European Commission

Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive'

Final Report
October – *2013*

EUROPEAN COMMISSION

Directorate-General for Justice
Directorate A – Civil Justice
Unit A1 – Civil justice policy

Contact: Head of Unit

E-mail: just-civil-coop@ec.europa.eu

European Commission
B-1049 Brussels

EUROPEAN COMMISSION

Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive'

Directorate-General for Justice

2014

EUR 825 EN

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*)**:**

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Luxembourg: Publications Office of the European Union, 2014

ISBN: 978-92-79-40742-0
Doi: 10.2838/4122

Table of contents

ABBREVIATIONS USED

ADR	Alternative Dispute Resolution
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LV	Latvia
LU	Luxembourg
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SI	Slovenia
SK	Slovakia
SE	Sweden
UK	United Kingdom

EXECUTIVE SUMMARY

Effective and efficient justice systems are of fundamental importance to the proper functioning of the internal market, to economic stability, to investment and to competitiveness. They foster confidence in commercial transactions, facilitate the resolution of disputes and help ensure that the necessary trust exists to encourage economic activity.

In 2008, at the onset of the global financial crisis and two years before the EU adopted its 10-year strategy on growth (Europe 2020), the European Parliament and European Council adopted the Mediation Directive 2008/52/EC. It aims to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. Considering the importance of effective and efficient justice systems, ultimately, the objectives of the Directive are to simplify and improve access to justice and to contribute to the proper functioning of the internal market.

Vice-President Reding recently stated that 'justice policies can help to reinforce stability, jobs and growth in Europe'.

Therefore, the European Commission has and continues to promote mediation and requested for this study to evaluate the contribution of the Directive to the EU Justice for Growth agenda.

This study is based on desk research and stakeholder consultation undertaken at the EU level (see Annex I and II to this report). In addition, 28 national reporters supplemented this work through national research and stakeholder consultation. Up to five national stakeholders per Member State were consulted including Ministries of Justice, mediators, trainers of mediators, users of mediation and judges. Wherever possible, this report provides examples based on quantitative data to support its statements. This evaluation of the implementation of the Directive is based on a number of fixed criteria (relevance, consistency and complementarity, effectiveness, efficiency, utility) as set by the Secretariat General of the European Commission.

The Mediation Directive

The Directive limits its scope of application to cross-border civil and commercial disputes. It contains few compulsory rules. Namely, it requires Member States to ensure that:

- Mediation agreements are enforceable;
- Mediation does not affect limitation periods to access subsequent proceedings or arbitration; and
- Confidentiality of the mediation process is protected.

No specific requirements for the functioning of mediation processes are set by the Directive. Thus, there are significant differences in the way national laws regulate mediation. Whilst this creates a variable situation, according to stakeholders, the flexibility of the Directive allowed mediation processes to be adapted to the national situations.

The Directive also includes a number of provisions encouraging Member States to take further actions to promote mediation such as:

- Applying the Directive's provisions to domestic disputes;
- Encouraging the use of codes of conduct and quality control mechanisms;

- Organising the training of mediators;
- Allowing judges to refer parties to mediation; and
- Setting up information sessions on mediation for parties to a dispute and encouraging the spreading of information on mediation to the general public.

Member States had to transpose the Directive into their national legislation by 21 May 2011.

The evaluation of the implementation of the Mediation Directive

The transposition context

At the time of this study (July 2012 - June 2013), all Member States have notified measures implementing the Mediation Directive to the Commission. Denmark is not bound by the Directive as it has certain opt-outs from the Lisbon Treaty, inter alia, in the field of justice. The mediation systems of some Member States are still subject to review and change; as the Directive only became applicable in 2011 some national legislators are still in the process of introducing new measures that will further enhance their application. [1]

The extent of the Directive's impact on Member States varies according to the pre-existing level of their national mediation systems (see map on systems in place before the transposition):

- Fifteen Member States already had a comprehensive mediation system in place prior to the adoption of the Directive. In these cases, the Directive has brought limited or no changes to their system.

- Four Member States either had scattered rules regulating mediation or mediation in the private sector was based on self-regulation. In these cases, the transposition of the Directive triggered the adoption of substantial changes to the existing mediation framework.

- Nine Member States adopted mediation systems for the first time due to the transposition of the Directive. However, these new comprehensive mediation systems are not all operational yet.

The quality of the transposition

Overall, the national legal frameworks in place to regulate the mediation systems do not pose important issues of conformity with the Mediation Directive. Nonetheless, some specific remarks with respect to the way national legislators have transposed the Directive's provisions on its scope, the enforceability of mediation agreements and the confidentiality of mediation can be made.

The Directive applies to civil and commercial matters, including family and labour disputes. However, Member States have taken a range of approaches with respect to the proceedings covered. Some have not included family and labour matters specifically within the remit of their transposition since family and labour disputes were subject to mediation or other alternative dispute resolution systems under other legal instruments which where already in place.

Furthermore, all Member States provide for the enforceability of mediation agreements, even though in some Member States the consent of all parties to the dispute is not necessary for the mediation agreement to be made enforceable. Some Member States do not provide exceptions for enforceability. Finally, the confidentiality of mediation is protected in all Member States, even though in some Member States the duty of confidentiality applies only to mediators or confidentiality is not applicable

[1] For example, Latvia is currently in the process of adopting new legislation aiming to complement the already existing mediation system and enhance compliance with the Directive.

to court mediation. It is noted that some Member States have adopted stricter rules on confidentiality than those of the Directive, including through the imposition of sanctions.

The quality of the implementation

The implementation of the Mediation Directive has had a significant impact on the legislation of many Member States. In Member States that did not have a mediation system in place, the Directive triggered the establishment of appropriate legislative frameworks regulating mediation. In Member States that either had only scattered rules regulating mediation or where mediation in the private sector was based on self-regulation, the transposition of the Directive improved the existing rules. In fifteen Member States, which already had a comprehensive mediation system in place prior to adoption of the Directive, its implementation only brought limited or no changes to their system. Certain difficulties in the implementation of the Directive have been identified concerning the functioning of the national mediation systems in practice. These difficulties are mainly related to the adversarial tradition prevailing in many Member States, the low level of awareness of mediation and the functioning of the quality control mechanisms.

1. *Relevance, Consistency and Complementarity*

The objectives of the Mediation Directive are pertinent to the needs of stakeholders and consistent with the objectives of further EU policies. Stakeholders agreed that this alternative dispute resolution mechanism has the potential to contribute to growth. No problems linked to gaps or overlaps amongst instruments for alternative dispute resolution were identified.

The Mediation Directive relates only to cross-border disputes. Thus, Member States were not required to make amendments to their systems with respect to domestic cases. Despite this limitation, almost all Member States opted to extend the Directive's requirements to domestic cases (see map on scope). This is an important positive development as stakeholders also reported a very limited number or no cross-border mediation cases and, therefore, they clarified that the contribution of mediation to growth is greater where the transposition of the Directive covers also domestic cases.

2. *Effectiveness*

Where the transposition of the Mediation Directive triggered the adoption of substantial changes to the existing mediation framework or introduced a comprehensive mediation system, a step forward in promoting access to alternative dispute resolution and achieving a balanced relationship between mediation and judicial proceedings has been made.

However, as mentioned above, certain difficulties which hinder the effectiveness of the Directive have been identified in its practical implementation. In particular, the adversarial tradition prevailing in many Member States (rather than the compromise approach which characterises mediation) further hinders the smooth application of the Mediation Directive.

3. *Efficiency*

3.1 Costs and financial aspects of mediation

Many Member States regulated the financial aspects of mediation by: setting thresholds for fees; establishing financial incentives (legal aid, free mediation services, refund of stamp duties and legal costs); and, introducing sanctions. These incentives and sanctions do not affect the right of access to justice but their efficiency varies according to the national contexts as confirmed by stakeholders.

None of the Ministries interviewed reported significant costs for the transposition of the Mediation Directive. Moreover, in most Member States the costs of mediation procedures are moderate and in almost all Member States mediation procedures start and are concluded faster than judicial procedures, even when national legislation does not put a limit on the duration of the mediation process. Stakeholders highlighted this as an important advantage of mediation.

3.2 Information about mediation to parties to a dispute and to the general public

Building upon the actions suggested by the Directive, all Member States foresee the possibility for courts to invite the parties to use mediation, with twelve Member States introducing the possibility for courts to invite parties to information sessions on mediation. In some Member States participation to such information sessions is obligatory. Some Member States also require lawyers to inform their clients of the possibility to use mediation for dispute resolution.

Less than half of the Member States have introduced an obligation in their national laws to spread information about mediation. Member States that set up new mediation systems took a variety of measures to inform citizens and businesses about mediation (e.g. online information on the websites of competent national bodies; public conferences; public promotion campaigns, TV spots; radio broadcasts; posters, etc.).

Nonetheless, the low level of awareness regarding mediation and the lack of information available to potential parties negatively affect the efficiency of mediation services as confirmed by stakeholders in eighteen Member States. The lack of information and cooperation of legal professionals constitutes an additional obstacle to the potential widespread use of mediation in at least ten Member States.

