system, but that majorly in Austria, experts feel that the current regime is working and is acceptable.

Belgium

7. What is the extent of confidentiality of the entire mediation process?
The average response to this question indicated that experts believe that confidentiality is assured with few exceptions. However, this question procured an interesting array of responses, indicating on a spectrum that confidentiality is assured with few exceptions, that confidentiality is assured with several exceptions and that confidentiality is guaranteed in all

cases. The average response is the most consistent with the law, which only provides an exception in cases in which disclosure is necessary for the implementation or enforcement of the agreement of the agreement by the court. The wide array of responses may indicate that some experts do not take the few exceptions into account.

8. To what extent do the courts refer cases to mediation?
The majority of respondents indicated that the courts mention possible referral to mediation. This is consistent with the law. Interestingly, some respondents indicated that the courts are proactive in referring cases to mediation. In Belgium, courts may refer a case to mediation at any stage of the proceedings until final arguments, but parties must agree to participate. These few discrepant responses may indicate that some courts are more proactive in referrals than other courts.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only with court approval through extensive further measures, with a minority stating that agreements are automatically enforceable. The current situation in Belgium could find that both answers are true. Under Belgian law, enforcement rules differ depending on whether the mediation is voluntary or judicial. An agreement made after a successful voluntary mediation may be ratified by a court, provided the agreement has been reached under the supervision of an accredited mediator. For judicial mediation, the parties may ask the judge who ordered the mediation to ratify the issues of the dispute.

10. To what extent is there a mediator accreditation system?
The vast majority of respondents indicated that mediator accreditation is based on statutory standards. This is consistent with the law, which grants a federal commission the duty of accrediting mediators or to grant accreditation to organizations that offer training sessions to aspiring mediators.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Unanimously, the responses stated that there are no economic incentives for litigants to participate in mediation, which is consistent with the current mediation law in Belgium.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
A vast majority of the responses indicated that no preliminary mediation informational session is required, which is consistent with the current situation in Belgium.

13. To what extent are there mandates for parties to use mediation?
The majority response was that no mandates for parties to use mediation exist, with a very small minority stating that mandates are only applicable to a few cases. Interestingly, both answers are consistent with the law. In general, there are no mandates for parties to use mediation. However, mandates are applicable to a few cases, specifically those for which a mandate exists in the preliminary agreement,

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The majority of respondents indicated that online mediation is present with minimal use. However, some respondents indicated that online mediation is not present in Belgium. In fact, one respondent even indicated that he or she does not know if online mediation exists in Belgium. These responses may show that although online mediation does exist, the public is not aware of this option. Therefore, it is rarely used.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The average, and majority, response indicated that there is no duty for attorneys to inform parties of mediation. However, there seems to be a vast discrepancy among the respondents' answers. In fact, about a third of respondents indicated that there is, in fact, a duty to inform. The average response is consistent with the current situation in Belgium. The law does not bind attorneys to a duty to inform, so there is no duty, per se; but the Ministry of Justice and courts and bar associations do provide a significant amount of information about mediation to parties.

16. What is your overall assessment of the requirements to become a mediator in your country?
A little over half of the respondents indicated that requirements are insufficient. Interestingly, the other respondents indicated that requirements are acceptable, and some respondents even suggested that requirements are excessive. This interesting split show that there are differing opinions on the scale of current suitability of current mediation law in Belgium, with one end of the pole wanting more and the opposite showing satisfaction with the current requirements and some even desiring less requirements.

Bulgaria

7. What is the extent of confidentiality of the entire mediation process?
A strong majority stated that confidentiality is guaranteed in all cases, with a strong minority stating that confidentiality is assured with few exceptions. The minority is actually more in line with the current law. Bulgarian legislation guaranteed mediation confidentiality protections before the Directive implementation, and the Mediation Act amendments raised these protections and carved out very narrow exceptions mostly for protection and policy concerns. Interestingly, parties and their lawyers are not prevented from misuse of mediation information in subsequent court proceedings, and no sanctions are in place for parties, lawyers or mediators. Instead, parties and mediators may sign an agreement to mediate that contains a confidentiality clause, which results in only a contractual liability breach for damages and allows only general remedies. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The majority of respondents stated that the courts encourage mediation, while a little less than half stated that courts mention possible referral to mediation within Bulgaria. Court referral to mediation was implemented pre-Directive, and currently regulation of court referral mediation is completely in line with the Directive, stating that a court (when appropriate) may encourage mediation for dispute settlement. The court is obliged to refer the parties to mediation in divorce proceedings, with the parties ultimately having the final say to accept. Overall, both answers can be in harmonization, as it seems the courts can and do in fact refer parties to mediation based on court discretion. Please see Chapter 3 for an in-depth discussion of this topic.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The respondents had mixed answers that varied between stating that mediated agreements are enforced only with court approval, or that such agreements are enforced only through extensive further measures. Both answers can act in harmonization, as under the Bulgarian Mediation Act, court approved mediated agreements have both enforceable, and the full legal force of a court settlement agreement. Parties can present the settlement agreement before the competent regional court for approval and thus get the highest possible

protection for the rights and interests stipulated in the mediated agreement. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
An almost even mix of respondents here stated that accreditation is based on statutory standards, while the remaining sample stated that accreditation is based on market standards. While the industry may set some market standards, the sample that stated accreditation is based on statutory standards is more in line with Bulgarian law. The Mediation Act and its implementing Ordinance provide very specific requirements for verifying the capacity of a mediator to ensure the high quality of mediation training and the professional qualification of mediators. The Minister of Justice accredits mediators by entering them into the Uniform Register of Mediators once their qualifications have been established. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
A majority of the responses stated modest incentives exist for parties to use mediation, while some viewed the incentives as strong. Based on individual interpretation, both answers are consistent with the law whereas incentive for a mediated settlement agreement, upon implementation of the agreement by the court, half of the stamp duty deposited shall be refunded to the plaintiff. There are no sanctions by the court or law if any type of mediation is not tried in good faith. A very small group of responses indicated that no incentives exist, but this is not consistent with the law, as such incentive is set forth in Bulgaria.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Here again existed a mix of respondents, with a little less than half stating that preliminary mediation sessions are required for some cases, while the other half stated that no such preliminary mediation session is required. It seems that such sessions are not required as consistent with the law, with one exception. In divorce proceedings, during the first hearing, the court must direct the parties to mediation or another procedure for voluntary resolution of the dispute. It should be noted that the Sofia Regional Court initiated a settlement program in the first quarter of 2010, where parties in cases pending before the court have the opportunity to receive information and consultation on the opportunity to use mediation and other voluntary dispute resolution methods. They may also receive professional assistance with resolving their case at the Court Settlement Centre, which operates pro bono and is staffed by volunteer mediators and judges trained in mediation techniques. Parties who have reached a settlement agreement may obtain a settlement agreement. So although it seems such information is generally not mandatory in most cases, it is available to the parties for use. Please see Chapter 3 for an in-depth discussion of this topic.

13. To what extent are there mandates for parties to use mediation?
The majority response was that no mandates for parties to use mediation exist. The majority answer is most consistent with the current law with one exception. Bulgaria continues to maintain a voluntary mediation procedure by party choice, as to add choice and flexibility for the parties. However, in divorce proceedings, during the first hearing, the court must direct the parties to mediation or another procedure for voluntary resolution of the dispute. But the parties still must agree to mediate in the end.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are present with minimal use (less than 5% of total mediated cases), with a minority of the responses indicating that such online mediation is not present. With potentially less than 5% use as reported by the majority of

experts, it is likely that the existence of such online mechanisms is likely not known widespread throughout the mediation communities throughout Bulgaria, which could indicate the discrepancy of the representative answers.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of responses in the sample concluded that no duty to inform existed for attorneys to inform parties of mediation as an alternative to litigation. Although a strong minority stated that such duty to inform does in fact exist. The majority showing is more consistent with the law, that Bulgaria does not include any requirement for parties and lawyers to consider mediation as a dispute resolution option, even post implementation of the Directive.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question interestingly showed that the great majority of respondents feel that the current requirements are acceptable, with very few respondents stating that the current requirements are insufficient. This interesting strong display of approval may indicate that legislative means and the current regulations are satisfactory for a majority of the mediation experts in Bulgaria, and could offer some insight for the EU regarding particular areas of satisfaction.

Croatia

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents indicated that confidentiality is guaranteed in all cases. This is consistent with the law in Croatia.

8. To what extent do the courts refer cases to mediation?
The majority of respondents stated that the courts mention possible referral. In Croatia, judges have the power to refer cases to mediation within their courts or to outside mediation centres. Interestingly, some respondents indicated that the courts are proactive in referral, and others indicated that the courts encourage mediation. One respondent, in fact, specified that different courts at the same level often operate differently in terms of referrals. This status of referral could show a weak support for mediation in some courts. Perhaps some judges are more comfortable with sending cases to mediation than others.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of respondents indicated that mediated agreements are automatically enforceable. A minority of the respondents indicated that agreements are enforced only through extensive measures. Interestingly, several respondents explicitly stated that they do not know. It seems as though the majority is more in line with the legislation. According to a provision in the Croatian Law on Mediation, all agreements made in mediation containing a private enforcement clause are enforceable by the law.

10. To what extent is there a mediator accreditation system?
Unanimously, the respondents indicated that accreditation is based on statutory standards. This is consistent with the current situation in Croatia, were the Ministry of Justice regulates the accreditation standards for registered mediators.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The vast majority of respondents stated that there are no incentives for parties to use mediation. The researchers were not able to find enough information regarding incentives to provide a discussion on this topic.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The vast majority of respondents indicated that preliminary mediation informational sessions are required for some cases. The researchers were not able to find enough information regarding mediation informational sessions to provide a discussion on this topic.

13. To what extent are there mandates for parties to use mediation?
The majority of the respondents state that mandates are applicable to a few cases, and a significant minority stated that no mandates exist. Interestingly, both responses can be true. In collective labour disputes, for example, there are requirements for parties to participate in mediation. However, there are no other mandates for other types of disputes.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
An overwhelming majority of respondents indicated that online mediation is not present in Croatia. The researchers were not able to find enough information regarding online mediation to provide a discussion on this topic.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of respondents indicated that attorneys do not have a duty to inform parties of the option of mediation. However, a significant minority of respondents indicated that they do, in fact, have a duty to inform. Interestingly, according to the current situation in Croatia, attorneys and judges do have a duty to inform parties about mediation, but there are no sanctions to enforce this.

16. What is your overall assessment of the requirements to become a mediator in your country?
Half of the respondents indicated that requirements are acceptable, a quarter indicated that requirements are excessive and the other quarter indicated that requirements are insufficient. This interesting display of variety shows that perhaps there is a situation where not everyone can be pleased with any one system, but that majorly in Croatia, experts feel that the current regime is working and is acceptable.

Cyprus

7. What is the extent of confidentiality of the entire mediation process?
The majority of the respondents determined that confidentiality is assured with few exceptions, and several respondents stated that confidentiality is guaranteed in all cases. This is consistent with the law. In Cyprus, the confidentiality of mediation meets the requirements of the Directive. Neither the mediators nor those involved in the administration of the mediation process can be required to give evidence in civil and commercial judicial proceedings regarding information that arises out of or is in connection with a mediation. The Directive also contains the exceptions of situations in which it is necessary to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person, or when it is necessary in order to implement or enforce an agreement. Alternatively, there is no public policy exception in Cyprus.

8. To what extent do the courts refer cases to mediation?
The majority of the respondents stated that the courts mention possible referral. This is consistent with the situation in Cyprus, in which the court may mention mediation but may not force parties to participate. Interestingly, many respondents specified that there are very few referrals despite the fact that the court mentions it.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
A majority of the respondents stated that mediated agreements are only enforced with court approval. This is consistent with the current situation in Cyprus. Settlement agreements are not automatically enforceable, and parties must file an application for agreement for it to become enforceable.

10. To what extent is there a mediator accreditation system?
The majority of respondents stated that accreditation is only based on statutory standards. This is consistent with the situation in Cyprus. For example, mediators are required to register with the Ministry of Justice and Public Order. Interestingly, a few respondents stated that there is no current accreditation system. This is inconsistent with the situation in Cyprus for civil and commercial mediations.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
All respondents stated that there are no economic incentives for litigants to participate in mediation. This is consistent with the Bill, which does not contain any incentives or sanctions.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The average answer indicated by the respondents is that preliminary mediation sessions are required only for some cases. However, many respondents indicated that no preliminary mediation session is required. The average answer is most consistent with the current situation. Although no preliminary mediation session is required, the court may send parties to such a meeting. According to the law, the only coercive power the court holds in this regard is the ability to call the parties to a directions hearing, in which they are informed about the possibility of mediation.

13. To what extent are there mandates for parties to use mediation?
The majority of respondents indicated that there are no mandates for parties to use mediation. This is consistent with the situation in Cyprus, where there are no mandates for parties to participate in mediation. Mediation is always completely voluntary. Interestingly, a few respondents stated that mandates are applicable to a few cases.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
All respondents indicated that online mediation is not present in Cyprus, and this is consistent with the current situation in the country.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The average respondent stated that there is no such duty to inform. However, many respondents indicated that there is, in fact, such a duty. In Cyprus, parties are required to consider mediation, but they are not obliged to participate. According to the law, attorneys should inform their clients about the possibility of mediation. This may show an area in which attorneys are misinformed or uninformed, or it may be a matter of differing interpretations of the law.

16. What is your overall assessment of the requirements to become a mediator in your country?
The average response for the overall assessment of the requirements for mediators was that requirements are insufficient. Interestingly, several responses indicated that requirements are acceptable. One respondent commented that requirements are sufficient for non-lawyers, however they are insufficient for lawyers.

Czech Republic

It is important to note that there was not a significant representation of responses for the Czech Republic. However, there are a sufficient enough number of responses for analysis.

7. What is the extent of confidentiality of the entire mediation process?
The average response indicated that confidentiality is assured with few exceptions, and a few respondents indicated that there are several exceptions. The differing responses are a result of differing interpretations of the law. Each response could be considered to be consistent with the law. According to the Act, an exception exists 'if the subject of the litigation is a dispute between him and a party to the conflict or its legal representative, arising from his mediation activities and to the extent necessary for his defence in the exercise of supervision of a mediation or in disciplinary proceedings.' In addition, the law gives the parties the power to determine the extent of the duty of confidentiality in the agreement to mediate.

8. To what extent do the courts refer cases to mediation?
The average response to this question was that the courts mention possible referral to mediation. However, a few respondents indicated other options, specifically indicating that courts encourage mediation and that courts are proactive in referring cases to mediation. According to the Code of Civil Proceedings, the presiding judge in a court proceeding may, when practical and appropriate, refer the parties to attend a three-hour introductory meeting with a registered mediator. Perhaps some courts are more proactive in mentioning possible referral, or perhaps some judges have a different interpretation of what is 'practical and appropriate'.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The vast majority of respondents indicated that mediated agreements are only enforced with court approval. This is consistent with the current situation in the Czech Republic. For agreements to be enforced, the court must approve the agreement as a conciliation agreement, or there must be a subsequent agreement addressing the fulfilment of any claims arising out of the mediation agreement.

10. To what extent is there a mediator accreditation system?
The vast majority of respondents indicated that mediator accreditation is based on statutory standards. This is consistent with the law, which requires mediators to perform a test and also register with the Ministry of Justice

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of the respondents stated that there are no incentives for parties to use mediation to resolve their disputes. This is consistent with the current situation in the Czech Republic.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
A vast majority of the responses indicated that a preliminary mediation session is required for some cases, which is consistent with the current situation. In the Czech Republic, the court may refer parties to participate in an introductory meeting on mediation.

13. To what extent are there mandates for parties to use mediation?
Unanimously, the respondents indicated that there are no mandates for parties to use mediation. This is consistent with this law.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The respondents unanimously indicated that online mediation exists, however there is only minimal use of this approach.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Unanimously, the respondents indicated that attorneys have no duty to inform parties of mediation; this is consistent with the current situation in the Czech Republic.

16. What is your overall assessment of the requirements to become a mediator in your country?
Although there were few responses for the Czech Republic, there was a wide array of opinions regarding the requirements of mediators. The average answer indicates that requirements are insufficient. However, some respondents also indicated that requirements are acceptable, and others indicated that they are excessive. This wide array may represent vast differences in peoples' understanding of what is necessary for mediation and also in their desires for the extent of mediator requirements.

Denmark

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents indicated that confidentiality is guaranteed in all cases, with a few respondents indicating that there are a few exceptions. Both interpretations are consistent with the law; however, there are a few exceptions that state that information is confidential unless parties agree otherwise or if the information is made available to the public.

8. To what extent do the courts refer cases to mediation?
Unanimously, the respondents indicated that the courts mention possible referral to mediation. This is consistent with the law, in which the court announces the option of mediation by the court as a possibility in the first letter from the court to the lawyers.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of respondents indicated that mediated agreements are enforced only with court approval. This is consistent with the current situation in Denmark.

10. To what extent is there a mediator accreditation system?
The majority of respondents indicated that accreditation is based on market standards; however, a few respondents indicated that there is no accreditation system. The majority response is consistent with the current situation in Denmark, in which the Danish Court Administration selects who, which are only judges or lawyers, can act as mediators.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Unanimously, the respondents indicated that there are no existing incentives for parties to use mediation. This is consistent with the current situation in Denmark.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Unanimously, again, the respondents indicated that there are no preliminary mediation sessions required of parties. This is consistent with the current situation in Denmark.

13. To what extent are there mandates for parties to use mediation?
Unanimously, the respondents indicated that there are no mandates for parties to use mediation. Again, this is consistent with the current situation in Demark.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The majority of respondents indicated that online mediation is not present in Denmark; however a few respondents indicated that it is present with only minimal use. This may show that the public is uninformed of the option of online mediation, or it may show that some respondents were incorrect in their belief that it does exist.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The respondents were divided in their answers to this question, with a majority indicating that there is a duty to inform and a significant minority indicating that there is no duty to inform. In Denmark, the legal representatives play an important role in the initial determination of whether to request court mediation, however there is no formal duty in the law requiring them to inform parties of this option. This discrepancy could be a matter of interpretation. Some attorneys may not believe that they have a duty because the court is proactive in informing the clients in the letter to the lawyers.