3.3 The quality of mediation and training of mediators

According to the broad definition in the Directive, a mediator can be any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

In line with the Directive's encouragement, twenty Member States introduced binding quality control mechanisms. Among those, most have set up obligatory accreditation procedures for mediators and mediation organisations and also run national registries for mediators.

The adoption of obligatory codes of conduct at national level is perceived by stakeholders as an important tool to ensure the quality of mediation. Twenty-one Member States require the development of and adherence to codes of conduct whereas in other Member States providers of mediation set their own codes of ethics. The European Code of Conduct for Mediators is used by stakeholders and has inspired national and sectorial codes. Organisations that have decided to commit to asking mediators acting under their auspices to respect the European Code of Conduct for Mediators may inform the Commission which will then include them on a list which is regularly updated and is available online for information purposes.

Moreover, taking inspiration from the Directive, nineteen Member States encourage of training or regulate it in their national legislation.

Nevertheless, in Member States with limited or no quality control mechanisms, stakeholders raised concerns about the quality of mediation and considered that the absence of such mechanisms prevents its widespread use.

4. Utility

Overall, it could be concluded that the Directive has provided EU added value by raising awareness

amongst national legislators on the advantages of mediation, by introducing mediation systems or by triggering the extension of existing mediation systems. These advantages have been brought without any significant costs on national budgets. Most stakeholders agree that these positive developments would have not been possible without EU intervention.

Recommendations to make the best use of mediation as an alternative dispute resolution system

In light of the above key difficulties and building upon the positive experiences, the following recommendations have been put forward in order to enhance the use of mediation based on stakeholders' views shared throughout the EU:

1) The European Commission could recommend and encourage Member States to gather and exchange data to draw lessons and evaluate the effectiveness of the Mediation Directive and its national transposing measures. The sharing of best practices and the identification of difficulties would allow mediation to contribute to the achievement of the goals of the EU internal market, the Europe 2020 Strategy for Growth and the Justice for Growth agenda.
2) EU financing could be crucial to helping national justice administrations to spread information about mediation and its advantages to citizens and businesses throughout Europe. The upcoming Civil Justice Programme 2014-2020 could be the main instrument for this action. The European Commission could also support and coordinate Member States' efforts in planning and carrying out awareness-raising activities by favouring the exchange of experiences and best practices and producing information material that could be then translated and tailored to each national context by the Member States.
3) Member States should consider:
   - Targeting information measures about mediation at legal professionals;
   - The feasibility of introducing an obligation to inform potential parties to a dispute about mediation and its advantages;
   - The feasibility of introducing an obligatory preliminary procedure in court where it would be assessed whether the dispute could be better dealt with in the context of mediation rather than judicial proceedings and refer the parties to it ('screening agency').
4) Member States could consider introducing an obligation to adopt codes of conduct for all mediation organisations or, when accreditation measures exist, to make subscription to codes of conduct obligatory. The European Code of Conduct for Mediators could be used as inspiration for the drafting of such codes where they do not exist.
5) The European Commission could be a key actor for the exchange of experiences and best practices among training organisations while taking into account the different needs and national contexts. More specifically, it could:
   - Organise seminars to identify solutions for efficient training organisation and possibly minimum common voluntary standards;
   - Support the drafting of a handbook to be used throughout Europe.

RÉSUMÉ

Des systèmes judiciaires efficients et efficaces sont indispensables au bon fonctionnement du marché intérieur, à la stabilité économique, à l'investissement et à la compétitivité. Ils renforcent la sécurité dans les relations commerciales, facilitent la résolution des conflits, et assurent la confiance nécessaire pour le développement de l'activité économique.

En 2008, lors du déclenchement de la crise financière mondiale et deux ans avant que l'UE n'adopte sa stratégie décennale pour la croissance (Europe 2020), le Parlement européen et le Conseil adoptaient la Directive sur la Médiation (Directive 2008/52/EC). Son objectif est de promouvoir le règlement à l'amiable des litiges en encourageant le recours à la médiation et en assurant un certain équilibre entre cette procédure et les recours judiciaires. Étant donné l'importance de se doter de systèmes judiciaires performants, l'objectif de la Directive est donc, *in fine*, de simplifier et d'améliorer l'accès à la justice et de contribuer ainsi au bon fonctionnement du marché intérieur.

La Vice-présidente de la Commission européenne, Viviane Reding a récemment fait observer que « les systèmes judiciaires peuvent aider à renforcer la stabilité économique, le marché du travail et la croissance en Europe »

La Commission européenne promeut activement la médiation et elle a requis, dans le cadre de cette étude, une évaluation des apports de la Directive dans le contexte du programme européen de 'Justice au service de la Croissance'.

Cette étude a été élaborée sur la base de recherches documentées et de consultations avec les acteurs concernés au niveau européen (voir Annexes I et II de ce rapport). En outre, 28 rapporteurs nationaux ont contribué à ce travail par le biais de recherches et de consultations avec les parties concernées au niveau national.

Jusqu'à cinq entités par État membre ont été consultées, dont les Ministères de la Justice, ainsi que des médiateurs, formateurs de médiateurs, parties à des médiations et des juges. Dans la mesure du possible, ce rapport fournit des exemples basés sur des données quantitatives afin d'illustrer les idées présentées. Cette évaluation de la mise en œuvre de la Directive s'est faite sur la base d'indicateurs précis (pertinence, cohérence et complémentarité, efficacité, efficiance et utilité) définis par le Secrétariat Général de la Commission européenne.

La Directive Médiation

Le champ d'application de la Directive se limite aux litiges civils et commerciaux transfrontaliers. Elle comporte quelques règles obligatoires. Plus particulièrement, elle exige des Etats membres que:

- les accords passés dans le cadre d'une procédure de médiation soient exécutoires;
- la médiation n'ait pas de répercussions sur les délais de prescription en matière de procédure judiciaire ou d'arbitrage;
- la confidentialité de la procédure de médiation soit assurée.

La Directive ne comprend pas d'exigences particulières quant à la mise en œuvre du processus de médiation. De ce fait, la façon dont le droit national encadre leur fonctionnement varie d'un Etat membre à l'autre. Si cela crée une diversité de situations, selon les parties intéressées, la flexibilité qu'offre la Directive permet aux procédures de médiation d'être adaptées aux spécificités nationales.

La Directive prévoit également un certain nombre de dispositions encourageant les États membres à prendre des actions supplémentaires pour promouvoir la médiation, telles que:

- l'application de la Directive aux litiges internes;
- l'incitation à l'utilisation de codes de conduite et de mécanismes de contrôle de qualité;
- l'organisation de formation pour les médiateurs;
- l'autorisation pour les juges de renvoyer les parties à la médiation; et
- la mise en place de réunions d'information sur la médiation pour les parties ainsi que la dissémination d'information sur la médiation au grand public.

Les États membres devaient transposer la Directive en droit interne au 21 Mai 2011.

Evaluation de la mise en œuvre de la Directive Médiation

Contexte de la transposition

Au moment de la réalisation de cette étude (juillet 2012 - juin 2013), tous les États membres avaient notifié leurs mesures de transposition auprès de la Commission. En raison des dérogations au Traité de Lisbonne dont bénéficie le Danemark, dans le domaine – entre autres – de la justice, ce pays n'est pas lié par la Directive. Dans certains États membres, les procédures de médiation sont en cours d'examen ou de modification. La Directive n'ayant force obligatoire que depuis 2011, certains législateurs nationaux travaillent actuellement à l'introduction de nouvelles mesures qui amélioreront son application.[2]

L'étendue de l'impact de la Directive sur les États membres varie en fonction de l'importance accordée précédemment à ce système dans le droit national (voir la carte des systèmes en place avant la transposition de la Directive):

- Quinze États membres disposaient déjà d'un système établi de médiation avant l'adoption de la Directive. Dans ce cas, la Directive n'a que légèrement modifié leur système si ce n'est pas du tout.

- Pour quatre États membres, les règles encadrant la médiation étaient dispersées, voire soumises à l'autorégulation dans le secteur privé. Dans de tels cas, la transposition de la Directive en droit interne a déclenché l'adoption de changements substantiels au cadre déjà existant.

- Neuf États membres ont introduit le système de médiation pour la première fois dans leur droit interne afin de transposer la Directive. Cependant, ces nouveaux systèmes de médiation ne sont pas encore tous opérationnels.

Qualité de la transposition

De manière générale, les cadres juridiques encadrant la médiation au niveau national ne posent pas de problèmes majeurs de conformité avec la Directive. Néanmoins, certaines remarques peuvent être faites quant à la façon dont le législateur national a transposé les dispositions de la Directive relatives au champ d'application, au caractère exécutoire des accords issus de la médiation, et à la confidentialité de la médiation.

[2] En Lettonie par exemple, la nouvelle législation visant à compléter le système de médiation déjà en place et à en améliorer la conformité avec la Directive est actuellement en cours d'adoption.

La Directive s'applique aux litiges civils et commerciaux, y compris les affaires familiales et les conflits du travail. Cependant, les États membres ont adopté différentes approches concernant les cas qui peuvent être couverts. Certains n'ont pas spécialement intégré les affaires familiales ni les conflits du travail aux textes de transposition car ces affaires faisaient l'objet de procédures de médiation ou d'un autre mode alternatif de règlement des conflits déjà existant en droit interne.

De plus, tous les États membres assurent l'exécution des accords issus de la médiation, même si dans certains États il n'est pas nécessaire d'obtenir le consentement de toutes les parties à l'affaire pour que celle-ci revête une force exécutoire. Certains États membres ne prévoient aucune dérogation à l'exécution de ces accords. Enfin, la confidentialité de la médiation est préservée dans tous les États membres même s'il est des États dans lesquels le devoir de confidentialité ne s'applique qu'aux médiateurs, ou aux médiations extrajudiciaires. Il est à noter que certains États membres ont adopté des règles encore plus strictes que celles prescrites par la Directive en matière de confidentialité, y compris la mise en place de sanctions en cas de violation.

Qualité de la mise en œuvre

La mise en œuvre de la Directive Médiation a eu d'importantes répercussions sur les systèmes législatifs de nombreux États membres. Dans les États membres qui ne disposaient pas d'un système de médiation avant l'adoption de la Directive, elle a entraîné l'adoption de cadres juridiques propres à la médiation. Dans les États membres dans lesquels les règles encadrant la médiation étaient dispersées, voire soumises à l'autorégulation dans le secteur privé la transposition de la Directive a contribué à l'amélioration des règles existantes. Dans les quinze États membres qui disposaient déjà d'un système de médiation avant l'adoption de la Directive, sa mise en œuvre n'a que légèrement modifié leur système si ce n'est pas du tout. Certaines difficultés de mise en œuvre de la Directive ont été identifiées eu égard au fonctionnement des systèmes de médiation au niveau national. Ces difficultés sont principalement liées au traditionnel principe du contradictoire qui prévaut dans de nombreux États membres, au faible niveau d'information sur la médiation ainsi qu'aux défauts des mécanismes de contrôle de qualité de la procédure.

1. *Pertinence, Cohérence et Complémentarité*

Les objectifs de la Directive Médiation répondent aux besoins des parties prenantes et ils sont conformes aux objectifs d'autres politiques de l'Union. Les acteurs concernés ont tous reconnu le potentiel qu'ont ces modes alternatifs de résolution des conflits d'influer positivement sur la croissance. Aucun vide juridique ni aucune interférence avec d'autres modes extrajudiciaires de résolution des conflits n'ont été observés.

Les dispositions de la Directive Médiation ne s'appliquent qu'aux litiges transfrontaliers. Ainsi, les Etats membres n'ont pas eu à modifier la législation applicable aux conflits internes, même si, en dépit de cette limite d'application, les États ont pour la plupart choisi d'étendre les obligations de la Directive aux situations internes (voir la carte relative au champ d'application). C'est une avancée remarquable d'autant plus que, d'après les acteurs concernés, les cas de médiation transfrontaliers sont rares voire inexistants, ainsi l'impact positif de la médiation sur la croissance est encore plus important lorsque les dispositions de transposition de la Directive s'appliquent aux litiges internes.

2. *Efficacité*

Là où la transposition de la Directive sur la Médiation a provoqué l'adoption de changements substantiels du cadre déjà existant en matière de médiation, ou a introduit tout un système de médiation, une étape a été franchie dans la promotion de l'accès à des modes alternatifs de résolution des conflits et vers un meilleur équilibre entre médiation et procédure judiciaire.

Cependant, comme il a été dit précédemment, certaines difficultés affectant l'efficacité de la Directive ont été identifiées lors de sa mise en œuvre. En particulier, le principe du contradictoire qui prévaut dans beaucoup d'États membres (au détriment d'une approche de conciliation telle que la médiation) affecte un peu plus encore la mise en œuvre de la Directive.

3. Efficience

3.1 Coûts et aspects financiers de la médiation

Beaucoup d'États membres ont réglementé les aspects financiers de la médiation en définissant des seuils d'honoraires, en établissant des incitations financières (aide judiciaire, services de médiation gratuits, remboursement des frais de timbres et de justice), et en introduisant des sanctions. Ces incitations et sanctions n'affectent pas le droit d'accès à la justice mais leur efficacité varie en fonction du contexte national comme l'ont confirmé les acteurs concernés.

Aucun des Ministères interrogés n'a fait part de coûts importants concernant la transposition de la Directive. De plus, dans la plupart des États membres, les coûts des procédures de médiation sont modérés et dans quasiment tous, les procédures de médiation sont enclenchées et clôturées plus rapidement que les procédures judiciaires, même là où le droit national n'impose pas de durée limitée à la procédure de médiation. Les parties prenantes ont identifié cet aspect comme un avantage de la médiation.

3.2 Information des parties au procès et du public relative à la médiation

Sur la base des actions suggérées par la Directive, tous les États membres prévoient la possibilité pour les tribunaux d'inviter les parties à un litige à recourir à la médiation et douze d'entre eux ont également introduit la possibilité pour les tribunaux d'inviter les parties à des réunions d'information sur la médiation. Dans certains États membres, la participation à ces réunions est obligatoire. D'autres États membres exigent également des avocats qu'ils informent leurs clients quant à la possibilité de recourir à la médiation comme mode de règlement de conflit.

Moins de la moitié des États membres ont introduit dans leur droit national une obligation de diffusion de l'information en matière de médiation. Les États membres ayant mis en place un nouveau système de médiation ont pris une série de mesures visant à informer les citoyens et les entreprises sur la médiation (information en ligne sur les sites des organismes nationaux compétents, conférences publiques, campagnes de promotion, publicité télévisuelle, diffusion sur les radios, affiches, etc.)

Néanmoins, le faible degré de connaissance de la médiation et le manque d'information disponible pour les parties éventuelles affectent de manière négative l'efficacité des services de médiation, comme l'ont confirmé les parties prenantes dans dix-huit États membres. Le manque d'information et de coopération de la part des professionnels du droit constitue un obstacle supplémentaire à une utilisation plus répandue de la médiation dans dix États membres au moins.

3.3 La qualité de la médiation et la formation des médiateurs

Selon la définition très vaste donnée par la Directive, un médiateur peut être tout tiers sollicité pour mener une médiation avec efficacité, impartialité et compétence, quelle que soit l'appellation ou la profession de ce tiers dans l'État membre concerné et quelle que soit la façon dont il a été nommé pour mener ladite médiation ou dont il a été chargé de la mener.

En réponse aux incitations données par la Directive, vingt États membres ont introduit des mécanismes de contrôle de qualité obligatoire. Parmi eux, la plupart ont mis en place des procédures

d'accréditation obligatoires pour les médiateurs et des organisations de médiation et tiennent également un registre national des médiateurs.

L'adoption de codes de conduite obligatoires au niveau national est perçue comme un outil important par les acteurs concernés afin d'assurer la qualité de la médiation. Vingt-et-un États membres exigent la mise en place et le respect de ces codes de conduite, tandis que, dans d'autres Etats membres, les organisations offrant des services de médiation adoptent leur propre code éthique. Le Code de Conduite Européen pour les Médiateurs est utilisé par les parties prenantes et a inspiré les codes nationaux et sectoriels. Les organisations qui se sont engagées à demander aux médiateurs intervenant dans leur cadre de suivre le Code de conduite européen peuvent en informer la Commission qui les inscrira alors sur une liste régulièrement mise a jour et disponible en ligne à des fins d'information.

De plus, s'inspirant de la Directive, dix-neuf États membres encouragent la formation ou la règlemente par le biais de leur législation nationale.

Néanmoins, dans les États membres où les mécanismes de contrôle de la qualité de la procédure sont limités voire inexistants, les parties concernées ont fait part de leur inquiétude quant à la qualité de la médiation et considèrent que l'absence de tels mécanismes constitue un frein à une utilisation plus répandue de la médiation.

4. Utilité

De manière générale, il peut être conclu que la Directive a apporté une valeur ajoutée européenne en attirant l'attention des législateurs nationaux sur les avantages de la médiation, en introduisant des systèmes de médiation ou en provoquant l'expansion de systèmes de médiation déjà existants. Ces avantages n'ont pas grevé les budgets nationaux de coûts importants. La plupart des parties concernées reconnaissent que ces progrès n'auraient pas été possibles sans l'intervention de l'Union européenne.