16. What is your overall assessment of the requirements to become a mediator in your country?
Unanimously, the respondents indicated that the current requirements to be a mediator are acceptable. It may be important to note that only judges and lawyers can be appointed as mediators. This unanimous response shows that they are content with the current requirements.

Estonia

7. What is the extent of confidentiality of the entire mediation process?
The average response to this question shows that confidentiality is assured with few exceptions in Estonia. This is consistent with the law, which states that a court may compel the mediator to disclose information where to do so is necessary for overriding considerations of public policy in criminal, civil or administrative proceedings.

8. To what extent do the courts refer cases to mediation?
The average response for referral states that the courts mention possible referral. However, many responses included further explanations to suggest that the courts encourage settlement, but they do not mention possible referral to mediation even though this option exists on the basis of law. Both interpretations are consistent with the situation in Estonia, in which the court can order the parties to mediate, but such discretion is not usually exercised, and also in which the court will take all possible measures during the proceeding to settle the case.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The average answer indicated states that mediated agreements are enforced only with court approval. In addition, the responses included other interesting responses, such as 'automatically enforceable' and explanations that the agreement is enforced differently depending on the status of the mediator. This, in fact, is consistent with the situation in Estonia, in which the enforcement of the agreement depends on who performs the role of mediator. However, court approval is always necessary. A more in-depth explanation of the role of mediators in Estonia can be found in Chapter 3.

10. To what extent is there a mediator accreditation system?
The majority of respondents indicated that there is no mediator accreditation system in Estonia. This is consistent with the law.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The respondents unanimously indicated that there are no incentives for parties to use mediation; this is consistent with the law.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The respondents unanimously indicated that there are no mandates for preliminary mediation informational session in Estonia; this is consistent with the law.

13. To what extent are there mandates for parties to use mediation?
Again, the respondents unanimously indicated that there are no mandates for parties to use mediation to resolve their disputes; this is consistent with the law.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are
The majority of respondents indicated that online mediation is not present in Estonia.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
All respondents similarly indicated that attorneys have no duty to inform parties of mediation as an option to resolving their dispute. This is consistent with the law.

16. What is your overall assessment of the requirements to become a mediator in your country?
The average answer to this question was that requirements are acceptable. However, some respondents also indicated that requirements are insufficient and others indicated that requirements are excessive. This shows an array of the opinions regarding the opinions that experts have in Estonia regarding mediator requirements.

Finland

7. What is the extent of confidentiality of the entire mediation process?
Respondents were split between confidentiality being guaranteed in all cases or assured with few exceptions. Generally, in Finland, out-of-court mediation is confidential, however, court mediation proceedings are presumptively public with some provisions listed in the Mediation Act in regard to protecting a mediator's duty of confidentiality. These include that a mediator may not reveal what they have learned regarding a mediated matter unless this is consented to by the parties or is required by law. In addition, the Finnish Code of Judicial Procedure states a mediator may not testify about knowledge gained in the course of a mediated matter unless it is required or the person protected by the provision consents.

Accordingly, this is likely the reason respondents were split in regard to the question of confidentiality. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
In Finland, judges have a duty to explore the possibility that parties could settle a dispute and thus, a majority of respondents stated that courts encourage mediation. In court-annexed mediation programs, the Finnish Mediation Act establishes the possibility for judges to be directly involved as a mediator in the mediation procedures as opposed to simply referring parties to mediation. Please see Chapter 3 for an in-depth discussion of this topic.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
A majority of respondents indicated that mediated agreements are enforced with court approval. A settlement reached between the parties in court mediation can be confirmed as the court's formal decision at the request of the parties, or, if out-of-court, it can be confirmed and thus be enforced by the court. Under the Mediation Act, enforceability requires that a mediator be trained in mediation or judges who act as mediators receive mediation training by the Ministry of Justice.

10. To what extent is there a mediator accreditation system?
No accreditation system in place in Finland was indicated by a majority of respondents. However, under the Mediation Act, enforceability of a mediated settlement agreement requires the mediator has been trained in mediation. Further, judges who act as mediators must undertake mediation training provided by the Ministry of Justice to guarantee the quality of the mediation and to ensure the mediation is efficient, unbiased and skilled.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Unanimously, those surveyed in Finland stated that there are no incentives to mediate currently.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
All respondents indicated there are no mandates for preliminary mediation informational sessions.

13. To what extent are there mandates for parties to use mediation?
There are no mandates in Finland for parties to use mediation according to all respondents that completed the questionnaire. Mediation in Finland is voluntary and so it is imperative that parties agree to mediate regardless of whether it is undertaken in or out of court.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Online mediation responses were evenly split between those who said it was not present and those that stated they were present with minimal use. Based on this response, the use of online mediation in Finland has room to expand.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Unanimously, all respondents stated attorneys have a duty to inform parties of mediation as an alternative to litigation. In Finland, counsel are required by the Bar Association's Code of Conduct to consider whether the dispute could be settled or resolved by use of ADR considering several aspects from economic impact to emotional impact. Further, judges, who may act as mediators, have a duty to explore whether there is a possibility the parties could reach a settlement of their dispute.

16. What is your overall assessment of the requirements to become a mediator in your country?
There was unanimous consensus of those surveyed that requirements to become a mediator in Finland are insufficient even though the Mediation Act requires the mediator to have been trained in mediation or judge-mediators to have been trained by the Ministry of Justice.

France

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents indicated that confidentiality is assured with few exceptions. A significant minority of respondents also indicated that confidentiality is guaranteed in all cases. This discrepancy could be due to a range of interpretations. France, for example, has a strong degree of confidentiality, however it includes the same exceptions as the Directive. These exceptions include situations in which it is necessary to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person, and also in situations in which it is necessary in order to implement or enforce that agreement. Other than these exceptions that are consistent with the Directive, confidentiality is guaranteed.

8. To what extent do the courts refer cases to mediation?
The majority of respondents indicated that the courts mention possible referral to mediation. Some respondents indicated that the courts encourage mediation, and others indicated that the courts are proactive in referring cases. This discrepancy could represent a lack of homologation among French courts. In France, judges can refer disputes to mediation at any time during the course of the judicial proceeding until the court makes the final decision. However, they only have the responsibility to provide general advice about mediation.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The vast majority of respondents indicated that mediated agreements are only enforced with court approval. This is consistent with the situation in France, in which parties must file a request for approval with the judge.

10. To what extent is there a mediator accreditation system?
The vast majority of respondents indicated that there is no mediator accreditation system, and a minority of respondents indicated that accreditation is based on market standards. This is consistent with the situation in France, where there is no specific Code of Conduct for mediators at the national level. However, French law does contain various provisions requiring mediators to possess certain training or qualifications, and associations also contain different rules and requirements for the accreditation of their mediators.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The vast majority of respondents indicated that there are no incentives for parties to use mediation. This is consistent with the current law.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The majority of respondents indicated that preliminary mediation sessions are not required. This is consistent with the current situation; however, as stated in the country analysis, there are currently advanced discussions concerning an introduction of such a mandate. Please see Chapter 3 for a full discussion of the legislation.

13. To what extent are there mandates for parties to use mediation?
The average answer indicated was that mandates are applicable to a few cases; however, the respondents were split between this response and 'no mandates'. This discrepancy may be due to the fact that mandatory mediation for family disputes is currently being tested in France.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The vast majority of respondents indicated that online mediation does exist in France, but there is very minimal use of this approach.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The average respondent indicated that there is no duty of attorneys to inform clients. Interestingly, a significant minority of respondents indicated that there is, in fact, a duty to inform. This discrepancy may be due to differing interpretations. In France, lawyers are not required to inform their clients of mediation before going to court. According to one respondent, there is a duty according to a professional code of ethics. Perhaps different codes of ethics range among the different associations.

16. What is your overall assessment of the requirements to become a mediator in your country?
The majority of respondents indicated that requirements for mediators are insufficient, and a significant minority indicated that requirements are acceptable.

Germany

7. What is the extent of confidentiality of the entire mediation process?
For Germany, the average response for the extent of confidentiality indicated is that confidentiality is assured with few exceptions. This is consistent with the law. For example, it may be necessary for the mediator to disclose the content of the mediation proceeding if this is necessary for the implementation or enforcement of the settlement agreement; it is necessary for overriding considerations of public policy, such as ensuring the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or if the disclosure contains obvious information that is not sufficiently important to remaining confidential. In addition, the legislation does not require confidentiality from the parties; the extent of confidentiality must be discussed and agreed to by the parties prior to the mediation.

8. To what extent do the courts refer cases to mediation?
According to the average of the respondents' answers, the courts encourage mediation. A significant minority of respondents indicated that courts mention possible referral. Interestingly, the interpretation of the current situation in Germany could include both of these realities. Pursuant to the Code of Civil Procedure, a court may suggest that parties attempt mediation. Perhaps certain courts are more encouraging of the use of mediation, and some simply mention referral as a possibility.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The average response indicated that mediated agreements are enforced only through extensive further measures; this is consistent with the current situation. In Germany, mediation agreements can be made enforceable through the following measures: it must be approved by a civil notary, be court-approved (for mediations conducted in parallel to court proceedings), be transferred to an arbitral award with agreed terms or be transferred into

an agreement by the parties' counsel and recorded by the responsible district court or be approved by a Gütestelle, an official registered board or person.

10. To what extent is there a mediator accreditation system?
The respondents' average answer is that there is no current accreditation system in Germany, but a significant minority indicated that there is accreditation based on market standards. Both of these answers can be considered consistent with the current situation in Germany. There is no overall accreditation system, however different mediation organizations set specific rules for accreditation. At present, no specific regulation for the professional title 'mediator' exists. However, the German Mediation Code provides authority for the Department of Justice to enact a legal ordinance, to be enacted in late 2013 or 2014, which has to establish in detail the future requirements for qualification as a so-called 'certified mediator'.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of respondents indicated that there are no incentives for parties to use mediation. It is important to note that some respondents indicated that there are modest incentives. Both of these answers can be considered consistent with the situation in Germany. In fact, a recent act gives the federal states the ability to reduce or even abolish certain legal fees if the claim is withdrawn after parties come to a settlement agreement as a result of mediation. The discrepancy in answers could be due to different states utilizing or not utilizing this power.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The vast majority of respondents indicated that there are currently no mandates for preliminary mediation informational sessions; this is consistent with the current situation in Germany.

13. To what extent are there mandates for parties to use mediation?
The vast majority of respondents indicated that there are no mandates for parties to use mediation. This response is consistent with the situation in Germany, where mediation remains a completely voluntary process.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The majority of respondents indicated that although online mediation is present, there is only minimal use of this approach.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Unanimously, the respondents indicated that attorneys do, in fact, have a duty to inform parties of the option of mediation. This is consistent with the law. According to Section 1(3) of the Rules on the Professional Practice for Lawyers, lawyers are required to advise their clients to resolve their legal problems in the most favourable way, and this includes mediation if it is appropriate.

16. What is your overall assessment of the requirements to become a mediator in your country?
The majority of respondents stated that the current requirements are acceptable.

Greece

7. What is the extent of confidentiality of the entire mediation process?
The average of the Greek responses indicated that confidentiality is assured with few exceptions. This is consistent with the Greek law, which provides for exceptions for public policy reasons, and when required to ensure the protection of the best interests of children or to prevent harm to the physical integrity of a person.

8. To what extent do the courts refer cases to mediation?
The majority of respondents indicated that the courts mention possible referral. However, many respondents specified that this is true in theory, but it does not occur much in practice. According to the law, the court may request parties' participation in mediation at any stage in court proceedings. But according to the respondents, it seems that the courts are not active in referral.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of respondents indicated that mediated agreements are enforced only with court approval. This is consistent with the current situation in Greece. For example, there are detailed legal rules concerning mediator training and accreditation in Greece. Mediators are accredited by the Administration Directorate General of the Greek Ministry of Justice, Transparency and Human rights following the completion of training through Public Training Mediator Institutes.

10. To what extent is there a mediator accreditation system?
Unanimously, the respondents indicated that mediator accreditation is based on statutory standards. This is consistent with the Mediation Act, Article 7, which discusses that the accreditation body for mediators is the Department of Lawyers' Function and Bailiffs.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of respondents indicated that there are no incentives for parties to use mediation to resolve their disputes. This is consistent with the current situation in Greece.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Unanimously, the respondents indicated that there are no mandates for parties to attend preliminary mediation informational sessions; this is consistent with the current situation in Greece. There have been advanced discussions about introducing a certain degree of compulsion to mediate disputes; however, these discussions have not led to any mandates.

13. To what extent are there mandates for parties to use mediation?
The respondents unanimously indicated that there are no mandates for parties to use mediation. This is consistent with the law for civil and commercial disputes.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Again unanimously, the respondents stated that online mediation does not exist in Greece.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of respondents indicated that there is a duty for attorneys to inform parties of mediation. Interestingly, there is also a significant minority that indicated that there is no duty to inform the parties of such an option. One respondent stated that only recently has this duty been imposed, but there is no specific sanction for attorneys who fail to do so. The

discrepancy in the responses could be due to the fact that these changes are recent. It may be important to note that the presence of lawyers is mandatory during the mediation process.

16. What is your overall assessment of the requirements to become a mediator in your country?
The average response to this question, with just over half of the responses, suggests that many participants of the questionnaire believe the requirements to be excessive. However, just less than half believe that the requirements are acceptable.

Hungary

7. What is the extent of confidentiality of the entire mediation process?
Confidentiality is either assured or guaranteed in all cases according to Hungarian respondents. Under Section 26 of the Mediation Act, unless otherwise provided by law, mediators must keep all information confidential and are bound even after the mediation. Mediators may, however, disclose information shared by one party to another unless the party explicitly requests it not be disclosed.

8. To what extent do the courts refer cases to mediation?
According to Hungarian respondents, courts either mention possible referral to mediation or encourage it. the Civil Procedure Code provides that: 'The court—if there is a chance for its success, particularly if it is requested by a party—informs the parties about the main features of mediation, the possibility of its application and also the related rules governing the recess of the proceedings.' The Code thereby provides the legal framework for advising the parties about mediation at any stage of the litigation proceedings.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
Mediation agreements are enforced with court approval in Hungary according to a majority of respondents. The Mediation Act, however, does not address enforceability and the parties are free to choose from among the options generally available to parties who wish to enforce a mediation agreement.

10. To what extent is there a mediator accreditation system?
Accreditation in Hungary is based on statutory standards. Pursuant to Section 5(1) of the Mediation Act, an individual will be registered as a mediator if that person has obtained a degree in higher education (at least a BSc/BA or higher degree) and has at least five years of certified professional experience in the degree field subsequent to obtaining the degree. In addition, mediators must verify that they have obtained the three-year professional training prescribed in the Qualification and Training Decree. A mediator must have a clear criminal record and is not banned by court judgment from pursuing mediation. Lastly, a mediator must not be under partial or total guardianship and must have full legal capacity.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
A majority of respondents indicated that there are no economic incentives to mediate in Hungary, although some stated there were modest incentives.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
According to a majority of respondents preliminary mediation information sessions are required for some cases in Hungary.

13. To what extent are there mandates for parties to use mediation?

Hungary has no mandates to use mediation according to a majority of respondents and statute.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Respondents indicated online mediation is not present in Hungary.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Unanimously, there is no duty for attorneys to inform parties of mediation, according to respondents, which is consistent with Hungarian law.

16. What is your overall assessment of the requirements to become a mediator in your country?
Also unanimously, respondents indicated requirements to become a mediator were acceptable in Hungary.

Ireland

7. What is the extent of confidentiality of the entire mediation process?
The majority of those surveyed in Ireland stated that confidentiality is assured with few exceptions, while a few responses elicited stated that it is guaranteed. The regulation for cross-border mediations states that 'a mediator or a person involved in the administration of a mediation shall not be compelled to give evidence in civil or commercial proceedings or an arbitration relating to a matter arising out of or connected with a mediation'. Exceptions exist when parties consent to waive their right to confidentiality, but future legislation in Ireland is very likely to include statutory protection for confidentiality in mediation proceedings.

8. To what extent do the courts refer cases to mediation?
Courts were seen by a majority of respondents as encouraging mediation or were at least proactive in referring individual cases to mediation. Court-based mediation may take place in Ireland after the parties have commenced litigation proceedings or by the consent of the parties.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
While a majority of respondents indicated agreements are enforced only with court approval, the answers to this question were a bit scattered. Some respondents stated they were automatically enforceable, others that they were enforceable by contract law or not enforceable unless signed by lawyers. Still others stated they were enforced through extensive measures and one individual simply didn't know. The variety of responses is intriguing as Regulation 5(1) of the Mediation Regulations provides that where the parties enter into an agreement following mediation, they, or any one of them with the consent of others, may apply to the court where the litigation began for an order making the agreement a rule of the court and providing it be enforceable against other parties. Where the mediation occurred before litigation, a party, with the consent of others, may apply to the Master of the High Court for a similar order. It appears that court approval is, indeed, the mechanism to be used to enforce a mediation agreement in Ireland.

10. To what extent is there a mediator accreditation system?
A majority of respondents indicated accreditation is based on market standards. In Ireland, any person may act as a mediator without being registered, certified or even trained as the title of 'mediator' is not protected by law.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Almost all respondents stated that no incentives are provided to mediate while two responses indicated modest incentives are present. Judicial recommendation for parties to consider mediation coupled with the possibility of a cost sanction for an unreasonable refusal to consider mediation acts as a strong catalyst for parties to attempt to mediate however, according to one expert.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Responses were pretty evenly split between the majority response that no preliminary mediation session is required versus preliminary mediation sessions being required for certain cases.

13. To what extent are there mandates for parties to use mediation?
Again, responses were split rather evenly to this answer with no mandates for parties to use mediation as the most cited answer. The other part of the split was that mandates were applicable in a few cases. The Mediation Regulations make no provision for parties and lawyers to consider mediation, however, the Irish courts have established that under the Civil Liability and Courts Act of 2004, a judge may order the parties to mediate even if one party does not wish to attempt it. Section 15 of the Act provides mediation in a personal injury action may be initiated at the request of one of the parties if the court determines mediation may assist in reaching a settlement. However, the principle of voluntariness remains even where participation in mediation is required and so it would seem the majority of responses that no mandate to use mediation in Ireland exists, even though the possibility of a judicial order remains intact.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Respondents stated that online mediation is present with minimal use or not present at all. Accordingly, online mediation as a forum for dispute resolution has room to expand in Ireland.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
A majority of respondents indicated attorneys have a duty to inform parties of mediation as an alternative to litigation but, interestingly, a few respondents indicated there was not a duty to inform. According to the Mediation Regulations, there is no provision for parties and lawyers to consider mediation, though perhaps in practice, it is customary.

16. What is your overall assessment of the requirements to become a mediator in your country?
Respondents were almost equally torn as to whether requirements were acceptable or insufficient to become a mediator in Ireland with a slight majority stating they were insufficient. This may be due to the non-existence of any accreditation requirements for mediators in the Mediation Regulations. However, the variety of individuals and bodies using different standards for training and accrediting mediators may leave some respondents satisfied with the current environment.

Italy

7. What is the extent of confidentiality of the entire mediation process?
The vast majority of respondents determined that confidentiality is guaranteed in all cases, with a significant minority indicating that there are a few exceptions. Interestingly, the law in Italy is consistent with that of the Directive, which includes exceptions regarding public policy and enforcement. The majority of respondents are not necessarily wrong in their interpretation, however, because confidentiality is guaranteed in all cases as supported by the Directive. However, those who indicated that there are a few exceptions took into account the exceptions provided in the Directive.

8. To what extent do the courts refer cases to mediation?
The vast majority of respondents indicated that the courts are proactive in referring individual cases to mediation. Pursuant to the new rules, judges now have the power to order parties to mediation at any stage in the dispute. This question resulted in an array of answers, also including 'the courts mention possible referral' and 'the courts encourage mediation'. This may show that judges of different courts have chosen to use this power to different degrees.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The vast majority of respondents indicated that mediated agreements are automatically enforceable. This is consistent with the current situation in Italy. With the new requirement that the attorneys be present during the mediation proceeding, this allows the agreement to be enforceable as soon as the attorney, the parties and the mediator sign the agreement.

10. To what extent is there a mediator accreditation system?
Again, there was a vast majority that indicated the same answer. According to these respondents, mediator accreditation is based on statutory standards. This is consistent with the situation in Italy, where mediation organizations that are registered with the Ministry of Justice regulate the certification of mediators.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The vast majority of respondents indicated that there are modest economic incentives for parties to use mediation. This is consistent with the law. Please see Chapter 3 for a full discuss of these existing incentives.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The respondents were in a consensus, and the vast majority indicated that preliminary mediation informational sessions are required. This is consistent with the current situation in Italy, where the first meeting of the mandatory mediation proceeding is information in content.

13. To what extent are there mandates for parties to use mediation?
Once again, the vast majority agreed on the same response, which states that mandates are frequently applicable to cases. This is consistent with Article 5, 1bis, Legislative Decree 28. Please see Chapter 3 for an in-depth discussion of this topic.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The vast majority of respondents indicated that online mediation is present, but there is only minimal use of this form of mediation. This shows that perhaps either the public is not aware of this option, or the public is generally aware, but it is still not widely accepted.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The average response for this question was that attorneys do have a duty to inform, and there are sanctions for lawyers who fail to do so. However, a significant minority indicated that there is simply a duty to inform, without the existence of sanctions. The average response is consistent with the law. In Italy, lawyers have a strict duty to inform clients of the option of mediation and to try to resolve disputes by way of mediation. In fact, a litigant can void the attorney-client contract if counsel fails to provide detailed information about mediation. This discrepancy in understanding is important to note.

16. What is your overall assessment of the requirements to become a mediator in your country?
The average response indicated that requirements are insufficient. However, just less than half of respondents indicated that requirements are acceptable.

Latvia

7. What is the extent of confidentiality of the entire mediation process?
Confidentiality is assured or guaranteed with few exceptions according to respondents in Latvia. The Mediation Law adheres to the generally accepted principle of confidentiality that all information obtained during mediation is confidential unless the parties mutually decide otherwise. The mediator too is subject to confidentiality and may not disclose information received from one party to another.

8. To what extent do the courts refer cases to mediation?
According to a majority of respondents, courts encourage mediation or, at the very least, mention possible referral. Under the Civil Procedure Law, the court has a duty to reconcile the parties, determine if they wish to settle the dispute or, if appropriate, refer them to arbitration.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
Respondents in Latvia were split on whether mediation agreements were enforced only with court approval or through extensive further measures. Currently, there are no specific procedures under the public regulation on how to enforce a mediated settlement, but in most cases a mediated settlement will qualify as a binding settlement agreement between the parties involved where enforcement is left to both parties' discretion.

10. To what extent is there a mediator accreditation system?
While a majority of respondents stated there was no accreditation system in Latvia, others stated that accreditation was based on statutory standards or market standards. The Mediation Law, however, provides for two categories of mediators, those that are mediators and those that are certified mediators. The Mediation Law provides that a mediator is a person who manages the mediation process. A certified mediator is a mediator who has learned the mediation process through an established procedure prescribed by law and has obtained a certificate allowing inclusion in the list of certified mediators. The list contains information about practicing certified mediators, their certificates and their competence. Please Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Economic incentives in Latvia are modest according to a majority of respondents, though many indicated there were no incentives. There are provisions in the Mediation Law that provide incentives for parties to pursue mediation in good faith and if one party refuses to

mediate without a good reason or does not follow the terms and order established, the other party may exercise their right to end the mediation process.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
According to a majority of respondents, and in accordance with the Mediation Law, no preliminary mediation session is required.

13. To what extent are there mandates for parties to use mediation?
There are no mandates in Latvia for parties to use mediation according to the Mediation Law and a majority of respondents.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Online mediation is present in Latvia though minimally used or not used at all according to respondents.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
There is no duty for attorneys to inform parties of mediation as an alternative to litigation in Latvia according to a majority of respondents and the Mediation Law.

16. What is your overall assessment of the requirements to become a mediator in your country?
A majority of respondents felt requirements to be a mediator in Latvia were acceptable, though a significant minority of respondents stated requirements were insufficient.

Lithuania

7. What is the extent of confidentiality of the entire mediation process?
In accordance with Article 7(1) of the Mediation Law that establishes that all information relating to the mediation must be held in strict confidence, the majority of respondents in Lithuania stated that confidentiality was guaranteed in all cases. Some respondents stated it was assured with several or few exceptions which is also in agreement with the Mediation Law that provides confidentiality does not apply to cases where failure to disclose would contravene public interest.

8. To what extent do the courts refer cases to mediation?
Respondents uniformly agree that courts mention possible referral to mediation.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
Mediation agreements are enforced only with court approval was the majority answer supplied by respondents in Lithuania. Respondents also considered agreements to be enforced only through extensive further measures which may reflect the procedure set forth in Chapter XXXIX of the Code of Civil Procedure that requires the consent of the other party for a court to enforce an agreement.

10. To what extent is there a mediator accreditation system?
The vast majority of respondents stated that there is no accreditation system in Lithuania, although a few considered accreditation to be possible through market standards. In reality, judicial mediators are required to demonstrate certain qualifications including a certificate that verifies participation in judicial mediation courses. However, the Mediation Law does specify any requirements for the professional qualifications of mediators. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
A majority of respondents from Lithuania stated that modest incentives are provided to encourage mediation, though some stated no incentives were supplied. The Lithuanian Code of Civil Procedure encourages the use of ADR and courts can suggest the parties attempt to reach an amicable agreement in judicial mediation. However, there are no requirements for parties to consider non-judicial mediation.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Almost unanimously, respondents stated that no preliminary mediation sessions were required in Lithuania. However, in the case of judicial mediation referrals, parties must be given all information relevant to the mediation before they can agree to participate.

13. To what extent are there mandates for parties to use mediation?
Overwhelmingly, respondents stated there were no mandates to use mediation, although a few responses stated mandates did apply to a few types of cases. If a court orders mediation through judicial referral, it is always dependent upon the written agreement of the parties to participate in the procedure.
14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
The vast majority of respondents indicated that online mediation is not present in Lithuania.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Attorneys do not have a duty to inform parties of mediation as an alternative to litigation according to a large majority of those surveyed. The Mediation Law does not require disputing parties to consider using mediation for resolution.

16. What is your overall assessment of the requirements to become a mediator in your country?
Nearly unanimously, respondents stated that requirements to be a mediator in Lithuania are insufficient. Article 2(5) of the Mediation Law simply defines a mediator in civil disputes as a third party, impartial, natural person who assists in resolving a dispute between other persons with a view to reaching a conciliation agreement.

Luxembourg

7. What is the extent of confidentiality of the entire mediation process?
A majority of the respondents determined that confidentiality is assured with few exceptions, along with an array of interesting responses that ranged from assured with several exceptions, guaranteed in all cases, or the response of 'other'. The majority answer is consistent with the current law in Luxembourg that provides for assured confidentiality with the few exceptions for execution requirements and imperative public order issues. However, the interesting aspect is that the responses reveal that the interpretation regarding confidentiality in the current mediation law has significant inconsistencies across the board, with a less than unanimous agreement as to the extent of confidentiality protectionisms among the mediation community.

8. To what extent do the courts refer cases to mediation?
A majority of the respondents stated that the courts encourage mediation, with other responses offering a range of varying statements regarding that the courts mention possible referral, the courts are proactive in referring individual cases to mediation, or the response of 'I don't know'. The majority answer, as well as harmonization with the answer that there is the mention of possible referral, is consistent with the current law in Luxembourg

regarding court referral to mediation. Under the law a judge may, at any time during the proceeding, invite the parties to use mediation on his or her own initiative (with consent of parties) or at the request of both parties.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
Half of the respondents stated that mediated agreements are enforced only with court approval, with the other half reporting that such agreements are enforced only through extensive further measures, and one response of 'I don't know'. The current situation in Luxembourg reflects that mediation agreements are enforceable at the request of at least one party for approval from a competent president of district court through a process called homologation. Therefore court approval is required, and is considered a potential extensive further measure for enforceability, resulting in both of the respondent majority answers having consistent aspects with the current law. Again here, there seems to be diverging opinions on the interpretation of the enforcements of mediated agreements under the current law.

10. To what extent is there a mediator accreditation system?
The majority of respondents stated that accreditation is only based on statutory standards, which is partially consistent with the current law which states that there is no accreditation requirement for mediators who do not work with courts, but judicial mediators must be accredited by the Minister of Justice, unless exempted in exceptional circumstances, under the law.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of responses stated that there are no economic incentives for litigants to participate in mediation, which is consistent with the current mediation law in Luxembourg.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The majority of responses indicated that a preliminary mediation session is required for some cases. This is consistent with the law where there are mandatory informational meeting on mediation for family disputes. However other types of mediation do not have such requirements to consider mediation on the parties. Mediation centres have assumed the obligation to provide information about mediation to the general public.

13. To what extent are there mandates for parties to use mediation?
Half of the respondents stated that mandates are applicable to few cases, with the other half stating that no mandates are applicable. This is partially consistent with the law. In Luxembourg, mediation is completely subject to the parties' approval and cannot be imposed on them, although there a component of compulsion regarding mandatory informational meetings for family mediation for divorce, separation of property and other family law affairs.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
A majority of the responses indicated that such online mediation is not present, which seems currently consistent with the situation in Luxembourg.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of the respondents stated that no duty to inform exists for attorneys regarding parties of mediation as an alternative to litigation. The majority answer is consistent with the current law, however it should be noted that under the national rules for members of

the bar, lawyers must consider all possibilities for resolving a dispute when advising clients, and they should include, if applicable, information about using mediation.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question procured the most interesting array of responses, indicating on a spectrum that the experts feel that the current requirements are insufficient, the requirements for all mediators should be mandatory, the requirements are acceptable, and that the requirements are excessive. This shows that there are currently many aspects on concern for mediation law in Luxembourg, and as has been shown by several inconsistencies of agreement in previous questions, many fluctuating interpretation issues within the current law among mediation experts.

Malta

7. What is the extent of confidentiality of the entire mediation process?
A little more than half of the respondents determined that confidentiality is assured with several exceptions, with a little less than half stating that confidentiality is guaranteed in all cases. The majority is actually consistent with the law in Malta, where confidentiality protects evidence acquired 'in the course of, or pursuant to' mediation proceedings, as well as communications and settlement discussions between mediation participants. Further, there are protections for the mediator, as he or she may not be called in any subsequent judicial proceeding to give evidence, beyond reporting whether an agreement was reached. The Code of Conduct for Mediators further creates confidentiality duties during the mediation proceedings for privileged information. However, there are a few exceptions to confidentiality under the law. This almost even split of responses shows that there is some current confusion, or disagreement in the interpretation of the current law regarding confidentiality of the entire mediation process.

8. To what extent do the courts refer cases to mediation?
Here again, almost more than half stated that the courts mention possible referral, where a little less than half of the respondents stated that the courts are proactive in referring individual cases to mediation. Actually both answers can exist in harmonization under the current law. In Malta, the court has the authority to stay adjudicative proceedings so that the parties may participate in mediation, and referral to mediation may be made by a joint request by the parties or referral by judge when appropriate.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only through extensive further measures, with a minority just under half stating that such agreements are enforced only with court approval. The current situation in Malta could find that both answers are particularly pertinent. The Mediation Act's 2010 amendment of Article 17 states that a single party, with consent of the other, may request that the content of the agreement be made enforceable via the appropriate provisions of the Code of Organization and Civil Procedure (as long as not contrary to national law and public policy). Once ratified, a final mediation agreement is classified as an executive title under Maltese law, with the final agreement is equivalent to a judgment by a court of law, and is enforceable by the court competent to take cognizance of the subject matter thereof.

10. To what extent is there a mediator accreditation system?
The majority of respondents selected that no accreditation system exists under the current system, although again a strong minority showing stated that accreditation does exist, and is based on statutory standards. Here, interestingly, the strong minority answered more

consistently with the current law than the majority. In Malta, the Malta Mediation Centre is responsible for verifying the accreditation requirements for mediators in both domestic and cross-border cases. Further, the Centre maintains a list of accredited mediators.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Unanimously, the responses stated that there are no economic incentives for litigants to participate in mediation, which is consistent with the current mediation law in Malta.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Again unanimously all of the responses indicated that no preliminary mediation session is required under the current law. This unanimous reporting is almost consistent with the law. The Mediation Centre does make information regarding mediation available to the public (via the publication of reports), but neither parties nor lawyers are required to consider mediation as a dispute resolution option in general civil cases. However, there are mandatory informational meeting on mediation for family disputes. But the respondents were in line with the current law in that other types of mediation do not have such requirement to consider mediation on the parties. And mediation centres have assumed the obligation to provide information about mediation to the general public.

13. To what extent are there mandates for parties to use mediation?
The majority response was that no mandates for parties to use mediation exist, with a very small minority stating that mandates are only applicable to a few cases. Interestingly, again, the small minority is closer with the actuality of the law in Malta, as mandatory mediation exists for family law court proceedings, before going to court.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Unanimously, the responses indicated that such online mediation is not present, which seems currently consistent with the situation in Malta.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Again, unanimously the respondent sample concluded that no duty to inform existed for attorneys to inform parties of mediation as an alternative to litigation. The unanimous reporting is consistent with the current law in Malta. Although it should be noted that the Centre makes information regarding mediation available to the public (via the publication of reports), but neither parties nor lawyers are required to consider mediation as a dispute resolution option in general civil cases.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an even split between the respondents, with a majority stating that the current requirements are insufficient, and a still significant minority stating that the current requirements are excessive. This interesting split show that there are polar opinions on the scale of current suitability of current mediation law in Malta, with one end of the pole wanting more and the opposite wanting less requirements. This split shows the interesting dichotomy, and suggests that the current situation and law has aspects for want by many mediation experts in Malta.

The Netherlands

7. What is the extent of confidentiality of the entire mediation process?
A majority of respondents stated that confidentiality is ensured with limited exceptions and a small minority stated it was guaranteed in all cases. Article 165, Paragraph 3 of the Civil Procedure Code (CPC) provides: 'When the confidentiality of a mediation is expressly agreed, the mediator and the parties involved in the mediation can decide to make use of a non-disclosure arrangement which protects the parties and the mediator from the obligation to give evidence or information that is related to the mediation in so far as this is related to the voluntary rights and obligations agreed between the parties' . Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The Netherlands judiciary has installed a referral to mediation faculty in all courts of first instance and in all courts of appeal. This means that a system is in place to assure the possibility of referral to mediation in cases that seem suitable for mediation. The degree of referral in responses to the Questionnaire ranged from a majority of respondents stating that courts encourage the use of mediation while a large minority stated courts mention possible referral to mediation.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
A majority of respondents stated that mediation agreements are enforced only through extensive further measures while a significant minority stated the enforcement is conducted only with court approval. Enforceability depends on whether the agreement was court-ordered or if the parties reached agreement on their own, possibly explaining the differing responses. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
Respondents were split evenly on the question of whether accreditation was based on statutory or market standards. However, no statutory provision exists for mediator accreditation, the Netherlands Mediation Institute has a national registry of mediators which may have led to confusion in the responses. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Responses to economic incentives in the Netherlands range from no incentives to having strong incentives. While a majority said there were no incentives, there was also significant feedback that modest or strong incentives existed. Legal aid is provided on a need-based basis and court-annexed mediation costs are partially covered by courts. A temporary stimulus measure expired in 2010 that allowed for parties to receive the first 2.5 hours of a mediation for free when they didn't qualify for legal aid. This may have been part of the reason for some of the difference in answers. Please see Chapter 3 for an in-depth discussion of this topic.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
No preliminary mediation sessions are required in the Netherlands according to the majority of respondents. However, a few responses stated preliminary mediation sessions were required for some cases. In court-annexed mediations, a judge can provide a mediation referral accompanied by a brochure and 'self-assessment' for parties to determine whether mediation would be suitable for their case. Please see Chapter 3 for an in-depth discussion of this topic.