Recommandations pour une utilisation optimale de la médiation comme mode alternatif de règlement des conflits

A la lumière des difficultés énoncées ci-dessus et sur la base des expériences positives qui ont été collectées, les recommandations suivantes ont été mises en avant afin de promouvoir le recours à la médiation, sur la base des opinions partagées des parties prenantes au sein de l'Union européenne :

1) La Commission européenne pourrait recommander aux États membres et les encourager à rassembler et à échanger des données permettant de tirer les leçons et d'évaluer l'efficacité de la Directive sur la médiation et ses mesures nationales de transposition. Le partage de bonnes pratiques et l'identification des difficultés permettraient à la médiation de contribuer à la réalisation des objectifs du marché intérieur, la Stratégie Europe 2020 pour la croissance et le programme de justice pour la croissance.

2) Le financement européen pourrait être crucial afin d'aider les administrations nationales de justice à diffuser l'information relative à la médiation et ses avantages pour les citoyens et entreprises à travers l'Europe. Le Programme Justice Civile à venir (2014 – 2020) pourrait être l'instrument principal de cette action. La Commission européenne pourrait également soutenir et coordonner les efforts des États membres pour la planification et la mise en place des campagnes de promotion en favorisant l'échange d'expérience et de bonnes pratiques et en produisant du matériel d'information qui pourrait ensuite être traduit et adapté à chaque contexte national par les États membres.

3) Les États Membres devraient envisager:

- de cibler leur démarches d'information concernant la médiation sur les professions juridiques;

- la faisabilité d'introduire l'obligation d'informer les parties éventuelles à un litige sur le recours à la médiation et ses avantages;

- la faisabilité d'introduire l'obligation d'une procédure liminaire auprès des juridictions au cours de laquelle pourrait être apprécié le caractère avantageux ou non d'une procédure de médiation par rapport à une procédure judiciaire pour un litige donné et les parties orientées vers la médiation ('agence de sélection').

4) Les États membres pourraient envisager de rendre obligatoire l'adoption de codes de conduite par les organismes de médiation ou, dans les cas où des mesures d'accréditation existent, de rendre la souscription à ces codes obligatoire. Le Code de Conduite Européen pour les Médiateurs pourrait être une source d'inspiration pour la rédaction de ces codes là où ils n'existent pas.

5) La Commission européenne pourrait être un acteur clé dans l'échange d'expériences et de bonnes pratiques au sein des centres de formation tout en prenant en compte les différents besoins et contextes nationaux. Plus spécifiquement, elle pourrait:

   - organiser des séminaires afin d'identifier des solutions pour l'organisation de formations efficaces et éventuellement des standards minimums volontaires communs;

   - soutenir la rédaction d'un guide qui pourrait être utilisé à travers l'Europe.

ZUSAMMENFASSUNG

Ein effektives und effizientes Justizsystem ist von grundlegender Bedeutung für das reibungslose Funktionieren des Binnenmarktes, für wirtschaftliche Stabilität, Investitionen und für die Wettbewerbsfähigkeit. Sie fördert das für die Wirtschaftstätigkeit notwendige Vertrauen in den Geschäftsverkehr und erleichtert die Beilegung von Streitigkeiten.

Im Jahr 2008, zu Beginn der globalen Finanzkrise und zwei Jahre bevor die EU ihre 10-Jahres-Strategie für Wachstum (Europa 2020) verabschiedet hat, haben das Europäische Parlament und der Europäische Rat die Mediationsrichtlinie 2008/52/EG verabschiedet. Sie zielt auf die gütliche Beilegung von Streitigkeiten ab, indem sie die Anwendung von Mediation und ein ausgewogenes Verhältnis zwischen Mediation und Gerichtsverfahren fördert. Aufgrund der bedeutenden Rolle eines effektiven und effizienten Justizsystems bezweckt die Richtlinie letztendlich eine Vereinfachung und Verbesserung des Zugangs zur Judikative und soll dadurch zum reibungslosen Funktionieren des Binnenmarkts beitragen.

Vizepräsidentin Reding erklärte kürzlich, dass „Justizpolitik zur Förderung von Stabilität, Arbeitsplätzen und Wachstum in Europa beitragen kann“.

Daher förderte und fördert die Europäische Kommission Mediation und gab diese Studie zur Bewertung des Beitrags der Richtlinie zur EU-Agenda Recht für Wachstum in Auftrag..

Diese Studie basiert auf Sekundäranalysen und der Konsultation der Interessengruppen auf EU-Ebene (siehe Anhang I und II dieses Berichts). Darüber hinaus haben 28 nationale Berichterstatter diese Arbeit durch nationale Recherche und Konsultation von beteiligten Kreisen ergänzt. Bis zu fünf nationale Akteure pro Mitgliedstaat wurden befragt, einschließlich der Ministerien für Justiz, Mediatoren, Ausbilder von Mediatoren, Nutzer von Mediation und Richter. Wo immer möglich, belegt dieser Bericht seine Aussagen mit quantitativen Daten. Die Umsetzung der Richtlinie wurde anhand einer Reihe von Kriterien(Relevanz, Kohärenz und Komplementarität, Wirksamkeit, Effizienz, Nutzen) bewertet, die vom Generalsekretariat der Europäischen Kommission festgelegt wurden.

Die Mediationsrichtlinie

Die Mediationsrichtlinie beschränkt ihren Anwendungsbereich auf grenzüberschreitende Zivil- und Handelssachen. Sie enthält wenige verbindliche Vorschriften. Diese verpflichten die Mitgliedstaaten sicherzustellen, dass:

- Mediationsvereinbarungen vollstreckbar sind;
- Mediation den beteiligten Parteien den Zugang zu einem Gerichts-oder Schiedsverfahren durch Auslaufen der Verjährungsfrist während des Mediationsverfahrens nicht versperrt.
- die Vertraulichkeit des Mediationsverfahrens geschützt ist.

Die Richtlinie enthält keine besonderen Anforderungen an den Ablauf der Mediationsverfahren. Daher wird Mediation in nationalen Gesetzen auf unterschiedliche Art und Weise geregelt. Während hierdurch unterschiedliche Ausgangslagen entstehen, hat diese Flexibilität der Richtlinie nach Ansicht der Befragten den Vorteil, dass die Mediationsverfahren an die nationalen Gegebenheiten angepasst werden können.

Die Richtlinie enthält auch eine Reihe von Bestimmungen, die die Mitgliedstaaten dazu veranlassen sollen, die Anwendung der Mediation mit weiteren Maßnahmen zu fördern, wie zum Beispiel:

- die Bestimmungen der Richtlinie auf inländische Rechtstreitigkeiten anzuwenden;
- die Nutzung von Verhaltenskodizes und Verfahren zur Qualitätskontrolle zu fördern;
- Ausbildung von Mediatoren zu organisieren;
- Es den Richtern zu ermöglichen, die Parteien auf die Mediation zu verweisen und;
- Informationsveranstaltungen über Mediation für die Parteien eines Rechtsstreits abzuhalten und die Informationen über Mediation auch unter der breiten Öffentlichkeit zu verbreiten.

Die Mitgliedstaaten mussten die Richtlinie bis zum 21. Mai 2011 in ihre nationale Gesetzgebung umsetzen.

Die Bewertung der Umsetzung der Mediationsrichtlinie

Der Umsetzungskontext

Zum Zeitpunkt dieser Studie (Juli 2012 - Juni 2013) hatten alle Mitgliedstaaten der Kommission Maßnahmen zur Umsetzung der Mediationsrichtlinie notifiziert. Dänemark wird von der Richtlinie nicht verpflichtet, da es bestimmte Befreiungen von dem Vertrag von Lissabon in Anspruch nimmt unter anderem im Bereich Justiz. Die Mediationssysteme einiger Mitgliedstaaten werden noch überprüft und geändert. Da die Richtlinie erst seit dem Jahr 2011 anwendbar war, sind einige nationale Gesetzgeber noch dabei, neue Maßnahmen zur weiteren Verbesserung ihrer Anwendung auszuarbeiten.

Das Ausmaß der Auswirkungen der Richtlinie auf die Mitgliedstaaten hängt von dem Niveau ihrer bereits bestehenden nationalen Mediationssystemen ab (siehe Übersicht über die vor der Umsetzung bestehenden Mediationssysteme):

- In fünfzehn Mitgliedstaaten war bereits vor der Verabschiedung der Richtlinie ein umfassendes Mediationssystem in Kraft. In diesen Fällen hat die Richtlinie nur eine begrenzte oder gar keine Änderung an dem Mediationssystem zur Folge gehabt;

- Vier Mitgliedstaaten hatten entweder verstreute Regeln zur Mediation oder die Mediation in der Privatwirtschaft beruhte auf Selbstregulierung. In diesen Fällen hatte die Umsetzung der Richtlinie erhebliche Änderungen an den bestehenden Mediationssystemen zur Folge;

- Neun Mitgliedstaaten haben aufgrund der Umsetzung der Richtlinie zum ersten Mal ein Mediationssystem etabliert. Allerdings sind diese neuen, umfassenden Systeme noch nicht alle funktionsfähig.