13. To what extent are there mandates for parties to use mediation?
Respondents were evenly split on whether there were no mandates to use mediation or if mandates existed but for few cases only. However, there is no provision in the CPC that requires mediation participation.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Unanimously, respondents stated that online mediation was present with minimal use in less than 5% of total cases.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
A one-respondent majority stated that a duty to inform exists for attorneys in regard to the availability of mediation while all others stated there is no duty to inform. According to Dutch experts, there are no rules or regulations concerning the duties of legal representatives or other professional mediation participants.

16. What is your overall assessment of the requirements to become a mediator in your country?
A majority of respondents stated that requirements in the Netherlands to become a mediator are acceptable, however, responses were mixed with others stating the requirements are excessive or insufficient.

Poland

7. What is the extent of confidentiality of the entire mediation process?
Respondents were almost evenly split in their responses to this question with a one-respondent majority stating that confidentiality is assured with few exceptions. The remaining responses stated that confidentiality is guaranteed in all cases. This split is consistent with the Polish Code of Civil Procedure (CCP) which requires mediators have a duty to keep facts acquired during mediation confidential unless the parties have exempted the mediator from keeping information confidential.

8. To what extent do the courts refer cases to mediation?
The CCP Article 10 allows courts to refer all civil matters in which a settlement agreement is permissible to be referred to mediation but does not provide specific criteria for how the cases are to be selected. Apparently, courts are proactively referring cases to mediation; however, as a majority of respondents stated, the courts only encourage mediation. Respondents also stated that courts are proactive in referring cases to mediation and that it can be mandated or at the very least is mentioned as an option for dispute resolution.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of respondents stated that agreements are enforced only with court approval in line with Article 183-15(1) of the CCP that provides a mediation agreement becomes fully effective only after approved by a court.

10. To what extent is there a mediator accreditation system?
The majority of respondents, were split on this question stating that accreditation is based on market standards, defined as those implicitly approved by users and providers of mediation services, and that there are no accreditation standards. The CCP provides anyone who has full legal capacity and a full range of public rights may be a mediator, which provides the foundation in this split of answers. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Modest incentives are provided in Poland according to all respondents. These include courts assigning litigation costs to a party who unjustifiably evades mediation. While not yet applied by Polish courts, the presence of this provision is likely to motivate parties to attempt mediation to avoid liability for litigation costs.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
In Poland, it was found unanimously by respondents that no preliminary mediation session is required before parties mediate. Some courts however, have these meetings available based on pro-bono work of mediators and consents by the judiciary.

13. To what extent are there mandates for parties to use mediation?
In line with the voluntary character of mediation in Poland embodied in the CCP and the Polish Constitution, a majority of respondents stated no mandates are required in Poland for parties to use mediation.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Online mediation exists in Poland with minimal use – that being less than 5% of all mediated cases according to a majority of respondents. However, a significant minority stated that online mediation is non-existent in Poland.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of respondents in Poland were split on this question with half stating that there is no duty to inform parties by their attorneys of mediation as an alternative to litigation, and the other half stating that a duty does in fact exist. The Code of Professional Conduct of Legal Counsellors provides that counsellors have a duty to inform their clients about the possibility of mediation if it is in the best interest of their clients.

16. What is your overall assessment of the requirements to become a mediator in your country?
In Poland, it was found by all respondents, that the requirements to become a mediator are insufficient. Again, the CCP provides anyone who has full legal capacity and a full range of public rights may be a mediator which provides the foundation in this split of answers. Please see Chapter 3 for an in-depth discussion of this topic.

Portugal

7. What is the extent of confidentiality of the entire mediation process?
A little more than half of the respondents determined that confidentiality assured with few exceptions, with a little less than half stating that confidentiality is guaranteed in all cases.
The majority is actually consistent with the new law that was recently passed in April 2013, that states mediation is confidential by nature, but there is an exception to confidentiality, where in situations when public policy interests are at stake, the content of mediation sessions has no value before court or arbitral proceedings.

8. To what extent do the courts refer cases to mediation?
Almost an even split of respondents stated that the courts in Portugal mention possible referral, with the other half stating that the courts are proactive in referring individual cases to mediation. Here both answers could possibly be harmonized to reflect the current situation in Portugal. Although voluntariness is a core characteristic of mediation, judges at any stage of a court procedure may determine the remittance of the process for mediation,

suspending the instance, unless any of the parties expressly opposes such remittance. While the article does not appear to require the judge to obtain the consent of the parties before remitting the case to mediation, the voluntary nature of mediation is still nominally preserved because any party may oppose the remittance through express notification. Further it appears that judges possibly may do this, and that they are also proactive in doing so when appropriate.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only with court approval, with smaller minority split stating that such agreements are either automatically enforceable, or are enforced only through extensive further measures. Prior to the Mediation Law, a mediation agreement could only be enforceable if it gained the status of an enforceable title or if it was confirmed by a judge. Under the former law such agreements could only be enforceable if it gained the status of an enforceable title or if it was confirmed by a judge. Under current law such settlement agreements are automatically enforceable, without the need for a homologation by a court, if they fulfil certain requirements. Please see Chapter 3 for an in-depth discussion of this topic and requirements. It is interestingly apparent that there is some extensive disagreement on the interpretation of the extent of enforceability of mediated agreements within Portugal. Although it should be noted that some of the disagreement could be due to the recent implementation of the 2013 law.

10. To what extent is there a mediator accreditation system?
The majority of respondents selected that no accreditation system exists under the current system, although again a strong minority showing stated that accreditation does exist, and is based on statutory standards. Here interestingly, neither the majority nor minority of answers is completely in line with the current system. In Portugal market private certifying parties set accreditation. Generally, mediators are not certified or accredited; it is in fact the mediation course they have followed that has been approved by the Ministry of Justice qualifying for access to the public mediation systems. Thus, mediators are not certified, and are usually called mediators if they take one of the mediation courses approved by the Ministry of Justice. Please see Chapter 3 for an in-depth discussion of this topic and requirements and the potential change in certification within Portugal.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
A majority of the responses stated that there are no economic incentives for litigants to participate in mediation, which is not in line with the current 2013 law, as there do appear to be economic incentives in place. Law No 41/2013, provides that when a claimant has the possibility of using ADR, but chooses to pursue judicial resolution instead, the claimant will bear the judicial fees. This interesting discrepancy of interpretation may suggest that this incentive may not be widely known within the ADR community of Portugal at this point in time. Please see Chapter 3 for an in-depth discussion of this topic.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The majority of the respondents selected that preliminary mediation sessions are required for some cases within Portugal. The majority answer seems to be consistent with the current law.

13. To what extent are there mandates for parties to use mediation?
The majority response was that no mandates for parties to use mediation exist, with a very small minority stating that mandates are only applicable to a few cases. The majority answer is most consistent with the current law as voluntariness is intended to be a core

characteristic of mediation in Portugal, and no form of mandatory mediation has been created. Please see Chapter 3 for an in-depth discussion of this topic.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are present with minimal use (less than 5% of total mediated cases), with a minority of the responses indicating that such online mediation is not present. With potentially less than 5% use as reported by the majority of experts, it is likely that the existence of such online mechanisms is likely not known widespread throughout the mediation communities throughout Portugal, which could indicate the discrepancy of the representative answers.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
A split of responses in the sample concluded that no duty to inform existed for attorneys to inform parties of mediation as an alternative to litigation, while the other half stated that such duty to inform does in fact exist. Here it seems such duty does exist. Under the Portuguese Bar Association Regulations lawyers have a duty to cooperate, always to the benefit of their respective clients, in order to avoid unnecessary claims, and must advise their clients towards a just and equitable settlement. Therefore under these standards it seems that such duty is in place under the Bar Association of Portugal.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an interesting split of answers with the most popular stating current requirements are acceptable, the next popular stating that the current requirements are excessive, and the least popular answer stating that the current requirements are insufficient. This interesting array of answers shows that there are opinions across the board on the scale of current suitability of current mediation law in Portugal. Such split shows the interesting dichotomy, and suggests that the current situation and law has aspects for want by many mediation experts in Portugal.

Romania

7. What is the extent of confidentiality of the entire mediation process?
According to a majority of respondents, confidentiality is guaranteed or at least assured in all cases. The Mediation Law mandates this responsibility to ensure confidentiality is included in the contract signed by the parties and the mediator before the mediation starts, and Article 44 states that the contract must be signed by all parties before the mediation begins. Mediators are also subject to ethical and deontological responsibilities concerning confidentiality, and sanctions have been established by law and in Mediation Council regulations for instances where a mediator breaks the bounds of confidentiality. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The majority of respondents indicated that courts mention possible referral to mediation. Judicial and arbitral bodies, as well as other authorities with jurisdictional competences, must inform the parties about the possibilities and advantages of using the mediation procedure and advise them to use this modality to settle their conflicts. Since the enactment of the Mediation Law in 2006, if a dispute has already been submitted to a court, Section 5 of the law allows the case to be referred to mediation upon the initiative of the parties or, if the parties agree to it, at the recommendation of the court. Only disputes regarding rights about which the parties may legally reach settlement may be referred. Please see Chapter 3 for an in-depth discussion of this topic.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
Mediated agreements are enforced only with court approval according to the majority of respondents in Romania. However, the effect of a mediation agreement varies depending on the type of agreement, and different types of additional proceedings may be required to enforce the agreement. For instance, in civil cases referred by the court, the parties' report to the court must prove the result of the mediation process by including a copy of the memo signed by the parties and the mediator at the end of the mediation. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
Accreditation to be a mediator in Romania is based on statutory standards according to a majority of respondents, but many indicated it is also based on market standards. The Mediation Law establishes that the mediator is a specially trained person who must be authorized by the Mediation Council. There are special requirements for those wishing to be authorized as mediators and to practice mediation as a liberal profession including a requisite mental capacity and having three years working experience. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Responses to this question ranged from no incentives to strong incentives, but the majority of respondents indicated that there are modest incentives. The Mediation Law states that if the parties use mediation to settle a case that is also pending in a court of law, and if the case is not subject to other laws that state otherwise, they will receive full reimbursement of the court fees. A different law regarding legal aid in Romania states that if a party will not try mediation or another form of ADR, if applicable, the application for judicial assistance might be denied. Further, the request addressed to the court concerning the delivery of a judgment that legalizes the understanding of the parties arising from the mediation agreement is to be taxed according to the Law.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
A large majority of respondents indicated preliminary mediation sessions are required for all cases. In cases of disputes which, as prescribed by the Law, may be subject to the use of mediation, the court has the obligation to invite bought sides to take part in an information meeting, which will detail the benefits of using mediation as an alternative procedure.

13. To what extent are there mandates for parties to use mediation?
Mandates are applicable to a few cases according to the majority of respondents in Romania. Participation in out-of-court settlement mechanisms can stem from either the initiative of one of the parties or the judge, and whatever the means of notification, mediation must be accepted by the other party.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
According to the majority of respondents, online mediation is not present or present with minimal use.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Respondents' answers were split between attorneys having a duty to inform parties of mediation or not having a duty, but a majority stated a duty to inform exists. Article 6 of the Mediation Law stipulates that 'the judicial and arbitral courts, as well as any other authorities having jurisdictional duties should inform the parties of the possibility and

benefits of using the mediation procedure and should advise them to use this method in order to settle the dispute between them'.

16. What is your overall assessment of the requirements to become a mediator in your country?
Respondents' answers were also split on this question, stating that requirements are acceptable, insufficient or excessive; however, a majority felt requirements to become a mediator were acceptable.

Slovakia

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents stated that confidentiality is guaranteed in all cases, which is not quite consistent with the current law, as it seems there are some exceptions that exist. The law seems to provide for certain exceptions to confidentiality when there is a threat to life or health or to the public order. Another exception involves situations in which a claim for breach is brought against a mediator where otherwise confidential information may be revealed to the extent necessary to determine the validity of the breach claim.

8. To what extent do the courts refer cases to mediation?
The majority of respondents stated that the courts encourage mediation, while a strong minority of responses indicated that courts mention possible referral for individual cases to mediation. Here both answers can actually exist in harmonization with each other, as it seems that the courts in Slovakia mention mediation with possible referral, as well as encourage mediation. Please see Chapter 3 for an in-depth discussion of this topic.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are automatically enforceable, while a strong minority of responses stated that they are enforced only through extensive further measures. It seems under the current law, the minority is more consistent regarding further extensive means. Under the law, and to ensure the enforceability of the agreement, the parties must follow the requirements of the Mediation Act, which states that an authorized party to the agreement may file a petition to enforce the mediation agreement or a petition to carry out its execution, if the mediation agreement (a) is executed in the form of a notarial deed, or (b) has been approved as a conciliation by a court or arbitration body pursuant to conditions stipulated in special regulations. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
The majority of respondents selected that accreditation for mediators in Slovakia are based on statutory standards, while a strong minority stated such accreditation is based on market standards. It seems that under the current law, accreditation for mediators in Slovakia is set by public regulation. Under the Mediation Act a mediator must be registered with the Ministry, which will register a person as a mediator if he or she fulfils requirements set by the Mediation Act. The training course includes education containing, introduction to Slovak legal order, interpersonal communication, conflict resolution, and rules of conduct. The training concludes with an exam at an accredited institution. The Ministry keeps a register of mediation educational institutions. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of respondents stated that modest incentives exist economically for mediation, while a little less than half of respondents indicated that no incentives are provided. Although it seems that the current law does not provide incentives for participation, but it can impose sanctions if a litigant refuses some of the processes without good reason of court recommended mediation. In this situation, it seems the court may refuse to completely or partially reimburse litigation costs, even when such reimbursement would have otherwise been available.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The majority of respondents stated that there are no preliminary mediation sessions required for parties, while a strong minority indicated that preliminary mediation sessions are required for some cases. The current situation in Slovakia indicates that generally no mandates exist for participation for most cases, but there are some cases in which the court does mandate participation for information sessions.

13. To what extent are there mandates for parties to use mediation?
The majority response was that there are no mandates in Slovakia, which seems to be consistent with the current law. There is no general obligation in Slovak law for parties to participate in mediation, however the parties can obligate themselves to resolve any disputes arising from contractual relations through mediation by incorporating a mediation clause into their contract.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are not present within Slovakia, while very few responses stated such tools are present with minimal use (less than 5% of total mediated cases). With potentially less than 5% use as reported by the majority of experts, it is likely that the existence of such online mechanisms is likely not known widespread throughout the mediation communities throughout Slovakia, which could indicate the discrepancy of the representative answers, especially in the majority. Although it is clear that such use is not being fully utilized according to the experts in this area.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of responses in the sample concluded that no duty to inform exists for attorneys to inform parties of mediation as an alternative to litigation, which seems to be consistent with the current law.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an interesting split between the experts regarding the acceptability of the current requirements in Slovakia. The most popular answer was that the current requirements are acceptable. The second most selected answer was that the current requirements are excessive. This interesting dichotomy split shows that the experts disagree on polar spectrums of the acceptability of current requirements.

Slovenia

7. What is the extent of confidentiality of the entire mediation process?
Respondents were evenly split as to whether confidentiality is guaranteed in all cases or assured with few exceptions. There are three provisions in the mediation act that may account for the varied response. Article 10 allows the mediator to disclose information

received from one party to another in the mediation; unless the information is subject to a specific condition it must be kept confidential. Article 11 stipulates all information related to the mediation be kept confidential unless otherwise agreed to by the parties or if disclosure is required by law. Article 12 provides that those involved with a mediation may not introduce evidence or give testimony relating to mediation. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The Judicial ADR Act requires the court to provide the option of alternative dispute settlement. Supporting this act, nearly unanimously, the respondents indicated that courts encourage mediation.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
According to a majority of respondents, mediation agreements are enforced only with court approval although some responses indicated that mediated agreements are automatically enforceable. Under Article 14(2) of the Mediation Act, parties reaching a settlement agreement can have it directly enforced as a notarial deed requiring the consent of the party who is given an obligation to perform, a court settlement immediately after the termination of the mediation proceedings or an arbitral award based on the settlement for parties who attempt mediation during the course of an arbitration. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
Unanimously, respondents agreed that mediator accreditation in Slovenia is based on statutory standards. These standards are listed under the Judicial ADR Act Article 8(1) where a candidate must have the capacity to enter into a contract; not have been convicted of a criminal offence, have at least the first level of post-secondary education and have undergone mediation training with the Minister of Justice.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Respondents were nearly evenly divided on this question between modest incentives and no incentives being provided. Under the Judicial ADR Act Article 19, parties who unreasonably decline the use of mediation may bear the costs of the judicial proceedings irrespective of the outcome of the dispute. Further, certain types of disputes are offered free mediation under the Judicial ADR Act.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Nearly all respondents indicated no preliminary mediation sessions are required. The Civil Procedure Act Article 306 allows a judge to inform parties about the possible use of mediation as a compulsory part of the judicial proceeding. However, parties have the right to oppose the decision to try mediation after an information session conducted by a judge.

13. To what extent are there mandates for parties to use mediation?
The entire class of respondents indicated that there are no mandates for parties to use mediation. The Judicial ADR Act simply requires the court to provide the option of alternative dispute settlement unless the judge deems it inappropriate under the circumstances.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Respondents indicated that online mediation is not present, although some did state that it is present with minimal use, that being less than 5% of total mediated cases. Based on this data, online mediation is a distinct field with room for growth in Slovenia.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
Respondents were nearly evenly split on this question as well. A majority stated attorneys do not have a duty to inform, while a large minority stated they do. The Mediation Act does not expressly require parties and lawyers to consider mediation as a dispute resolution option, rather, the Judicial ADR Act requires the court to provide the option; thus, this may be the source for the differing responses.

16. What is your overall assessment of the requirements to become a mediator in your country?
Unanimously, those surveyed stated that requirements to become a mediator in Slovakia are insufficient. According to Article 3(1)(b) of the Mediation Act, a mediator is any third person who accepts a request to mediate, irrespective of the person's title or profession and irrespective of the manner in which the person has been appointed or approached. The Judicial ADR Act has stricter accreditation requirements as noted above.

Spain

7. What is the extent of confidentiality of the entire mediation process?
A strong majority stated that confidentiality is assured with few exceptions, with a strong minority stating that confidentiality is guaranteed in all cases. The majority is consistent with the law, which states that the mediation process and the documents used during the process are confidential. Further, mediators and parties involved may not be compelled to provide testimony or produce documents in a judicial or arbitral proceeding concerning information obtained in or related to the mediation, with very few exceptions regarding public policy. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The vast majority of respondents stated that the courts mention possible referral to mediation within Spain. This is consistent with the current law where courts may invite the parties to try to mediate, and may urge parties to attend an information session.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only with court approval, which is consistent with the current law where the enforcement of Spanish settlement agreements may be effected by way of ordinary judicial procedure, or by expedited procedure, if the mediation settlement agreement is notarized. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
The majority of respondents selected that accreditation is based on market standards, defined as those standards implicitly approved by users and providers of mediation services. Although this answer seems in conformity with the situation in Spain, the law also provides requirements for specific mediation training and provides some regulation of accreditation requirements for particular entities. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
A majority of the responses stated modest incentives exist for parties to use mediation. This answer is consistent with the law where there is a reduction in notarization costs on the settlement agreement. Further there are potential sanctions if mediation has been attempted, the defendant can be liable for costs if it accepts the claim before presenting its statement of defence.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Half of the respondents stated that preliminary mediation sessions are required for some cases within Spain, while the other half stated that no such preliminary mediation session is required. Here it seems that the first answer is in line with the law, with the second answer also having applicability. Under the current law, once notice of mediation is presented to the mediator or the mediation institution, the mediator or mediation institution will (unless agreed otherwise by the parties) call the parties to an information session. And a party's failure to attend the information session without justification is considered a rejection of the mediation.

13. To what extent are there mandates for parties to use mediation?
The majority response was that no mandates for parties to use mediation exist. The majority answer is most consistent with the current law with one exception. There are no requirements for parties to participate in mediation where no prior agreement to mediate exists. However, in those cases where a prior agreement exists, a court will not process any claims subject to the mediation obligation provided the other party presents the relevant objection to the court. While the mediation is in effect the parties may not initiate any judicial or extrajudicial claim in relation to the claims being addressed in the mediation.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are present with minimal use (less than 5% of total mediated cases), with a minority of the responses indicating that such online mediation is not present. With potentially less than 5% use as reported by the majority of experts, it is likely that the existence of such online mechanisms is likely not known widespread throughout the mediation communities in Spain, which could indicate the discrepancy of the representative answers.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of responses in the sample concluded that no duty to inform existed for attorneys to inform parties of mediation as an alternative to litigation. Although a strong minority stated that such duty to inform does in fact exist. The majority showing is more consistent with the law, as it does not impose any obligations on parties, lawyers or any other professionals to consider mediation as a dispute option (other than as suggested by the court).

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an interesting split of answers with the most popular stating current requirements are acceptable, the next popular stating that the current requirements are insufficient. This interesting array of answers shows that there are two strong polar opinions regarding the suitability of current mediation law in Spain. Such split shows the interesting dichotomy, and suggests that the current situation and law has aspects for want by many mediation experts in Spain.

Sweden

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents stated that confidentiality is assured with few exceptions, which is consistent with the current law in Sweden. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
Half of the respondents stated that the courts mention possible referral to mediation, with the other half stating that the courts are proactive in referring individual cases to mediation. Both answers can actually exist through harmonization, as in Sweden, the courts may refer parties to mediation, but only in disputes for which the parties are allowed to reach a settlement out of court. Parties can agree to court-arranged mediation, in which the court can make an order where the parties must appear before a mediator appointed by the court under the Code of Judicial Procedure.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only with court approval, which is consistent with the current law which states that if a settlement is concluded after judicial proceedings have been initiated, regardless of whether there was assistance of the court, the court shall confirm the settlement in a judgment if requested by both parties. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
The majority of respondents selected that no accreditation exists under the current legal regime in Sweden. This is consistent with the law, as The Mediation Act does not stipulate anything regarding how to ensure the quality of mediation, and there is no official scheme to certify mediators. However, the legislature has given the Swedish National Courts Administration the task of ensuring the quality of mediation. The Administration has been asked to keep a list of mediators and to decide how that list should be kept.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
Unanimously, the respondents stated that no incentives are provided, which is consistent with the law in Sweden.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
Unanimously the respondents stated that there is no preliminary mediation session required, which seems to be consistent with the law in Sweden also.

13. To what extent are there mandates for parties to use mediation?
The majority response was that no mandates for parties to use mediation exist. The majority answer is most consistent with the current law that values party autonomy and the voluntariness of the mediation process.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are not present within Sweden, while very few responses stated such tools are present with minimal use (less than 5% of total mediated cases). With potentially less than 5% use as reported by the majority of experts, it is likely that the existence of such online mechanisms is likely not known widespread throughout the mediation communities throughout Sweden, which could indicate the discrepancy of the

representative answers, especially in the majority. Although it is clear that such use is not being fully utilized according to the experts in this area.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of responses in the sample concluded that no duty to inform existed for attorneys to inform parties of mediation as an alternative to litigation, which is consistent with the current law in Sweden.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an interesting want from the experts in Sweden, who almost unanimously stated that the current requirements in Sweden are insufficient. Sweden is a country that has maintained a very voluntary process, valuing party autonomy, without strict mediator and mediation regulation. However, with such a strong response, it is suggested that the current situation and law has aspects for want by many mediation experts in Sweden for more regulation.

United Kingdom

7. What is the extent of confidentiality of the entire mediation process?
The majority of respondents stated that confidentiality is assured with few exceptions, while a strong minority of respondents suggested that it is guaranteed in all cases. The majority answer is more in line with the law, as it seems the courts have certain exceptions to confidentiality. Please see Chapter 3 for an in-depth discussion of this topic.

8. To what extent do the courts refer cases to mediation?
The majority of respondents stated that the courts encourage mediation, while a strong minority of responses indicated that the courts mention possible referral to mediation. Both answers can actually coexist in harmony with each other under the current system in the United Kingdom, as courts do mention possible mediation, as well as encourage parties to use ADR when appropriate. Please see Chapter 3 for an in-depth discussion of this topic.

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
The majority of responses stated that mediated agreements are enforced only through court approval, while the next most popular answer indicated that enforcement takes extensive further measures. Here again, it seems both answers can act in harmonization. In England and Wales, enforceability of awards was implemented for cross-border disputes, providing that, for existing proceedings, an application can be made for enforceability under the law. Where a dispute is cross-border, and there are no existing proceedings, a court application, called a mediation settlement enforcement order (MSEO), can be made. The settlement agreement is attached to the MSEO and the court will require evidence that each party has given its explicit consent to the application being sought. Securing a MSEO enables a party to apply for judgment on an expedited basis if the other party breaches the settlement terms. Please see Chapter 3 for an in-depth discussion of this topic.

10. To what extent is there a mediator accreditation system?
The vast majority of respondents selected that accreditation for mediators in the UK is based on market standards. This is consistent with the law and the current situation within the United Kingdom. The state does not regulate mediation in England and Wales, nor does anyone professional body have overall control over accreditation. While there is no requirement for a mediator to be legally qualified, the mediation profession tends to be heavily populated by solicitors and barristers, many of whom were previously litigators,

(although relatively few have solid transactional experience). There is also no requirement for a mediator to be a member of a panel accredited by the CMC. That said, the CMC represents the interests of 80 mediation providers in civil, commercial and workplace mediation, and an estimated 6 000 mediators are accredited with these providers. Please see Chapter 3 for an in-depth discussion of this topic.

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
The majority of respondents stated that no incentives are provided, however a minority of answers indicated that there are modest incentives provided. Under the current system in the UK, a party who unreasonably refuses to mediate can face serious cost sanctions at the end of a trial. Where a court decides that a party has unreasonably refused to engage in ADR, it can exercise its discretion and make adverse cost awards. The courts have developed guidelines indicating the sort of factors a court should take into account in making its determination, and in October 2013, the Court of Appeal extended the guidelines to 'send out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR'. Please see Chapter 3 for an in-depth discussion of this topic.

12. To what extent are there mandates for (preliminary) mediation informational sessions?
The vast majority of respondents stated that there are no preliminary mediation sessions required for parties, which is consistent with the current law. In the UK, courts may provide short information hand-outs and mediation suitability questionnaires to the parties about mediation and the mediation process. Through the CPR, parties are supposed to be encouraged by the court to use an ADR procedure when the court considers it to be appropriate; however, the courts are generally reluctant to go further and compel mediation. In addition, in the family courts, all potential applicants in relevant family proceedings are generally expected, before making an application for a court order, to attend a MIAM to consider dispute resolution options, if invited by a mediator to do so.

13. To what extent are there mandates for parties to use mediation?
The majority response was that there are mandates applicable to a few cases within the UK, which is consistent with the current law. Mediation is the choice of the parties as a voluntary process, and the only court-annexed mediation procedures, in England and Wales are for certain appeals and for small claims disputes. This does not mean that mediation is mandatory for these cases, but a mediator is contacted to establish whether mediation would be suitable for the case. Aside from small claims, a court may stay a hearing to allow a party to negotiate for mediation, but it is not an order to mediate. Please see Chapter 3 for an in-depth discussion of this topic.

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
Most responses stated that such online tools are present with minimal use (less than 5% of total mediated cases). Very few respondents indicated that such tools do not exist within the UK. This seems to be currently consistent with both the law, as well as the current condition within the United Kingdom.

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
The majority of responses in the sample concluded that a duty to inform does exist, while a strong minority suggested that no duty to inform exists for attorneys to inform parties of mediation as an alternative to litigation. It seems, under the current law, that such duty to inform does exist. Solicitors are required, under the Civil Procedure Rules of the Civil Procedure Act of 1997, to inform clients about ADR, early in the proceedings. The CPR

requires the courts to actively manage cases, and the parties to assist the court in doing this, which places such duty on solicitors on informing clients about ADR processes.

16. What is your overall assessment of the requirements to become a mediator in your country?
This question showed an interesting display of basically two strong opinions from across the scale of answers. The most popular answer was that the current requirements are acceptable. The next most selected answer was that the current requirements are insufficient. This interesting split display shows that perhaps there is a situation in the UK where the mediation experts feel that the current scheme is acceptable, but that it could be better, as indicated with the response of insufficient from many of the experts—perhaps wanting more regulation legislatively, or through the market standards.

ANNEX 2: NON-LEGISLATIVE PROMOTIONAL MEASURES DISCUSSED

In this annex the study team intends to provide the reader with additional information about some of the promotional measures discussed and evaluated by the EU experts in Chapter 3, in addition to some examples of selected best practices from third (non-EU-)countries.

A. The EU Settlement Week

Promotional measures such as a 'mediation day' or a 'settlement week' can increase the public's awareness of mediation as an alternative to litigation. Such a day or week is generally designated by the local justice system, in cooperation with other organizations, to raise both awareness and use of mediation. A number of EU Member States have already established such mechanisms.

This approach to mediation promotion has also been used in the United States. In 1989, the State of Texas enacted the Texas Settlement Week Act, which requires counties with a population of 150,000 or greater to conduct two settlement weeks each year.[76] During a settlement week, volunteer mediators facilitate one-hour mediations with litigants during designated time slots in the hope that the parties will reach a binding settlement agreement. Similar ideas have been used in other regions of the United States. In 2011 in New York, for example, state governor Andrew M. Cuomo and New York City mayor Michael M. Bloomberg proclaimed 20 October 2011 to be 'Mediation Settlement Day'.[77] This year, Mediation Settlement Day in New York was scheduled to take place on 17 October 2013.[78]

During the designated week or day, multiple organizations focus on providing educational and promotional activities about mediation. Some activities are solely informational, such as classes and trainings for alternative dispute resolution providers. At the national level in the United States, for example, the American Bar Association (ABA) designated 13-19 October 2013 as Mediation Week in order to celebrate the strides that have been made in institutionalizing mediation as an alternative dispute resolution process. During this week, practitioners, law schools, ADR organizations, courts, and local and state bar associations were invited to reach out to local communities and schools to offer presentations about mediation and its benefits. In one instance of a local response to the ABA initiative, the New York State Unified Court System is hosting an annual 'Mediation Settlement Day'.[79] This annual event is designed to promote and educate potential parties and attorneys about mediation through special programs.

Other activities not only inform the community through classes and lectures, but also provide actual mediation sessions and settlement conferences, often as a free service by volunteer mediators. In McLennan County of Texas (USA), for example, the McLennan County Dispute Resolution Center (MCDR) organizes settlement week activities once or twice a year.[80] The MCDR provides qualified, volunteer mediators to litigants who jointly submit their case and pay only a $50.00 per party scheduling fee to participate in a half-day session during the week. In the state of Kentucky (USA), the Kentucky Court of Justice has

[76] For more information, see < http://www.disputemediationservice.org/index.php/services/csm > last accessed 24 September 2013.
[77] For more information, see <http://www.indisputably.org/?p=2868> last accessed 25 September 2013.
[78] For more information about Mediation Settlement Day in 2013, see <http://www.finra.org/ArbitrationAndMediation/Mediation/Settlement/p011330 > last accessed 25 September 2013.
[79] For more information, see<http://www.nycourts.gov/ip/adr/MSD.shtml > last accessed 25 September 2013.
[80] For more information about Settlement Week in McLennan County, see <http://www.disputeresolutioncenterwaco.org/q_a.pdf > last accessed 23 September 2013.

also created a 'Settlement Week'.[81] During this week, parties and counsel meet at the local courthouse for two-hour private settlement conferences conducted by volunteer mediators. According to the website, this venture saves time and money, helps alleviate the heavy court dockets in Kentucky, and gives the local bar association an avenue for community involvement.

Following the models suggested in these examples and others, the EU could coordinate a similar exercise with the judiciaries of the Member States. The EU could designate a certain week each year for the promotion of mediation. During this week, organizations, universities and firms could join to educate people about mediation and its benefits. In addition, mediators could volunteer their services to parties who wish to try mediation.

The logistics of setting up the mediations could be handled on-line. A mainframe computer in each country could keep track of the availability of mediators for certain time periods during the designated week. Litigants and their counsel would be able to input online the nature of their case, the city, and the preferred mediation date. The computer would then assign a mediator automatically. The parties could then contact the mediator directly to arrange the meeting. In exchange for the free, or reduced price, mediation, the litigants could be asked to complete a simple on-line survey providing evaluation of outcomes, and other data. This would help the EU to gather data about the benefits of such a promotional measure.

B. Encouraging Pilot Projects in the EU

Mediation development in the United States happened over the course of decades of experience and experimentation. Mediation was first implemented formally on the federal level. Starting in 1898, it was used to address conflicts between organized labour and management; several federal agencies were created to address these disputes during the first half of the 20th Century. Over the same period of time, states adopted various initiatives to apply mediation to non-labour disputes in areas such as domestic relations, civil rights, and community conflict. By the 1970s, mediation of these non-labour disputes was also being addressed on the federal level through a number of programs.

The first systematic federal ADR legislation in the United States, the Alternative Dispute Resolution (ADR) Act, was enacted in 1998. The ADR Act requires each District Court to authorize the use of ADR processes in all civil actions. Under the Act, each District Court, within its discretion and through its local rules, can authorize or even mandate mediation for different categories of cases.

Significantly, enactment of the ADR Act came only after a four-year long pilot (experimentation) period. This period was used to measure how mediation would affect time and costs expended in dispute resolution. The program analysed comparable civil cases with and without mediation, using random criteria such as odd and even filing numbers to select the cases, and monitored their outcomes.

Where procedural rules allow, the pilot project approach to mediation implementation could be taken in the EU, especially in countries where there is, to date, little or no experience with mediation. The following material provides a sampling of the development and implementation of pilot mediation projects in the U.S., Argentina, Australia and Canada.

[81] For more information about the Settlement week organized by the Kentucky Court of Justice, see < http://courts.ky.gov/courtprograms/mediation/Pages/SettlementWeek.aspx > last accessed 23 September 2013.

B.1. U.S. Pilot Programs

B.1.1. Creating a National Framework for Pilot Projects[82]

By the time the 1998 federal ADR Act was enacted, court involvement in ADR was growing rapidly: over half of the United States District Courts already offered mediation. By the end of the century, nearly eighty district courts had authorized or established at least one court-wide ADR program, with mediation being the most commonly-used form of ADR. In addition, thousands of state courts were using mediation procedures. The time had clearly arrived to attempt to develop some uniform standards.

In 1993, the State Justice Institute (SJI), an organization designed to promote the quality of state court justice, improve communication between state and federal courts, and promote innovation, awarded a grant to the Center for Dispute Settlement in Washington, D.C. and the Institute of Judicial Administration to 'inspire court-connected mediation programs of high quality' and to reflect the best practices in court-connected mediation. The *National Standards for Court-Connected Mediation Programs* resulted. The *National Standards*, like the ideas in this Study, were intended to be used by courts as guidelines.

Among the recommendations of the *National Standards* are that mediation services should be available on the same basis as are other services of the courts; that each court should develop policies and procedure that take into account the linguistic and cultural diversity of the community; that all parties should have equal access to mediation; that pro se litigants should be informed about mediation and that attorneys should be encouraged to inform their clients of the availability of mediation; and that courts should provide orientation and training for attorneys, court personnel, and others regarding the availability and use of mediation services. The *National Standards* also encourage awareness and management of logistical considerations such as the location and hours of operation for mediation services; determining who will have the responsibility to keep the court informed of the progress of the mediation; developing a complaint mechanism for the parties to air their grievances; determining the information that should be provided to judges, court personnel, the bar, and users; and developing the criteria for referring cases to mediation.

This study, like the *National Standards*, is devoted to developing an analytical approach and framework for the development of mediation programs that can be implemented in a variety of settings. Like the U.S., the EU is a collection of many different states, cultures and ethnicities. Accordingly, there is not a one-size fits all approach to designing or implementing mediation programs. European states would therefore be well-served to consider similar factors as those outlined by the Center for Dispute Settlement and the Institute of Judicial Administration in implementing their mediation programming.