Die Qualität der Umsetzung in nationales Recht

Insgesamt gibt es in den nun bestehenden nationalen Rechtsakten keine signifikanten Konformitätsprobleme in Bezug auf die Mediationsrichtlinie. Dennoch sollte auf einige Besonderheiten in Bezug auf die Art und Weise, mit der nationale Gesetzgeber die Bestimmungen der Richtlinie umgesetzt haben, hingewiesen werden, insbesondere bezüglich des Anwendungsbereichs, der Vollstreckbarkeit der Mediationsvereinbarungen und der Vertraulichkeit der Mediation.

Die Richtlinie gilt für Zivil- und Handelssachen, einschließlich familien- und arbeitsrechtlichen Auseinandersetzungen. Es gibt jedoch unter den Mitgliedstaaten verschiedene Ansätze in Bezug auf die erfassten Verfahren. Manche haben familien- und arbeitsrechtliche Angelegenheiten nicht in den Anwendungsbereich der Gesetzgebung, die die Richtlinie umsetzt, aufgenommen, da diese Angelegenheiten bereits nach Rechtsakten, die schon in Kraft waren, Gegenstand von Mediation oder anderer alternativer Streitbeilegungsverfahren waren.

Darüber hinaus sehen alle Mitgliedstaaten die Vollstreckbarkeit der Mediationsvereinbarungen vor, wenn auch in einigen Mitgliedstaaten die Zustimmung aller Parteien des Rechtsstreits keine Voraussetzung für die Vollstreckbarkeit der Vereinbarung ist. Einige Mitgliedstaaten sehen keine Ausnahmen für die Vollstreckbarkeit vor.

Die Vertraulichkeit der Mediation wird in allen Mitgliedstaaten geschützt, auch wenn in einigen Mitgliedstaaten die Pflicht zur Geheimhaltung nur für Mediatoren oder für außergerichtliche Mediation gilt. Es wird darauf hingewiesen, dass einige Mitgliedstaaten - unter anderem durch die Verhängung von Sanktionen - auch strengere Vorschriften im Hinblick auf die Vertraulichkeit verabschiedet haben als von der Richtlinie vorgesehen.

Die Qualität der Umsetzung in der Praxis

Die Umsetzung der Mediationsrichtlinie hatte eine erhebliche Auswirkung auf die Rechtssysteme in vielen Mitgliedstaaten. In Mitgliedstaaten, in denen es vor der Verabschiedung der Richtlinie kein Mediationssystem gab, hat sie die Schaffung geeigneter Rechtsrahmen initiiert. In Mitgliedstaaten, in denen entweder nur vereinzelte Regeln zur Mediation existierten oder die Mediation in der Privatwirtschaft auf Selbstregulierung beruhte, hat die Umsetzung der Richtlinie die bestehenden Regelungen verbessert. In den fünfzehn Mitgliedstaaten, die bereits vor der Verabschiedung der Richtlinie ein umfassendes Mediationssystem hatten, hat ihre Umsetzung nur eine begrenzte oder gar keine Änderung an dem Mediationssystem zur Folge gehabt. Es wurden gewisse Schwierigkeiten in der praktischen Umsetzung der Richtlinie festgestellt. Diese Schwierigkeiten beruhen vor allem auf der in vielen Mitgliedstaaten vorherrschenden kontradiktorischen Tradition, dem geringen Bekanntheitsgrad von Mediation innerhalb der Bevölkerung und Mängeln in der Qualitätskontrolle.

1. *Relevanz, Kohärenz und Komplementarität*

Die Ziele der Mediationsrichtlinie sind relevant für die Bedürfnisse der beteiligten Kreise und sind im Einklang mit den Zielen weiterer EU-Politiken. Die Befragten waren sich einig, dass dieses alternative Streitbeilegungsverfahren das Potenzial hat, zum Wachstum beizutragen. Es wurden keine Probleme im Zusammenhang mit Regelungslücken im Hinblick auf andere Instrumente zur alternativen Streitbeilegung oder Überlappungen mit diesen festgestellt.

Die Mediationsrichtlinie bezieht sich nur auf Streitsachen mit grenzüberschreitendem Bezug. So wurden die Mitgliedstaaten nicht verpflichtet, Änderungen in Bezug auf interne Fälle vorzunehmen. Trotz dieser Einschränkung entschieden fast alle Mitgliedstaaten, die Anforderungen der Richtlinie auf inländische Fälle auszudehnen (siehe Übersicht zum Anwendungsbereich). Dies ist eine wichtige positive Entwicklung, denn interessierte Kreise berichteten auch von einer nur sehr begrenzten Anzahl grenzüberschreitender Mediationsverfahren und stellten somit klar, dass der Beitrag der Mediation zum Wachstum größer sei, wenn die Umsetzung der Richtlinie auch inländische Fälle abdecke.

2. *Wirksamkeit*

Wo die Umsetzung der Mediationsrichtlinie wesentliche Änderungen des bestehenden Rechtsrahmens bewirkt hat oder ein umfassendes Mediationssystem etabliert wurde, wurden die Förderung des Zugangs zur alternativen Streitbeilegung und ein ausgewogenes Verhältnis zwischen Mediation und Gerichtsverfahren einen Schritt nach vorn gebracht.

Jedoch wurden, wie oben erwähnt, gewisse Schwierigkeiten bei der praktischen Umsetzung festgestellt, die die Wirksamkeit der Richtlinie beeinträchtigen. Insbesondere steht die in vielen Mitgliedstaaten vorherrschende kontradiktorische Tradition (im Gegensatz zur Suche nach einem

Kompromiss, die die Mediation charakterisiert) einer reibungslosen Anwendung der Mediationsrichtlinie im Wege.

3. Effizienz

3.1 Kosten und finanzielle Aspekte der Mediation

Viele Mitgliedstaaten regulierten die finanziellen Aspekte der Mediation durch die folgenden Maßnahmen: Festlegung von maximalen Gebühren; Schaffung finanzieller Anreize (Prozesskostenhilfe, kostenlose Mediationsleistungen, Erstattung der Gerichtsgebühren und der Anwaltskosten) und die Einführung von Sanktionen. Diese Anreize und Sanktionen wirken sich nicht auf das Recht auf Zugang zu den Gerichten aus, aber ihre Effizienz variiert je nach nationalem Kontext, wie die Befragten bestätigten.

Keines der befragten Ministerien berichtete von erheblichen Kosten für die Umsetzung der Mediationsrichtlinie. Darüber hinaus sind in den meisten Mitgliedstaaten die Kosten für Mediationsverfahren moderat, und Mediationsverfahren werden schneller begonnen und abgeschlossen als gerichtliche Verfahren, selbst wenn die nationalen Rechtsvorschriften keine Höchstdauer des Mediationsverfahrens vorschreiben. Beteiligte Kreise betonten dies als einen wichtigen Vorteil der Mediation.

3.2 Information über Mediation für Streitparteien und für die breite Öffentlichkeit

Aufbauend auf den in der Richtlinie vorgeschlagenen Maßnahmen, sehen alle Mitgliedstaaten die Möglichkeit für Gerichte vor, die Parteien aufzufordern, Mediation in Anspruch zu nehmen. Darunter sind zwölf Mitgliedstaaten, die die Möglichkeit für Gerichte vorsehen, die Parteien zu Informationssitzungen über Mediation einzuladen. In einigen Mitgliedstaaten ist die Teilnahme an solchen Informationsveranstaltungen obligatorisch. Einige Mitgliedstaaten verpflichten darüber hinaus Anwälte, ihre Mandanten über die Möglichkeit zu informieren, Mediation zur Streitbeilegung zu nutzen.

Weniger als die Hälfte der Mitgliedstaaten haben eine Verpflichtung zur Verbreitung von Informationen über Mediation in ihre nationale Gesetzgebung aufgenommen. Mitgliedstaaten, die erstmals Mediationssysteme etabliert haben, führten eine Vielzahl von Maßnahmen durch, um Bürger und Unternehmen über Mediation zu informieren (z. B. Informationen auf den Webseiten der zuständigen nationalen Stellen, öffentliche Konferenzen, öffentliche Werbekampagnen, TV-Spots, Radiosendungen, Plakate, etc.).

Dennoch wirken sich der geringe Bekanntheitsgrad von Mediation und der Mangel an Informationen, die potenziellen Parteien zur Verfügung stehen,negativ auf die Effizienz der Mediation aus, wie von Befragten in 18 Mitgliedstaaten bestätigt wurde. Der Mangel an Informationen und die fehlende Zusammenarbeit unter Juristen stellen ein zusätzliches Hindernis für die mögliche Verbreitung der Mediation in mindestens zehn Mitgliedstaaten dar.

3.3 Die Qualität der Vermittlung und Ausbildung von Mediatoren

Nach der breiten Definition in der Richtlinie kann ein Mediator eine dritte Person sein, die ersucht wird, eine Mediation auf wirksame, unparteiische und sachkundige Weise durchzuführen, unabhängig von ihrer Bezeichnung oder ihrem Beruf in dem betreffenden Mitgliedstaat und der Art und Weise, in der sie für die Durchführung der Mediation benannt oder mit dieser betraut wurde.