[82] Information in this section came from the following sources: Timothy K. Kuhner, 'Court Connected Mediation Compared: The Cases of Argentina and the United States.' ILSA Journal of International & Comparative Law, Vol. 11.3. P. 8 available at the Social Science Research Network website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888809; State Justice Institute website: http://www.sji.gov/about.php; New Mexico Court Connected ADR Research website: http://www.nmadr.org/web_documents/Proposed%20Rules%20Governing%20Court-Connected%20Mediation%20Services%20-%20NM%20-%208.6.13.pdf; Center for Dispute Settlement and The Institute for Judicial Administration's 'National Standards for Court-Connected Programs' website: http://courtadr.org/files/NationalStandardsADR.pdf; State Justice Initiative website: http://www.sji.gov/about.php; and the National Standards for Court-Connected Mediation Programs website: http://courtadr.org/files/NationalStandardsADR.pdf (all last accessed on October 13, 2013).

B.1.2. Foreclosure Mediation Programs[83]

The Access to Justice Initiative (AJI) of the U.S. Department of Justice and the U.S. Department of Housing and Urban Development (HUD) have joined with the Vice President's Middle Class Task Force to seek solutions to the foreclosure crisis that help homeowners. The joint effort has included a study, not unlike this one, of interventions that have protected homeowners in danger of losing their homes, and ways in which the government can support those efforts. These interventions have included, at all levels from the federal to the local, loan modification programs, mortgage payment assistance, principal reduction programs, counselling assistance, funds to promote neighbourhood stabilization, and regulatory reform. Foreclosure mediation has been effective in helping to coordinate these efforts.

Mediation programs help lenders and homeowners work together to find workable alternatives to foreclosure. These programs can decrease the number of defaults resulting in foreclosure, increase the likelihood that mortgage terms can be renegotiated, and facilitate the use of alternatives to foreclosure that may be less harmful to homeowners and still acceptable to lenders.

At least 14 states have tried this approach, resulting in the creation of more than 25 foreclosure mediation programs. So far, outcomes are impressive; some programs have seen a 70-75% settlement rate, with approximately 60% of those settlements allowing homeowners to remain in their homes. In light of this success, the AJI and HUD have initiated a pilot project to review programs around the country in order to identify strategies that promote successful outcomes. As with other programs discussed in this report, the goal is not to promote a one-size-fits-all approach, but instead to determine how variations in local context and needs will and should dictate each program's approach.

A notable aspect of a foreclosure mediation program is that it does not require a third-party neutral to be present at every stage of the mediation. In Philadelphia, for instance, the parties first meet to discuss foreclosure alternatives in pre-mediation 'conciliation conferences'. A third-party mediator only becomes involved if the parties cannot reach an agreement. If mediation fails to resolve the matter, these most intractable cases go before a judge. The mediators in the program range from retired judges and lawyers called 'referees' in New York City to non-profit organizations such as the Center for Conflict Resolution in Illinois.

A foreclosure mediation program generally follows one of two models for participation: an opt-in process where the homeowner receives notice of eligibility but must affirmatively request mediation, or an opt-out process, where homeowners receive a notice that foreclosure has begun and are automatically scheduled for a mediation session. Jurisdictions such as Connecticut and New York with automatically scheduled programs have participation rates around 70% or higher, whereas opt-in programs generally have participation rates below 25%. Nevada has a non-judicial foreclosure program where lenders are required to participate in mediation before a foreclosure can proceed, and Rhode Island provides incentives in the form of a fine for failing to try mediation before foreclosing. In contrast, New Hampshire's foreclosure mediation program is voluntary for lenders.

To inform those affected by foreclosure about the possibility of mediation, some jurisdictions have sent community coordinators or organizers door-to-door in targeted neighbourhoods.

[83]Information in this section came from the following sources: U.S. Justice Department website: http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf and the Centre for Research on Globalisation: http://www.globalresearch.ca/irelands-home-mortgage-crisis-no-debt-relief-the-destruction-of-savings-and-pensions/5326871 (last accessed October 13, 2013).

There is a broad consensus that homeowners fare better in mediation when assisted by a knowledgeable housing counsellor and/or lawyer who help gather loan documents, identify loan modification options and facilitate communication. Almost all programs provide free housing counsellors, and sometimes legal assistance, with some jurisdictions even requiring counselling assistance prior to mediation. Congress has gone as far as to create a non-profit National Foreclosure Mitigation Counselling Program called NeighborWorks® that offers mediation-related educational workshops to ensure that the participants helping to facilitate the mediation process are well trained.

The European housing crisis could benefit from the implementation of similar programs. For example, in Ireland, the Central Bank of Ireland has estimated that 186 785 mortgages are at risk: they are in arrears, they are being restructured, or they are in possession. This figure accounts for a total of 25.3% of all mortgages still outstanding and represents some 650 000-750 000 people.

To decide whether a mediation program is actually effective there should be thorough and careful tracking and evaluation of program data. At a minimum this tracking should include participation and settlement rate. It could also include tracking the substance of the agreement, the time period for achieving resolution, and whether homeowners had the assistance of a counsellor or an attorney.

B.2. Argentina[84]

Mediation became part of the Argentinian system in about five years. This rapid development should be encouraging for European nations who have yet to fully implement the Directive on Mediation.

Beginning around 1990, an exchange of information, training and experience began between Argentine lawyers and judges and U.S. mediation experts, enabling the Argentine participants to receive training in mediation and import it to their country. A local pool of Argentine mediation experts began to develop. In addition, the Argentine federal government and the Agency for International Development (AID) expressed a strong interest in mediation. Government programs and projects soon followed. The National Argentine Mediation Plan was setup in Buenos Aires with the intent of institutionalizing mediation, and the Ministry of Justice sponsored training sessions. A list of approximately 4 000 official mediators was created – the only ones allowed to mediate.

In 1993, a two-year trial period started during which ten participating courts referred select cases to mediation as part of a pilot project. The Ministry of Justice recorded a settlement rate of approximately 50%, suggesting mediation had the potential to decrease case congestion.

Legislation soon followed. In 1995 the Argentine Legislature, citing the threat that a continued increase in court cases could collapse the legal system and limit the inability of the state to provide justice, enacted the 'Mediation and Conciliation Law'. The law requires all types of litigants in Buenos Aires to attend mediation. In addition, in 1996 the Argentine Legislature put into effect the 'Labour Conciliation Instance Law' to mandate mediation in Buenos Aires for labour and employment disputes. Both Argentine laws mandate attendance at mediation before adjudication. The legislation proved effective, resulting between 1995

[84] Information in this section was taken from the following sources: Timothy K. Kuhner, 'Court Connected Mediation Compared: The Cases of Argentina and the United States.' ILSA Journal of International & Comparative Law, Vol. 11.3. P. 8 available at the Social Science Research Network website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888809 (last accessed October 13, 2013).

and 1998 in roughly 40 000 resolved cases and the diversion of more cases than would have otherwise gone to court.

Argentina's pilot project in mediation is another example for European nations to consider following. Those countries that have yet to implement the Directive on Mediation, or those looking to expand their mediation programs, should note in particular the importance of government involvement in promoting mediation's use. The Ministry of Justice played a crucial role in promoting, monitoring and implementing Argentina's national pilot project on mediation. So, too, will it be important in Europe that governmental bodies recognize and support the benefits of implementing mediation programs. This includes providing training, support, publicity and resources necessary to ensure a mediation program's success.

B.3. Australia[85]

The start of mediation in Australia dates back about 20 years. At that time, a group of commercial lawyers, influenced by the Chief Justice of New South Wales who was an eminent mediator himself, formed a national organization whose goal was to train lawyers as mediators. This pilot program was successful, and today most courts encourage mediation, either to avoid delays or because its effectiveness is openly acknowledged. Many Australian laws facilitate or even mandate mediation. Most universities offer courses in dispute resolution and some have certificate programs in mediation. Mediation has become well established and is accepted by lawyers as a useful mechanism for settling cases.

Contemporary Australia is one of the most multicultural nations on earth. Only Israel has a more diverse population. Consequently, cultural issues often play a role in mediation and the law. For instance, the Native Title Act of 1993, which addressed land expropriations from native aboriginals, was originally enacted to enable Aboriginal people to negotiate and mediate Aboriginal land disputes. Claims by Aboriginal people, under the Native Title Act, are mediated by members of the National Native Title Tribunal (NNTT), to advance and protect the interests of indigenous people. The mediation process can last months or even years. Unless the Court orders otherwise, it must refer every native title application to the NNTT for mediation after notification.

The mediation process begins with each side telling their story. A series of meetings generally follows, during which the mediator helps identify the issues, suggests a negotiation process, promotes communication and helps parties look at possible options for agreement. The Tribunal reports to the Federal Court on the progress of the mediation and may make recommendations. The Federal Court may issue orders consistent with the recommendations, or issue other orders to assist in the progression of the mediation. If the Tribunal reports that no agreement has been reached or that matters have reached an impasse, the court can then order the mediation ended and transferred to the court.

The *Review of the Native Title Claim Process in Western Australia* issued in 2001 endorsed efforts to resolve native title applications by agreement, noting that it is in the interests of all people of Western Australia to ensure that Aboriginal people receive full recognition of their right and interests through mediation, negotiation and similar processes of conciliation.

[85] Information in this section is taken from the following sources: Joanna Kalowski's article *Diversite des mediations du monde: Afriques – Orients – Ameriques…et Europes*, 2009 website: http://www.jok.com.au/publications/mediation-in-australia; Central Land Council, *The History of the Native Title Act* available at: http://www.clc.org.au/articles/info/the-history-of-the-native-title/ ; *Native Title Issues & Problems,* Creative Spirits available at http://www.creativespirits.info/aboriginalculture/land/native-title-issues-problems; the Western Australian Government website: http://www.dpc.wa.gov.au/lantu/WhatIsNativeTitle/Documents/Wand2.pdf; and 'Mediation Proves Quicker and Cheaper Than Courts,' Selma Milovanovic, *The Age.* April 02, 2009 website: http://www.theage.com.au/national/mediation-proves-quicker-and-cheaper-than-courts-20090401-9jt2.html?skin=text-only (all last accessed October 13, 2013).

Further, the report stated litigation has a divisive influence on the Aboriginal and non-Aboriginal communities involved and could have a significant, negative personal impact on them. Further, the report noted that the adversarial nature of litigation does not tend to result in sound management systems.

Another mediation pilot project in Australia that has proven successful involved mesothelioma sufferers. For decades, asbestos-related cases had languished in the Supreme Court for months, and many patients died before they could get a verdict. But in 2009, in the state of Victoria, almost all of about 148 asbestos civil claims were settled through mediation. A report on mediation across Supreme and County courts in 2009 revealed that up to 65% of civil claims settled without trial in those courts, with an annual savings of $30 million in legal fees.

Mediation came to be used at all levels of the court system. Of 101 commercial cases in 2007-2008 only seven had reached trial. The chair of the national advisory body on alternative dispute resolution, Court of Appeal judge Murray Kellam, confirmed that all civil cases before the Supreme Court were being sent to mediation. In 2007 46 Court of Appeal cases were also resolved through mediation.

During the same time period, the Supreme Court introduced judge-led mediation, in which specialist judges conduct preliminary conferences with litigants where they are ordered to provide documents before another judge settles the case. Multimillion-dollar claims were settled this way and the court hopes to continue the practice based on the state government issuance of a $3.7 million grant for judge-led mediation.

Overall the state government is investing $17.8 million to expand alternative dispute resolution initiatives. Attorney General Rob Hulls has been quoted as saying mediation frees up court time and resources to deal with those matters that can only be resolved through the court process. He has had direct experience; he initiated a pilot mediation program at the Broadmeadows Magistrates Court in 2008, which recorded an 86% success rate over the course of seven months. All civil claims under $40,000, it was reported, would now be referred to mediation under the program, which originally dealt with disputes under $10,000.

Australia's experience with the use of mediation in a multicultural setting, as well as its experiences with the use of mediation at multiple levels of the court hierarchy, could provide helpful models for the EU.

B.4. Canada

B.4.1. Victim Offender Mediation[86]

The first Victim-Offender Reconciliation Programme (VOM) in Canada began as a pilot project in Kitchener, Ontario in the early 1970's when a youth probation officer convinced a judge that two youths convicted of vandalism should meet the victims of their crimes. After the meetings, the judge ordered the two youths to pay restitution to those victims as a condition of probation. VOM was thus started as a probation-based/post-conviction sentencing alternative. It later evolved into an organized victim-offender program funded by church donations and government grants, with the support of community groups.

[86] Information in this section was taken from the following source: 'Victim Offender Mediation', Christopher Bright. Prison Fellowship International. 1997 website: http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/vom (last accessed October 13, 2013).

The VOM involves a meeting between the victim and the offender facilitated by a trained mediator during which they parties begin work to resolve conflict and construct their own approach to achieving justice. The victim's participation is voluntary, as is the offender's, although the alternatives to participation are generally far less attractive. The mediator uses a facilitative style of interaction with the victim and offender in which they assume a proactive role in attempting to achieve the outcome perceived as fair by both parties. Both parties are given an opportunity to express their feelings and recall the circumstances of the offense. The process concludes with an attempt to reach an agreement on what the offender will do to repair the harm caused. If an agreement is reached, it is memorialized in writing, and payment and monitoring schedules are set. The mediator does not impose a resolution. Studies have concluded that these programs have high client satisfaction rates, victim participation rates, restitution completion rates, and result in reduced fear among victims and reduced criminal behaviour by offenders.

Often cases are referred to VOM after a conviction or formal admission of guilt in court, but in some cases they are diverted before a disposition in an attempt to avoid prosecution. The mediator contacts the victim and offender to make sure both are psychologically capable of making the mediation a constructive experience and that the victim won't be further harmed by the meeting with the offender.

In the US the first Victim-Offender Reconciliation Program began in Elkhart, Indiana in 1978 and the idea has spread throughout the U.S. and Europe. It has been estimated that as of 1997, 400 VOM programs exist in the U.S. alone, and to a similar extent in Europe. While VOM was not initially viewed as a reform of the criminal justice system, but it was soon realized that it could perform that function as well. The phrase 'restorative justice' has been used to describe the process.

European nations would do well to follow this innovative example from Canada, and some have already done so or are doing something similar. Austria and Germany, among other nations, already have similar programs. Victim/offender mediation is a common way of compensating victims in Austria for any personal injury, loss, or damage caused by an offence. The process includes reconciliation talks, apologies, help for the victim and community service or payments to public welfare institutions. From 1992-1995 approximately 5,500 charges against adult offenders were settled through victim/offender mediation in Austria. In Germany, mediation is used for both juvenile and adult offenders and includes face-to-face meetings between the victim and the offender as well as requirements that offenders compensate victims. From 1977 to 1993 this approach to victim compensation had an impact in a significant number of cases.

B.4.2. Federal Transportation Agency Mediation[87]

The Canadian Transportation Agency began a pilot project to provide mediation services to parties involved in disputes about transportation matters in 2000. The project initially focused on railway issues and was re-evaluated after one year. Before implementing the program, the Agency consulted with its Accessibility Advisory Committee and examined mediation models used by Canadian and American regulatory bodies to ensure the process was designed to accommodate the needs of all participants. Mediation continues to be used today.

The Canadian Transportation Agency reports that the program has worked well for disputes involving several major transportation providers. The Agency's Air Travel Complaints

[87] Information in this section was taken from the following source: Canadian Transportation Agency website: http://www.otc-cta.gc.ca/eng/mediation (last accessed October 13, 2013).

Program staff informally mediates complaints to try to find a mutually acceptable resolution. The program is also offered as an option for disputes related to transportation accessibility the disabled, as well as rail transportation issues related to rates, service, obligations, competitive access, crossings, rail line and rail yard expansion, abandonments, noise and vibration among others. Marine issues are also mediated by under the Agency's program, including coastal trade, pilotage tariffs, and fees fixed by Canadian port.

The Agency invites participants to contact them to initiate the mediation and to contact the other party. Once both parties agree to mediate a trained mediator is assigned to the case in an informal setting where together the parties address the issues involved. At the session the mediator attempts to help negotiate a mutually-acceptable settlement with the parties. The mediation must take place within a 30-day deadline under the law, which is faster than the 120-day deadline set by the law for the Agency's formal dispute resolution process, but the deadline can be extended if both sides agree. Sometimes the mediation produces an agreement within a few days or even a few hours. Confidentiality is expected unless both sides agree otherwise, and if the dispute ends up going to the Agency for a formal, court-like decision, the mediation will not be involved in the case.

The transportation sector in Europe is fertile ground for disputes similar to those in Canada. According to the Agency's website, mediation provides an alternative method of resolving disputes in less time, at lower cost, and allows the parties to have greater control over the outcome as compared to the regulatory process or litigation. So too, could these benefits be realized through the implementation of similar programs in Europe.

C. Fostering Mediation Advocacy Education: An Emphasis on Law and Business Schools

Courses on mediation, especially mediation advocacy, are very rare in EU law schools, and almost unheard of in business schools. Unsurprisingly, in countries where mediation is used more often, universities offer numerous courses in the field of mediation and alternative dispute resolution. In some cases, these courses are a mandatory part of the degree requirements. Fostering university-level mediation education nurtures future mediation users.

One method of promoting this approach would be to organize and sponsor an annual 'EU Mediation Advocacy Competition'. Teams of law and business students would take on the roles of lawyers and business clients, and compete with one another over a several-day period.

There are several examples of other mediation competitions worldwide. But the EU has an opportunity to create a unique mediation competition, which can mirror some of the successful elements in other mediation competition programs but add its own distinctive features.

C.1. ICC International Commercial Mediation Competition[88]

Perhaps the most comprehensive example that could be used as a standard for an EU Mediation Competition is the ICC (International Chamber of Commerce) International Commercial Mediation Competition, held every year in Paris, France. The annual ICC competition is devoted solely to commercial mediation, and is organized by the ICC ADR

[88] Information in this section comes from: http://www.iccwbo.org/training-and-events/competitions-and-awards/mediation-week/ (last accessed October 1, 2013).

Secretariat. The event gathers teams from universities and mediation experts from around the world as participants and judges.

Competitors come from law and business schools worldwide, and they perform mock mediations as teams in a number of rounds. The event lasts 6 days that include over 200 mock mediation sessions, as well as educational, social and training events on mediation. Further, over 120 trained and experienced commercial mediators and other dispute resolution professionals act as mediators, judges or observers during the Competition.

In conjunction with the mediation competition, the ICC hosts Mediation Week, during which the ICC welcomes over 600 participants from more than 40 countries to discuss new developments in alternative dispute resolution, and to analyse and share experiences and meet with colleagues. The ICC also hosts the Mediation Round Table, with over 100 professional mediators and academics, which provides a forum for the exchange of best practices and new techniques. It also offers an international environment for interactive discussions.

C.2 (AIM) Advocates in Mediation International Competition for Mediation Advocacy[89]

AIM offers the International Competition for Mediation Advocacy (ICMA) in Toronto, Canada. The competition is an annual educational event for law students and was created to assist with the development of mediation advocacy skills that are routinely exercised in the practice of law. The competition is cross-cultural, hosting law students, mediators, lawyers and dispute resolution law faculty from around the world. The competition is typically held over a 4-day period, with preliminary rounds (more than one case is mediated by teams) spread out over the first two days, and the quarter and semi-finals taking place on the third day. The finals typically follow on the fourth and final day of the competition.

The competition consists of two segments in written and oral advocacy. In the written advocacy component, the teams provide a brief ex parte submission describing their mediation strategy. In the oral advocacy component, teams participate in a mediation session to test their representation skills and problem-solving approach.

Each team consists of two students, and in each competition round, one student acts as a lawyer in the mediation and the other plays the role of the client. Students are judged on preparation, teamwork, how well the interests of the client are represented in the mediation process and their ability to capitalize on opportunities during the mediation process. Each session is mediated by an experienced professional mediator and evaluated by the mediator and a panel of two judges from diverse practice backgrounds.

C.3. American Bar Association: Law Student National Representation in Mediation Competition[90]

This competition is designed to familiarize law student participants with advocacy skills in mediation. The judging criteria are designed to reward those participants who use an effective combination of advocacy skills and problem-solving approaches throughout the mediation. The competition is open only to full and part-time law students.

[89] Information in this section comes from: http://www.advinmed.com/ICMA.asp (last accessed October 1, 2013).
[90] Information in this section comes from: http://www.americanbar.org/groups/dispute_resolution/awards_competitions/law_student_national_representation_in_mediation_competition.html; http://www.americanbar.org/content/dam/aba/events/dispute_resolution/lawschool/representation_in_mediation_competition/2013/final_mediation_competition_rules_2012-2013.authcheckdam.pdf (all last accessed October 1, 2013).

The competition begins with a regional qualifier for the national competition. The qualifier consists of two preliminary rounds, in which all teams participate, and a final round in which the top two teams participate. The first place team at each regional qualifier automatically advances to the National Competition.

The National Competition consists of two preliminary rounds, a semi-final round and a championship round. Each team participates in two preliminary rounds, with the top four teams advancing to the semi-final round. In the Semi-Final Round, teams are paired according to their rankings from the preliminary rounds. The winner of each of the semi-final rounds advances to the championship round.

In order for an EU mediation competition to be successful, the EU needs its own model that could take advantage of the unique diversity of the mediation practice in among the EU Member States. Many established mediation competitions do not offer diverse mediation subjects or problems, or a focus on cross-border issues; an EU competition could. The EU mediation competition also could be more inclusive of the array of mediation types—court-annexed, commercial, civil, family, etc. The diversity available in an EU competition could be attractive for students, participants, and potential sponsors of the competition.

A possible set-up for an EU competition would include, as is standard, competition in rounds. Teams could be given mock mediation problems and asked to solve and role-play the mediation in front of a panel of judges, who would score teams on various point elements. The teams could also be asked to submit written mediation strategy briefs as a separate component of the competition, reflecting the AIM and like competitions. The briefs could be scored on a customized scale, with the winning brief advancing past other competitors in 'knock-out' rounds.

The best teams in role-play and the written submission would advance in rounds (paired and competing against their respective rankings) until the final teams competition. The winners of the domestic competition would automatically advance to the EU national competition. This would make the competition two-tiered, with the first phase of the competition taking place at the domestic level (in each respective country), and the championship rounds then taking place at the EU level. This scheme would reflect what has been successful within both the AIM and American Bar Association: Law Student National Representation in Mediation competitions. This strategy would also promote the mediation competitions at the local level and offer the incentive of the honour of competing on the larger EU level. Each country could send one or more teams to the EU level competition.

To make this idea work, a committee or board with the responsibility to maintain and conduct the affairs of the competition and promotional measures should be organized. The board or committee should be composed of mediation professionals throughout the EU or internationally, who would be charged with the logistics of the competition, rules, obtaining participants and promoting the competition. The committee or board should also gather corporate and/or industry sponsors, which could reflect the ICC competition roster of respective sponsorships.

Mirroring the ICC, the EU competition should also open the competition beyond law students to promote participation and support from the various mediation communities. The EU could open the competition to business schools, law schools and other professional schools where mediation is a major component of the educational program. Allowing more professional diversity into the competition will allow more widespread participation and publicity. It would also likely draw in more competitors and interest from future participants in the mediation system.

Notably, the ICC competition involves, as judges or observers, 120 leading commercial mediators and corporate representatives from around the world. If the EU is able to take a similar approach and attract leading mediators from around the world, their participation might attract a wider audience of potential competitors. Further, an invitation to be a judge or representative from the EU could be viewed as an honour, and would likely be considered an accolade and a desirable opportunity.

By building on existing programs' success, the EU could establish its own student-based competitions to nurture and develop interest in mediation at an early stage in future practitioners' lives. Such a competition, if planned and structured correctly, could create a forum for practitioners, students, and sponsors to explore and facilitate more widespread mediation familiarity throughout the EU.

D. Appoint EU Mediation Champions or Ambassadors[91]

EU citizens are not very aware of mediation. A potential solution could be the appointment of important public figures as 'mediation champions' or 'ambassadors'. These people would ideally be former lawyers or business managers who are known and respected throughout the EU. Promotion of mediation by a familiar and respected member of the legal and business world has the potential not only to increase awareness, but also to instil confidence in the process. The key ambassadors would be appointed at the EU-level, and then these people would select colleagues or peers to act as champions or ambassadors at the domestic level.

Argentina offers a model. During the inception of mediation in Argentina, prominent lawyers and judges travelled to the U.S. to receive training in mediation and brought their learning back to Argentina. In return, U.S. mediation experts travelled to Argentina to promote the benefits of mediation. This exchange helped to prompt various developments in mediation promotion through both local and national, and private and public, action. Australia offers another model. There, a group of commercial lawyers formed a national organization with the goal of training lawyers as mediators, and were inspired by a prestigious local mediation champion—a former Justice of New South Wales. His influence is said to have been invaluable in convincing many that mediation was an idea whose time had come. In Ontario, Canada, the appointment of Justice Edson Haines to the High Court of Justice provided the roots of judicial mediation. Justice Haines was renowned for his ability to help the parties reach a settlement through inviting counsel to a meeting in his chambers, and his influence can be seen in subsequent mediation and ADR developments in Canada. European states could very well benefit from champions like Sir Laurence Street or Justice Edson Haines to lead the promotion of mediation within their borders.

E. Creation of an 'EU Mediation Specialist'

Certifying 'mediation specialists', or using a similar designation or recognition for mediators, has played a role in an increase in the use of mediation in some countries. EU professionals are likely to find the addition of a specialization title or designation very attractive, especially when supported by strong policies in favour of those particular services.

[91]Information in this section is taken from the following sources: Timothy K. Kuhner, 'Court Connected Mediation Compared: The Cases of Argentina and the United States.' ILSA Journal of International & Comparative Law, Vol. 11.3. P. 8 available at the Social Science Research Network website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888809; Joanna Kalowski's article *Diversite des mediations du monde: Afriques – Orients – Ameriques…et Europes*, 2009 website: http://www.jok.com.au/publications/mediation-in-australia and Chief Justice Warren K. Winkler, 'Some Reflections on Judicial Mediation: Reality or Fantasy?'. Court of Appeal for Ontario, March 24, 2010 website: http://www.ontariocourts.ca/coa/en/ps/speeches/reflections_judicial_mediation.htm (last accessed October 13, 2013).

Below are some country-specific examples of countries or industries with a high degree of mediation implementation and use, as well as particular examples of specialty titles or designations used within the mediation sector, many of which could be used or considered by the EU.

E.1 Australia:[92]

In Australia a nationally consistent accreditation of standards system was developed to enhance the quality of national mediation services and facilitate consumer education and confidence, as well as improve the credibility, coherence, and capacity of the ADR field. The National Mediator Accreditation System (NMAS) was commenced in January of 2008 as an industry-based accreditation scheme. It relies mostly on voluntary compliance by mediator organizations (Recognized Mediator Accreditation Bodies—RMABs) that agree to accredit mediators in accordance with requisite standards.

The Mediator Standards Board (MSB) (which is an independent industry body) has the responsibility of developing and maintaining the NMAS. The responsibility of the NMAS is to provide (regardless of mediators' fields of work) a 'base level' of accreditation for all mediators.

However certain fields (such as family dispute resolution) may require further accreditation schemes, and many mediation organizations can opt to accredit mediations under the NMAS and specific field-based accreditation systems.

As stated by the Australian Mediation association, the accreditation system provides various benefits to members:

(1) The AMR is a highly visible and trusted place to find mediators. Mediator's listings can show either their service's contact details or their direct contact information. The AMR will become another source of direct referrals to mediators and mediation services.
(2) The AMR gives independent recognition of mediation practice standards that provides greater reassurance to users, government, industry, as well as other organizations.
(3) AMR mediators, accredited through the Australian Mediation Association, will be allowed to call themselves an 'Australian Mediation Registered Mediator' and use the logo which is expected to develop as a brand that signifies quality in mediation in Australia.
(4) The AMR will demonstrate publicly that being a mediator in Australia is part of a coherent and valued occupation.
(5) With the requirement for annual updating of Continuing Professional Development records, the Register will encourage the systematic maintenance and development of mediation skills.

Australia offers some interesting and potentially viable options that could be implemented throughout the EU for developing the certification of an 'EU Mediation Specialist', including implementing a nationally consistent accreditation system for mediator accrediting bodies. This would help facilitate accreditation uniformity based on minimum standards of practice and certification for mediators across the EU. Such uniformity is potentially also useful for

[92] Information in this section comes from the following sources: http://www.ama.asn.au/ANMS_Accreditation.pdf; http://www.nadrac.gov.au/what_is_adr/NationalMediatorAccreditationSystem/Pages/default.aspx (all last accessed October 1, 2013); For history of the NMAS see: http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf (last accessed October 1, 2013).

cross-border disputes, regarding some elimination of different mediator certification requirements in different Member States.

Further, many of the projected benefits to Australian mediators under such a system could be adapted for the EU. Following the example of Australia, the EU could create the title of 'EU Mediation Registered Mediator', with an included logo, for mediators as a title to promote their practice. Many mediator professionals would likely find such an option attractive, as well as having their name on a list of certified specialists that is maintained by an overall accreditation regulating organization.

E.2. Canada:[93]

The ADR Institute of Canada (ADR Canada) is a national non-profit organization that provides national leadership in the development and promotion of dispute resolution services in Canada and internationally. ADR practitioners across the country belong to the institute through affiliates in certain major provinces. Members include over 1,700 individuals and 60 business and community organizations from across Canada.

According to the Institute, it provides the following benefits to members:

(1) A regulatory framework that includes standards for education and practice including a Code of Ethics and a Mediator's Code of Conduct. This framework (which includes a Discipline and Complaint Procedure) provides the public with an important measure of protection.
(2) Recognized practice designations that include the Chartered Mediator (C. Med.), Chartered Arbitrator (C. Arb.), and Qualified Mediator designations. These designations assist the public in choosing a practitioner who is practicing at a specific level and whose qualifications have been reviewed by a professional body for enhanced quality assurance.
(3) Leadership to ADR practitioners.
(4) Networking and educational opportunities.
(5) A unified voice for ADR practitioners in speaking to government.
(6) Important advertising opportunities including listing on ADR Connect, a national database of members from which the public may select the ADR practitioner of his or her choice.
(7) National Mediation Rules and National Arbitration Rules that are widely accepted throughout Canada for the resolution of commercial disputes.

As noted by the Institute, a member in good standing may obtain accreditation as Chartered Mediator, Chartered Arbitrator or Qualified Mediator. The professional designation may then be placed after the qualified mediator's name. The designations are recognized nationally and internationally and signify to the public, and to those who are referring clients, that an ADR practitioner has achieved a particular level of skill and experience. Individuals who hold these designations enjoy a competitive advantage. Professionals who have earned these designations inspire confidence based on their particularized designations.

The Canadian professional designation practice offers a potentially attractive option for the EU to consider. The EU could create specific professional designations (or professional titles) for mediation practitioners or 'EU Mediation Specialist[s]' to use after their respective names, regardless of whether the background is legal, business, or other industry specific. Such a designation would likely appeal to professional practitioners who desire such accolades and recognition.

[93] Information in this section comes from: http://www.adrcanada.ca/about/index.cfm (last accessed October 1, 2013).

Further such titles or professional designations would also likely bolster public confidence in mediation because they indicate compliance with professional standards and the possession of important qualifications. This approach could be implemented throughout the EU, and in the professional community achieving the designation for their respective industry could be a motivating professional goal.

E.3. Hong Kong:[94]

The Hong Kong Mediation Accreditation Association Limited (HKMAAL) was established to be the single premier mediation accreditation body in Hong Kong by setting requisite standards for accredited mediators, supervisors, trainers and coaches, as well as to promote a culture of best practices and professionalism for mediation in Hong Kong. The HKMAAL has accredited mediators according to one of two designations: 'General Mediator' or 'Family Mediator'. HKMAAL acts as a regulatory body for mediation accreditation, trainings and standards, but it does not itself provide mediation training courses.

Once a candidate has successfully completed training and is accredited as a mediator, his or her name is kept on the HKMAAL list of Panel Members for 3 years on the organization's website. Accredited mediators can be searched by specialty of services and other demographic information and are listed as an HKMAAL Accredited Mediator.

Hong Kong also offers a potentially attractive option for the EU: the creation of a single, premier mediation accreditation body. Such an organization could help raise standards in training and certification to a specific uniform minimum (set by the Directive). As an incentive for being a part of this body, Member States, organizations, and individuals would be listed on the organization's website. Such a premier organization could also promote public confidence and serve as a uniform, reliable resource for finding specifically qualified institutions and mediators. Also of potential interest for the EU is the breakdown between general mediators and family mediators. The EU could use similar approach if it determines that listing a specialty (or specialities) would prove more beneficial than a general approach.

E.4. United States:[95]

Most U.S. states do not have 'certified specialists'; instead, they have 'qualified third party neutrals'. Such neutrals have been through mediation training, although each state varies as to mandatory training requirements.

The state of Florida does, however, have a certificate specialty for court-connected cases through the Supreme Court of Florida.[96] Recipients are called 'Court Certified Mediators'. To achieve such a certification, an applicant must meet all training and accreditation requirements set and regulated by the State of Florida through the Supreme Court Certified Mediation Training Program. The certification process must be completed within 2 years of completion of the training program. Certification lasts for 2 years and then requires for renewal that the mediator complete at least 16 hours of CME (continuing mediation education) credits, and pay a renewal fee. Certified mediators' names are added to the searchable directory of Court Certified Mediators with the Supreme Court under an array of

[94] Information in this section comes from: http://www.hkmaal.org.hk/en/index.php (last accessed October 1, 2013).
[95] Information for this section from: http://www.flcourts.org/gen_public/adr/bin/HowToBecomeMediator.pdf; http://www.flcourts.org/gen_public/adr/disclosure.shtml; http://199.242.69.70/pls/drc/drc_main_screen (all last accessed October 1, 2013).
[96] *See also* The State of Virginia (Supreme Court) for similar certification as a court-referred mediator, found: http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/certification_process/certification_requirements.html (last accessed October 1, 2013); *see also* Donald T. Weckstien, *Mediator Certification: Why and How*, 30 U.S.F. L. Rev. 757, 760-62 (1996).

specialties (family, circuit, dependency, and appellate) and can be further narrowed by demographics.

Many in the United States have pushed to have more certification of mediators for a number of reasons, including: (1) protecting the public from incompetent and unethical mediation services; (2) preventing the monopolization of mediation practices by already existing professionals; (3) reducing court congestion through judges referring cases to qualified mediators; (4) discouraging those who would ruin the reputation of mediation while bolstering the good reputation of qualified mediators through credibility, training, practices and other factors that promote public and industry confidence in mediation.

The United States offers an attractive option, mainly for individual EU states, with regard to court-annexed mediation specialists. However, for the EU overall, the approach would offer potentially significant information regarding qualifications, as well as promoting cooperative initiatives between the state and legal mediation services.

Also of interest, however, for the EU is the fact that there has been no uniformity in the creation of specialists in the American legal system. The U.S. thus offers educational examples of potential obstacles that the EU might face in creating a uniform specialty. Even with the advancements ADR and mediation in the U.S., there is a lack of national uniformity on accreditation requirements and no one national system of accreditation or national specialist title available. The EU might look at some of the obstacles the U.S. has confronted in order to avoid them when creating a system within the EU.

F. The EU Mediation Pledge

In the United States, mediation has become a mainstream dispute processing tool in significant part because of the very active role of corporate America, which has been moved by the need to contain the massive costs of civil litigation overseas. One very effective tool that has resulted from corporate America's interest in promoting mediation tool has been, since 1979, the ADR Pledge.