Im Einklang mit dem Vorschlag der Richtlinie führten 20 Mitgliedstaaten verbindliche Mechanismen zur Qualitätskontrolle ein. Die meisten davon führten obligatorische Akkreditierungsverfahren für Mediatoren und Mediationsorganisationen ein und unterhalten nationale Register für Mediatoren.

Die Verabschiedung verbindlicher Verhaltenskodizes auf nationaler Ebene wird von den Beteiligten als ein wichtiges Instrument wahrgenommen, um die Qualität der Mediation zu gewährleisten. In 21 Mitgliedstaaten ist die Entwicklung und Einhaltung von Verhaltenskodizes obligatorisch, während in anderen Mitgliedstaaten die Anbieter von Mediation ihre eigenen Kodizes entwickeln oder entwickelt haben. Der Europäische Verhaltenskodex für Mediatoren wird von den Beteiligten genutzt und dient nationalen und sektoriellen Kodizes als Vorlage. Organisationen, die beschlossen haben, ihre ihnen angeschlossenen Mitglieder zu verpflichten, den Europäischen Verhaltenskodex für Mediatoren zu respektieren, können die Europäische Kommission darüber informieren. Sie werden dann in eine Liste aufgenommen, die regelmäßig aktualisiert wird und online verfügbar ist.

Außerdem fördern 19 Mitgliedstaaten die Ausbildung von Mediatoren, oder regulieren sie in ihrer nationalen Gesetzgebung in Anlehnung an die Richtlinie.

Dennoch erhoben Beteiligte in den Mitgliedstaaten mit geringen oder fehlenden Mechanismen der Qualitätskontrolle Bedenken im Hinblick auf die Qualität der Mediation und äußerten die Ansicht, dass das Fehlen solcher Mechanismen einer breiteren Anwendung der Mediation hinderlich ist.

4. Nutzen

Insgesamt konnte festgestellt werden, dass die Richtlinie einen „EU-Mehrwert“ gebracht hat, vor allem durch die Sensibilisierung der nationalen Gesetzgeber für die Vorteile der Mediation, durch die Einführung von Mediationssystemen oder die Erweiterung bestehender Systeme. Diese Vorteile konnten ohne erhebliche Kosten für die nationalen Haushalte erreicht werden. Die meisten Beteiligten sind sich einig, dass diese positiven Entwicklungen nicht ohne Intervention der EU möglich gewesen wären.

Empfehlungen für die optimale Nutzung der Mediation als alternatives Streitbeilegungsverfahren

Im Hinblick auf die oben genannten Hauptschwierigkeiten und aufbauend auf den positiven Erfahrungen wurden folgende Empfehlungen - basierend auf den Ansichten der interessierten Kreise in der gesamten EU - hervorgebracht, um den Einsatz der Mediation zu verbessern:

1) Die Europäische Kommission könnte den Mitgliedstaaten empfehlen, Informationen und Erkenntnisse zu sammeln und auszutauschen, um Lehren daraus zu ziehen und die Wirksamkeit der Mediationsrichtlinie und ihre nationalen Umsetzungsmaßnahmen zu bewerten. Der Austausch von bewährten Praktiken und die Identifizierung von Schwierigkeiten würde es ermöglichen, dass Mediation zur Verwirklichung der Ziele des EU-Binnenmarkts, der Europa-2020-Strategie für Wachstum und der Agenda Recht für Wachstum beiträgt.

2) Eine Finanzierung durch die EU könnte nationale Justizverwaltungen wesentlich darin unterstützen, Informationen über Mediation und ihre Vorteile unter Bürgern und Unternehmen in ganz Europa zu verbreiten. Das bevorstehende Programm Ziviljustiz 2014-2020 könnte das wichtigste Instrument für diese Bemühungen sein. Die Europäische Kommission könnte auch die Bemühungen der Mitgliedstaaten bei der Planung und Durchführung von Sensibilisierungsmaßnahmen unterstützen und diese koordinieren: sie könnte den Austausch von Erfahrungen und bewährten Praktiken sowie die Ausarbeitung von Informationsmaterial fördern,

welches dann von den Mitgliedstaaten übersetzt und auf den jeweiligen nationalen Kontext zugeschnitten werden könnte.

3) Die Mitgliedstaaten sollten:

   - Gezielte Informationsmaßnahmen über Mediation bei Rechtspraktikern in Erwägung ziehen;

   - Feststellen, ob die Einführung einer Verpflichtung, potenzielle Streitparteien über die Mediation und ihre Vorteile zu informieren, möglich ist;

   - Feststellen, ob ein obligatorisches Vorverfahren vor Gericht durchführbar ist,, in dem geprüft würde, ob der Rechtsstreit besser im Rahmen einer Mediation anstelle eines Gerichtsverfahrens behandelt werden könnte und die Verweisung der Parteien darauf („Screening Agentur“).

4) Mitgliedstaaten sollten die Einführung einer Verpflichtung für alle Mediationsorganisationen prüfen, Verhaltenskodizes zu erlassen oder, wenn Akkreditierungmaßnahmen existieren, die Verpflichtung, Verhaltenskodizes zu befolgen. Der Europäische Verhaltenskodex für Mediatoren könnte als Vorlage für die Ausarbeitung solcher Kodizes verwendet werden.

5) Die Europäische Kommission könnte ein wichtiger Akteur für den Austausch von Erfahrungen und bewährten Praktiken zwischen den Ausbildungseinrichtungen unter Berücksichtigung der unterschiedlichen Bedürfnisse und des jeweiligen nationalen Kontexts werden. Insbesondere könnte sie:

   - Seminare organisieren, um Lösungen für eine effiziente Organisation der Ausbildung und möglicherweise gemeinsame freiwillige Mindeststandards auszuarbeiten;

   - Die Ausarbeitung eines Handbuchs fördern, das in ganz Europa eingesetzt werden könnte.

FINAL REPORT

1. INTRODUCTION

1.1 CONTEXT AND PRESENTATION OF THE MEDIATION DIRECTIVE

EU policies in the field of alternative dispute resolution and in particular mediation date back a number of years. In 1999, to facilitate access to justice in the Member States, the Tampere European Council called for the creation of alternative, extra-judicial procedures for dispute resolution in the Member States. To address this request, a Green Paper on alternative dispute resolution in civil and commercial law was adopted by the European Commission in 2002.[3] The Green Paper took stock of the existing situation in the Member States and initiated a broad consultation among stakeholders on how to best promote the use of alternative dispute resolution, and in particular of mediation.

As a result of the consultation process, in 2004 the European Commission adopted a proposal for a Directive on mediation in civil and commercial matters.[4] Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') was adopted in 2008.[5] Member States had to transpose the Directive's provisions into their national legislation by 21 May 2011.[6]

In May 2013, the Directive on consumer alternative dispute resolution (ADR)[7] and the Regulation on consumer online dispute resolution (ODR)[8] were adopted which are both without prejudice to the Mediation Directive.

The Mediation Directive time line

[3] Green Paper on alternative dispute resolution, COM(2002)196 final, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf.

[4] Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2004)718 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0718:FIN:EN:PDF.

[5] 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, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF.

[6] The information on mediators and on the organisations providing mediation services for the general public, together with a list of competent courts, had to be communicated by the Member States to the European Commission by 21 November 2010.

[7] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.06.2013, p. 63-79, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF

[8] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.06.2013, p. 1-12, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF

The Mediation Directive is aimed at facilitating access to alternative dispute resolution and promoting the amicable settlement of disputes. The Directive also refers to the means necessary to reach these aims, namely encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings.

The aims of the Mediation Directive are to:

- ***facilitate access to alternative dispute resolution; and***
- ***promote the amicable settlement of disputes.***

The means to reach these aims are:

- ***encouraging the use of mediation; and***
- ***ensuring a balanced relationship between mediation and judicial proceedings.***

The provisions of the Mediation Directive

The Mediation Directive applies to cross-border disputes in civil and commercial matters. However, Member States may choose to apply the Directive's provisions also to domestic cases. The Directive addresses the main concepts of mediation by defining the terms 'mediation' and 'mediator'[9] and regulates other aspects of the mediation process: information and awareness-raising; prescription periods; confidentiality; enforcement; and quality of mediation.

According to the Directive, Member States need to encourage the availability of information on mediators and on the organisations providing mediation services to the general public. Member States also need to ensure that courts have the right to suggest mediation to the parties to a case or to invite them to attend information sessions on mediation. In line with the case-law of the Court of Justice of the European Union, the Directive is without prejudice to national legislation making the use of mediation compulsory or subject to sanctions or incentives provided that this does not impede access to justice.

To ensure access to justice, the effects of mediation on limitation and prescription periods are regulated by the Mediation Directive: Member States must ensure that the parties are not prevented from initiating judicial proceedings or arbitration following mediation due to the expiry of limitation and/or prescription periods.

[9] Article 3(a) defines 'mediation' as 'a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question'. 'Mediator' is defined in Article 3(b) as 'any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation'.

The Directive sets strict confidentiality requirements applicable to mediators as well as to all those involved in the mediation process to protect parties to the mediation process and ensure its smooth functioning.

The agreement reached at the end of the mediation process is likely to be implemented by the parties voluntarily. Nevertheless, the Directive requires Member States to establish a procedure for the enforcement of the agreement in order to make mediation a valid alternative to judicial proceedings.

In accordance with the Directive, Member States need to ensure the quality of mediation by encouraging the development of voluntary codes of conduct, effective quality control mechanisms and training requirements.

1.2 CONTEXT AND PRESENTATION OF THIS STUDY 'EVALUATION AND IMPLEMENTATION OF DIRECTIVE 2008/52/EC - THE MEDIATION DIRECTIVE'

The agenda Justice for Growth as part of the Europe 2020 Strategy

High quality, independent, effective and efficient justice systems throughout Europe are necessary to reduce costs for businesses and to make it easier for people to exercise their rights and freedoms. In this context, ensuring that claims can be settled within a reasonable timeframe and promoting the use of alternative dispute resolution mechanisms is part of the Commission's agenda Justice for Growth. This helps to drive growth, attract investors and increase competitiveness, thus contributing to achieving the goals of the Europe 2020 Strategy.[10]

Vice-President Reding recently stated that 'justice policies can help to reinforce stability, jobs and growth in Europe'.

The role of mediation as an alternative dispute resolution system

In line with the Justice for Growth agenda and the Europe 2020 Strategy, mediation could be seen as a means to improve the efficiency of the justice system and to reduce the hurdles that lengthy and costly judicial procedures create for citizens and businesses; it can therefore contribute to economic growth. Mediation may also contribute to maintaining good relationships between the parties as, contrary to judicial proceedings, there is no 'winning' and no 'losing' party, which is particularly important, e.g. in family law cases.

The purpose of this study

An evaluation of the contribution of the Mediation Directive to the objectives of the Justice for Growth agenda and ultimately to the Europe 2020 Strategy can provide useful elements for shaping next initiatives in the field. Moreover, Article 11 of the Directive requires the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Directive by the Member States. It mentions that the report must consider the development of mediation throughout the European Union and the impact of this Directive on the Member States.

In light of the above, the Commission (DG JUSTICE) requested a study to provide comprehensive information regarding the evaluation of the application of the Directive by the Member States and to assess the compliance of national transposing measures with the Directive's provisions.

[10] http://europa.eu/rapid/press-release_SPEECH-13-29_en.htm.

The methodology

This study includes 28 national reports (EU Member States).[11] To support the work of national reporters, literature review was conducted at EU level and a number of stakeholders[12] were consulted to identify the main issues at stake concerning the implementation of the Mediation Directive across Europe.

National reporters have supplemented this work undertaking legal and empirical analysis to draft their respective national reports. The methodological tools used included further desk research, literature review and stakeholder consultation at national level through phone interviews with different types of actors involved in the mediation process. These were: Ministries of Justice, mediators, trainers of mediators, users of mediation and judges.[13] The national reporters carried out up to five interviews with national stakeholders on the basis of a questionnaire approved by the European Commission.

The national reporters were requested to look at the balanced relationship between mediation and judicial proceedings and to gather data (2005-2012) on the number of cases dealt with in mediation and court proceedings as well as the success rate of mediation cases. Specific statistics for family mediation were also considered.

The result of this research varies considerably among Member States and no comparison among quantitative data is possible due to the different type of data available. Where quantitative data at national level is not available, the national reporters gathered existing data at regional or local level. Data from mediation associations has also been gathered through stakeholder interviews.

This report provides an overview of the situation in Europe by gathering information from the 28 national reports. Wherever possible, it provides examples based on quantitative data to support its statements. It is divided as follows:[14]

- Analysis of the compliance of the national transposing measures with the Directive's provisions (section 23)

This section intends to provide an analysis of the transposition of the Directive in the EU Member States (excluding Denmark which is not bound by the Directive). It is based on the Tables of Concordance drafted by national reporters.

- Analysis of the national legislation beyond the required transposition measures (section 24)

This section identifies the measures taken by Member States which go beyond the scope of the Directive: it highlights when the transposition of the Directive has triggered the adoption at national level of measures which further encourage the use of mediation and aim to ensure a balanced relationship between mediation and judicial proceedings (such as extending the application of the Directive's requirements to domestic cases).

This section also gives an overview of how the Member States have organised their mediation

---

[11] The term 'Member States' includes Croatia (HR) which joined the European Union on 1 July 2013.

[12] Avi Schneebalg, Belgian Attorney, Mediator and Professor of Mediation, has assisted the management team throughout the project. The list of EU stakeholders consulted is included in Annex II to this report. The management team wishes to thank them, and in particular Avi Schneebalg and ADR centre, for their contribution to this project.

[13] All national reports include an annex listing the stakeholders consulted at national level.

[14] See Terms of Reference of this study *Evaluation and implementation of Directive 2008/52/EC - the 'Mediation Directive'*. The services are part of Specific Contract JUST/2011/JCIV/FW/0151/A4, in the context of the multiple framework contract JUST/2011/EVAL/01.

systems covering the following aspects of the mediation process: scope of application of the Directive as transposed by Member States, mediation process, enforceability, access to justice, mediators, quality, financial aspects, information and promotion, confidentiality.

- Evaluation of the implementation of the Directive (section 25)

This section provides an ex-post evaluation of the Mediation Directive according to a number of fixed criteria:[15]

- Relevance of the Directive in relation to the needs of the stakeholders;
- Consistency and complementarity with other instruments at EU and national level;
- Effectiveness in achieving the Directive's objectives in practice and allowing a smooth application in all Member States;
- Efficiency in achieving the effects of the Directive at reasonable cost;
- Utility in terms of added value of the Directive.

In light of this evaluation, building upon positive and negative experiences and taking into account stakeholders' suggestions as reported in the 28 national reports, suggestions/recommendations for action to make the best use of mediation as an alternative dispute resolution system are finally put forward.

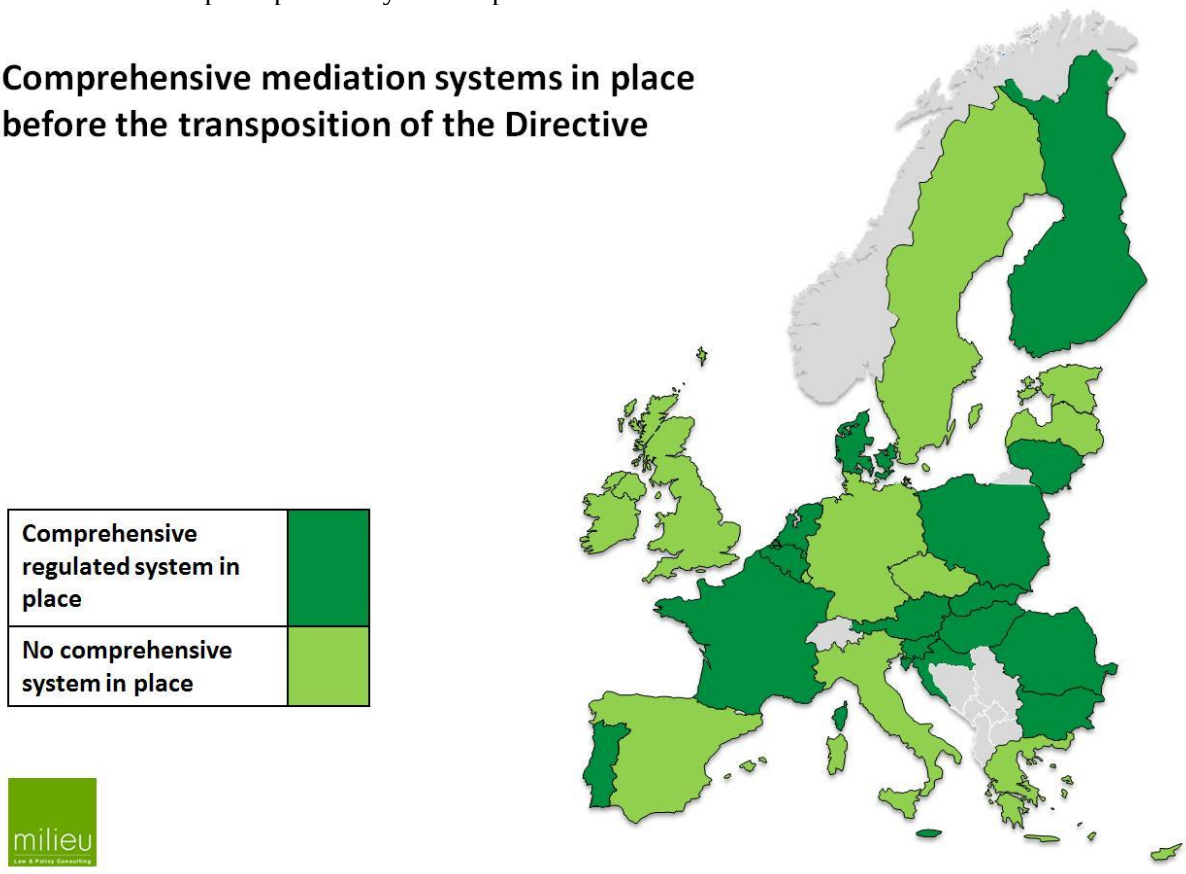
[15] For more information on ex-post evaluations, see the website of the Secretariat-General of the European Commission available at http://ec.europa.eu/dgs/secretariat_general/evaluation/documents_en.htm.