The ADR Pledge is a written, public statement underwritten by thousands of the most well-known corporations in the U.S. A pledge is different from a commitment, in that it is not binding; still, a pledge indicates, formally, that the signatory is willing to undertake a discussion about the possibility of amicably resolving certain disputes, notably, through mediation. When mediation is not mandatory, or there is no mediation clause in a contract, approaching a signatory of the mediation pledge allows the initiating party to be reassured that proposing mediation will not necessarily be seen as an indication a weak case. For the responding party, the pledge provides a good reason to accept the invitation without raising false hopes of being amenable to settle the matter out of court. A good pledge, of course, should be much more than a 'face saving' device for litigants. It should include a commitment to train key people within the signatory organization about what mediation is, and how it should be conducted, so that the organization will make effective use of the process.

F.1. France

One EU attempt to create something similar to the suggested pledge has been the 'Mediation Charter' in France. After initial enthusiasm, however, the Charter seems to have lost visibility and importance, as also shown by the limited number of signatories. Indeed, the Charter was initially promoted by a handful of corporations, which might not have made it attractive for competitors to sign. A wider EU Charter, promoted by the EU amongst all the major Employers Federations could go a long way to avoiding that problem.

F.2. UK[97]

In August 2013, the Centre for Effective Dispute Resolution (CEDR) and the International Institute for Conflict Prevention & Resolution (CPR) announced that CEDR would be CPR's exclusive 21st Century Corporate Pledge Partner in the United Kingdom. The UK signatories to the Pledge were made public at a special event in London on November 12th.

The CPR 21st Century Corporate ADR Pledge, which aims to benefit the business community, provides that signatories will commit resources toward managing and resolving disputes through negotiation, mediation and other ADR processes as appropriate. The Pledge has been signed by more than 4,000 operating companies and 1,500 law firms, who have thereby shown their commitment to consider ADR before filing suit. The goal of the Pledge is to establish and practice global, sustainable dispute resolution processes within the corporate business model. The agreement also provides that CEDR and CPR will collaborate on substantive programs and initiatives to further the goals of the Pledge.

The Pledge reads:

Our company believes the costs, delay and damage to relationships resulting from adversarial litigation practices have risen to level that are unsustainable in the present day global business arena. Alternative dispute resolution (ADR) practices developed over the last 30 years have encouraged more cost-effective and collaborative solutions...we believe that disputes can be resolved using ADR methods so that the outcome enhances both the company's short and long term well-being, as well as sustaining its vital business relationships.

Signing the Pledge is said to benefit a company by helping to manage conflicts, reduce legal expenses and decrease risk.

F.3. Ireland[98]

Similar to the Centre for Effective Dispute Resolution-International Institute for Conflict Prevention and Resolution (CPR) Pledge, the Irish Commercial Mediation Association (ICMA) and CPR entered into a Mutual Recognition Agreement to promote each organization's ADR pledges and charters as mutually supportive of one another. The purpose of the collaboration is to increase awareness of alternative dispute resolution processes worldwide and to strengthen each organization's efforts to do so through pledges, charters and commitments. Both organizations agreed to recognize CPR's Corporate Policy Statement on Alternatives to Litigation, the CPR 21st Century Corporate ADR Pledge and ICMA's Pledge for Mediation. Austin Kenny, ICMA's chairman stated that the purpose of the Agreement is to promote the awareness and use of mediation in business to prevent and resolve disputes.

F.4. Singapore[99]

In recognition of the benefits of mediation, including time and financial savings, the Singapore Mediation Centre (SMC) has created a Pledge to Mediate. By taking the pledge, companies and organizations formally show their commitment to resolving disputes outside

[97] Information in this section was taken from the following source: Centre for Effective Dispute Resolution website: http://www.cedr.com/articles/?item=CPR-21st-Century-Pledge (last visited October 14, 2013).
[98] Information in this section was taken from the following source: International Institute for Conflict Prevention and Resolution website: http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/782/CPR-and-the-Irish-Commercial-Mediation-Association-Enter-into-Historic-Agreement-to-Recognize-Respective-Pledges-Promoting-ADR-Press.aspx (last visited October 13, 2013).
[99] Information in this section was taken from the following source: Singapore Mediation Centre website: http://www.smcmediationcharter.sg/pledge.html (last visited October 13, 2013).

traditional litigation channels. Signatories of the Pledge benefit through cost savings, goodwill from the opposing party and the creation of creative and holistic solutions.

Signing the Pledge also signals a commitment to five core actions including: considering mediation as a first resort to resolve disputes with other organizations or people; utilizing mediation clauses in agreements and forms the organization is a party to, where appropriate; engaging staff and members of the organization with knowledge and skills from mediation; having the organization's name displayed on the Singapore Mediation Charter website; and placing a Singapore Mediation Charter logo on the organization's website or a link to the SMC's website. Organizations that sign the Pledge also receive exclusive benefits from SMC including 15% off full rates for workshops and seminars; customized in-house conflict management workshops; free legal consultation on the drafting of mediation clauses; a free one-hour talk, 'Introduction to Mediation at SMC'; consultation and support from SMC's panel of mediation experts; and a free listing of the organization's name on a dedicated Mediation Charter website.

F.5. Poland[100]

The Polish Ministry of Justice has endorsed a pledge developed by the Civic ADR Council and officially released March 4, 2013 with the participation of over fifty major business and lawyers' organizations.

F.6. International Trademark Association[101]

The International Trademark Association (INTA) ADR Pledge for brand owners was introduced for the purpose of signifying for brand owners the company's policy that in the event of non-urgent, non-counterfeiting-related trademark disputes between the Pledge signatory and another company, the signatory is prepared to explore the resolution of the dispute through negotiation or ADR techniques with the other company. INTA also has developed a pledge for law firms that signify that a law firm will disseminate the knowledge of mediation within its organization, keep its personnel informed of the role of mediation in dispute resolution and the most advanced mediation techniques, and regularly train for mediation. The pledge aims to ensure the appropriate intellectual property lawyers in a firm will be knowledgeable about ADR and the Trademark Mediators Network, as well as INTA's applicable mediation guidelines and rules. Further, the pledge commits the firm to have its attorneys discuss with clients, when appropriate, the availability of ADR procedures.

The various examples of pledges used by businesses in various countries suggest another way that the EU could promote the use of mediation. While often initiated by private businesses, the EU could consider approaching leading corporations to suggest the approach and its benefits.

[100] Information for this section was taken from the following source: Polish Ministry of Justice website: http://ms.gov.pl/pl/dzialalnosc/mediacje/spoleczna-rada-ds-alternatywnych-metod-rozwiazywania-konfliktow-i-sporow/dokumenty-deklaracje/ (last visited October 13, 2013).
[101] Information in this section was taken from the following source: International Trademark Association website: http://www.inta.org/Mediation/Pages/ADRPledge.aspx (last visited October 13, 2013).

ANNEX 3: THE STUDY QUESTIONNAIRE

Assessing the Impact of the EU Mediation Directive (Directive 2008/52/EC) and Exploring Legislative and Non-Legislative Measures to Encourage the Use of Mediation in EU Member States

This three-part questionnaire was created to gather information about mediation legislation for civil and commercial cases in EU Member States, and to uncover why mediation is not being used as much as expected. Based in part on the answers to this questionnaire, a report is going to be presented to the European Parliament by the end of November with a series of proposals to foster mediation use across the Union (IP/C/JURI/IC/2013-062).

In particular, Part I aims to gather your estimate of the current mediation market in your country. Part II is a quick assessment of the existing law in your country. Part III includes a list of legislative solutions (Part IIIA) and non-legislative proposals (Part IIIB) for you to assess in terms of their ability, or inability, to make more mediations happen in your country.

Responding to the questionnaire is easy. It simply asks you to choose among existing options or to rank a number of proposals. If your preferred answer is not listed amongst the options, please choose the closest answer to the situation in your country. Please only use the option of 'Other' if the situation in your country is radically different from any of the three designated options presented.

Your responses to the questionnaire are very important to us, and will be kept confidential.

Part I- Estimate of Current Mediation Market

For the purposes of this questionnaire, the 'mediation market' is defined as the total number of civil and commercial mediations falling within the scope of the 2008 Mediation Directive (Directive 2008/52/EC).

1. Please indicate your country: _____

2. Estimate the number of mediations that occur in your country annually.
(a) Less than 500
(b) Between 500 and 2,000
(c) Between 2,000 and 5,000
(d) Between 5,000 and 10,000
(e) More than 10,000
(f) I don't know

3. In your country today, do you think a 'balanced relationship between mediation and judicial proceedings', as requested by Article 1 of the EU Mediation Directive, exists in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually?

4. Based on your answer to Question 2, please estimate the average monetary value of mediations in your country (i.e., the average claim made by the plaintiff, regardless of the average resulting settlement).
(a) Less than €25,000
(b) Between €25,000 and €50,000
(c) Between €50,000 and €100,000

(d) More than €100,000
(e) I don't know

5. SKIP this question if above you have answered 'I don't know'. For a dispute of average value, as you estimated it above, what is the average cost in Euros to be split by the parties involved, including mediation and administrative fees (if applicable), but excluding lawyers' fees (where present)? Please indicate the total without spaces or commas (e.g., if your estimate is three-thousand Euro, please insert '3000'). _____

6. SKIP this question if above you have answered 'I don't know'. For the same dispute of average value, what is the average duration of a mediation (in days) from the moment the request for mediation is filed until the end of the process? For the purposes of data collection and computation, please indicate an exact number, rather than a range.

Part II- Assessment of the Existing Law in Your Country

Please note: The following questions are only for mediation in civil and commercial matters as covered by the Directive.

7. What is the extent of confidentiality of the entire mediation process?
(a) Assured with several exceptions
(b) Assured with few exceptions
(c) Guaranteed in all cases
(d) Other: Please specify_____

8. To what extent do the courts refer cases to mediation?
(a) The courts mention possible referral
(b) The courts encourage referral to mediation
(c) The courts are proactive in referring individual cases to mediation
(d) Other: Please specify_____

9. How are mediated agreements enforced if one of the parties does not comply with the agreed terms?
(a) Enforced only through extensive measures
(b) Enforced through a simple court procedure
(c) Immediately enforceable as an 'enforceable title' if the agreement is co-signed by the mediator or if both parties are assisted by legal counsel
(d) Other: Please specify_____

10. To what extent is there a mediator accreditation system?
(a) No accreditation system
(b) Accreditation based on market standards, which are defined as those standards implicitly approved by users and providers of mediation services
(c) Accreditation based on statutory standards, including state exams or other forms of licensing by a public authority
(d) Other: Please specify_____

11. To what extent are there economic incentives for mediation, such as restitution of court fees and/or tax credit?
(a) No incentives
(b) Modest incentives
(c) Strong incentives
(d) Other: Please specify_____

12. To what extent are there mandates for (preliminary) mediation informational sessions?
(a) No preliminary mediation session required
(b) Preliminary mediation session required for some cases
(c) Preliminary mediation session required most cases (more than 50% of all cases)
(d) Other: Please specify_____

13. To what extent are there mandates for parties to use mediation?
(a) No mandates
(b) Mandates applicable to few cases
(c) Mandates applicable frequently (more than 20% of all cases)
(d) Other: Please specify_____

14. To what extent does online mediation (i.e., mediation in which not all of the parties are physically present in the same place, e.g., Skype, telephone, chat rooms, etc.) exist?
(a) Not present
(b) Present with minimal use (less than 5% of total mediated cases)
(c) Present with extensive use
(d) Other: Please specify_____

15. To what extent do attorneys have a duty to inform parties of mediation as an alternative to litigation?
(a) No duty to inform
(b) Duty to inform with no specific sanction
(c) Duty to inform and specific sanctions for not informing client of mediation
(d) Other: Please specify_____

16. What is your assessment of the requirements to become a mediator in your country?
(a) Requirements are insufficient
(b) Requirements are acceptable
(c) Requirements are strong
(d) Other: Please specify_____

Part III

Part IIIA includes possible legislative solutions in the EU to promote the use of mediation. Part IIIB includes non-legislative proposals to encourage the use of mediation. Please rank the likely impact that the following solutions and proposals would have in your country. Even if your country has already implemented one of these measures, please rank it. Please use the following scale:

Extremely negative impact
Negative impact
No significant impact
Positive impact
Extremely positive impact

PLEASE NOTE: Some of the following measures may have both positive and negative effects. For example, making mediation mandatory would increase its use, but might provoke resistance from lawyers, or it may not be suitable for a particular legal culture. If you think that any of the measures could have negative effects, please include both the positive and negative aspects in giving a ranking for these proposals (for example, if you think that mandatory mediation might have an extremely Positive Impact on the number of mediations, but will also generate limited resistance, instead of ranking that measure with 'Extremely Positive Impact', you could rank it with 'Positive Impact'; if you think the

resistance will be significant, and thus reduce the Positive Impact more significantly, you could rank it with 'No significant impact' or even 'Negative impact').

IIIA Legislative Solutions

17. Require counsel to inform parties of mediation as an alternative to litigation and enforce penalties for lawyers who fail to do so
18. Require mandatory mediation information sessions before litigation proceedings
19. Make mediation mandatory in certain categories of cases
20. Make mediation mandatory in appropriate cases, with the ability to opt out at little or no cost during the first meeting
21. Make mediation mandatory for the 'stronger' party, defined as the party in the position associated with greater bargaining or economic power (e.g., banks and insurance companies)
22. Require 'stronger' parties who refuse to participate in mediation to provide a written reason for this refusal
23. Grant judges the power to order litigants to mediation
24. Require judges to explain why they did not refer a case to mediation
25. Assess the productivity of judges based in part on the number of cases referred to mediation
26. Impose sanctions for parties' refusals to attend mandatory mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case
27. Provide incentives for parties who chose to mediate, such as providing refunds of court fees or tax credits
28. Require a third-party review of the settlement focusing on violations of law, public policy or unconscionable stipulations
29. Require that legal assistance be made mandatory to parties in mediation
30. Require each Member State to designate a minimum number of cases to be mediated each year in order to achieve the objective of 'ensuring a balanced relationship between mediation and judicial proceedings' set forth in Article 1 of the 2008 Mediation Directive
31. Other: _____
32. Out of the list of legislative measures above, please identify the one solution that would have the single, most positive impact on the use of mediation in your country. _____

IIIB Non-Legislative Proposals

33. Develop and implement pilot projects to encourage the use of civil and commercial mediation
34. Develop an EU-wide 'settlement week' program, aimed at exposing the benefits of mediation to the general public
35. Designate national mediation champions or ambassadors, defined as public figures who support the use of mediation and educate others about its benefits
36. Create an EU-wide 'mediation pledge' for members of certain industries to pledge to use mediation as their dispute resolution process
37. Establish a mediation advocacy education program for law schools, business schools and other higher educational facilities
38. Create a uniform certification of mediators at the EU level
39. Create an EU Alternative Dispute Resolution Agency to promote mediation
40. Other _____
41. Out of the list of non-legislative measures above, please identify the one proposal that would have the single, most positive impact on the use of mediation in your country._____

Please remember, your responses will remain confidential.

42. Please indicate your name: _____

43. Please indicate your profession: _____
44. [OPTIONAL] Please indicate your email: _____

45. If you have any comments, we would be delighted to hear them. _____

We greatly value your time and your responses. This information will be very important as the European Union is currently reconsidering its mediation policy.

We highly encourage you to pass this link along to any colleagues who may be interested in providing such influential input. http://www.surveygizmo.com/s3/1382928/Questionnaire

ANNEX 4: COST AND TIME OF MEDIATION (NEW QUESTIONNAIRE)

Below is the additional questionnaire in full, entitled 'The Cost and Time of Mediation in the EU'.

Please estimate the time and the cost of a mediation process in your country, based on the following scenario adapted from the World Bank - Doing Business 2013.

The dispute: Seller sells goods to Buyer. Buyer alleges that the goods are of inadequate quality and refuses to pay. Seller, however, insists that the goods are of adequate quality. Moreover, because the goods were custom-made for Buyer, Seller cannot sell them to anyone else. Seller therefore demands full payment and threat to sues Buyer.

Value in dispute: The value of the dispute equals 200% of the economy's income per capita as the follow:

Country	Value of the dispute	Country	Value of the dispute
Austria	€ 72.632	Italy	€ 53.128
Belgium	€ 69.414	Latvia	€ 18.571
Bulgaria	€ 9.850	Lithuania	€ 18.466
Croatia	€ 20.827	Luxembourg	€ 117.489
Cyprus	€ 45.971	Malta	€ 31.621
Czech Republic	€ 27.850	Netherlands	€ 74.782
Denmark	€ 90.812	Poland	€ 18.767
Estonia	€ 22.857	Portugal	€ 31.955
Finland	€ 72.812	Romania	€ 11.895
France	€ 63.789	Slovakia	€ 9.128
Germany	€ 66.135	Slovenia	€ 35.504
Greece	€ 37.639	Spain	€ 46.602
Hungary	€ 19.143	Sweden	€ 80.045
Irland	€ 58.015	UK	€ 56.812

Mediation: Before going to court, the parties begin a mediation procedure within a most popular mediation provider of the capital city (in order to estimate time and cost, you may consult its website or call for information).

1) **Your country**: _____
2) **Time - Duration of a mediation process in days**. Please indicate the average number of calendar days of the mediation process from the day of the deposit of the mediation request to the day of its the end. Please note: usually it takes form 30 to 90 days. Do not insert 1 or 2 days that usually represent the duration of the mediation sessions. Nr. of days _____
3) **Cost - Mediation costs**. Please indicate the cost in Euro only for the Plaintiff charged by the mediation centre to administer this mediation including mediator fees and administration costs. Euro_____
4) **Cost – Attorney fees**. Please indicate the attorney fee in Euro charged by an average local firm (including value added tax and other applicable taxes) to assist the Plaintiff in this mediation. Euro_____
5) **Comments**_____
6) Name _____
7) Profession_____
8) Email _____

EUROPEAN PARLIAMENT

CATALOGUE: QA-02-14-004-EN-C

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Role

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

Policy Areas

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

Documents

Visit the European Parliament website: **http://www.europarl.europa.eu/studies**

PHOTO CREDIT: iStock International Inc.

ISBN: 978-92-823-5269-4
DOI: 10.2861/48823

Publications Office