2. ANALYSIS OF THE COMPLIANCE OF THE NATIONAL TRANSPOSING MEASURES WITH THE DIRECTIVE'S PROVISIONS

This section presents a brief overview of the analysis of the compliance of national transposing measures with the requirements of the Mediation Directive. It is noted that Denmark is excluded from this overview since it is not bound by the Directive.

2.1 THE TRANSPOSITION CONTEXT

Fifteen Member States[16] already had a comprehensive mediation system in place prior to the adoption of the Directive and the Directive has brought limited or no changes to their system. In other cases, either Member States had scattered rules regulating mediation or mediation in the private sector was based on self-regulation. This analysis focuses on the legal transposition measures communicated by the Member States to the Commission, including both pre-existing rules and rules adopted specifically to transpose the Directive.



The Directive required the Member States to bring into force laws, regulations and administrative provisions to comply with the Directive's provisions by 21 May 2011. However, Article 10 (information on the competent courts or authorities for mediation to be communicated by the Member States to the European Commission) had to be transposed by 21 November 2010. All Member States have notified to the Commission measures implementing the Directive. Twenty-one Member States[17] have respected the transposition deadlines. In six Member States,[18] the

[16] In the UK, comprehensive mediation systems were in place in England, Wales and Scotland.

[17] AT, BE, BG, DE, EE, EL, ES, FI, HU, IE, IT, LT, MT, NL, RO, PL, PT, SK, SI, UK. Croatia transposed the Directive in the context of the acceding process to the European Union.

[18] CY, CZ, FR, LV, LU, SE.

transposition of the Directive was delayed by over six months.

Latvia has notified implementing measures to the Commission and is expected to adopt legislation complementing the existing mediation system in in the first half of 2014;[19] thus, the corresponding national report made reference to the draft rules but these are not covered here as they could be changed during the legislative process.

The mediation systems of some Member States are still subject to review and change; as the Directive only became applicable in 2011, some national legislators are still in the process of introducing new measures that will further enhance their application. In Ireland, the Directive has been transposed by the Irish Mediation Regulations but a draft Mediation Bill proposing a number of changes to the Regulations was presented to Parliament in March 2012 and could be adopted by the end of 2013.[20] Two Bills to enhance the transposition of the Directive are also being debated by the Portuguese Parliament and are expected to be adopted by the end of 2013.[21]

On 6 December 2012 the Italian Constitutional Court ruled[22] that the provisions establishing compulsory mediation introduced by the Government in a Legislative Decree go beyond the Parliamentary Law delegating powers to regulate mediation. Compulsory mediation was therefore no longer applicable as of 6 December 2012. In June 2013, the Italian Government adopted a Decree Law (*Decreto Legge del fare*) reintroducing compulsory mediation under different rules.[23] The German Federal Ministry of Justice is considering standards for mediation training[24] and, in Spain, a number of further measures to implement the mediation system in practice (such as the creation of a general register for mediators) still need to be adopted by the Ministry of Justice.[25] In Hungary, the National Judicial Council[26] is considering the adoption of certain measures relating to training and information on mediation to the public and the Parliament[27] is considering whether to make mediation compulsory for family disputes. The Croatian legislator is also considering whether to make mediation compulsory in family cases.[28] In Estonia, new rules considering mediation under the Children Protection Act are being debated.[29]

2.2 THE QUALITY OF THE TRANSPOSITION

[19] The Latvian Government has adopted the draft Mediation Law on 18 September 2012. The draft Mediation Law has been submitted to the National Parliament for adoption (expected in June 2014 according to the stakeholder consulted (Ministry of Justice).

[20] http://www.justice.ie/en/JELR/Pages/PB12000042.

[21] Proposals for Law No. 115/XII and Law No. 116/XII.

[22] Judgment of the Constitutional Court of 6 December 2012, n. 272, O.J. 12 December 2012.

[23] Article 84, Decree Law of 21 June 2013, n. 69 Urgent rules to re-launch the economy (*Disposizioni urgenti per il rilancio dell'economia)*, GU n. 144 of 21 June 2013) which entered into force on 22 June 2013.

[24] According to Section 6 of the 2012 Mediation Act this has to be determined by way of statutory order of the Federal Ministry of Justice.

[25] Information collected through consultation with national stakeholders (Federal Ministry of Justice).

[26] http://www.birosag.hu/engine.aspx?page=OBH_Elnokenek_beszamoloi.

[27] Article 176 of the Draft Civil Code.

[28] Information collected through consultation with national stakeholders (Ministry of Justice).

[29] Information collected through consultation with national stakeholders (Ministry of Social Affairs).

2.2.1 Objective

> Article 1
> 1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

Eleven Member States[30] have explicitly included the Directive's objective in their legislation. In the United Kingdom, the Directive's objective is reflected in the law of England and Wales and Gibraltar.[31] The legislation of eight Member States reflects the objective partially[32]. For instance, Czech legislation does not explicitly refer to mediation as an amicable alternative dispute resolution method.

The other Member States do not expressly make reference to the objective of the Directive in the national transposing legislation. However, in these countries, the national legislator shares the Directive's objectives as can be deduced from the combined reading of other provisions of the national laws on mediation.

2.2.2 Scope

> Article 1
> 2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

In line with Recital 8,[33] almost all Member States[34] have extended the scope of their national transposing measures also to domestic cases. Only three Member States, namely Ireland,[35] the Netherlands[36] and the United Kingdom[37], have chosen to transpose the Directive with respect to cross-border cases only.

A number of Member States[38] correctly allow the use of mediation in civil and commercial disputes, including family and employment matters. Legislative provisions of several Member States foresee a broader[39] or more limited[40] group of disputes that may be submitted to mediation,

[30] AT, BE, DE, HR, HU, IT, LT, MT, PL, RO, SI.

[31] The jurisdictions of England, Wales, Scotland, Northern Ireland and Gibraltar have been analysed for the United Kingdom for purposes of this study.

[32] CZ, EE, EL, ES, FI, LU, PT, SE.

[33] Recital 8 of the Mediation Directive reads 'The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes'.

[34] AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, PL, PT, RO, SE, SK, SI. There are two exceptions in France: conventional mediation in labour disputes in purely domestic cases is not included in the scope, and regarding administrative matters the provisions of the Directive only apply to cross-border mediation.

[35] Regulations 2(1) and 2(2) of the European Communities (Mediation) Regulations 2011.

[36] Article 2 of the Law of 15 November 2012 implementing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

[37] For instance, for England and Wales, Schedule 2 Rule 78.23(1) of the Civil Procedure Rules as amended in 2011 and Part 35.1 of the 2010 Family Procedure Rules.

[38] AT, CZ, EE, EL, HR, FI, IE, LT, SE, SI, SK, UK.

[39] BG, CZ, DE, FR, SL, UK.

for example, including administrative disputes or excluding family and labour ones. Note that even when not included within the scope of the national legislation transposing the Directive, family and labour disputes are subject to mediation or other alternative dispute resolution systems under other legal instruments which were already in place.

The failure to transpose the expression 'rights and obligations not at the parties' disposal' by a number of Member States[41] might lead to ambiguity as to whether disputes concerning them could be subject to mediation or not. Moreover, many Member States[42] have not explicitly excluded mediation for revenue, customs or administrative matters or for the liability of the State for acts and omissions in the exercise of State authority. In some cases, this could in principle allow for mediation to be used in such disputes. Germany allows mediation with respect to administrative matters by not limiting its transposing rules to civil and commercial matters.[43]

2.2.3 Definitions of cross-border disputes, mediation, mediators and domicile

> Article 2
> 1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:(a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Article 5 an invitation is made to the parties.
> 2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).
> 3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

No significant conformity issues were identified in relation to the definition of 'cross-border disputes'. Member States have either transposed the definition of the Directive or have omitted it due to the fact that the transposing legislation relates to both cross-border and domestic cases and, therefore, there was no need to identify cross-border disputes separately from domestic ones. Ireland[44] and the United Kingdom[45] transposed the definition by means of a direct cross-reference to the Directive's definition.

As regards the definition of 'domicile', most Member States have not included a cross-reference to Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in their transposing laws. However, as Regulations have general application, are binding in their entirety and are directly applicable in all Member States the absence of such a cross-reference to Regulation (EC) No 44/2001 does not give rise to conformity issues.[46]

[40] BE, CY, EL, ES, HU, IT.

[41] CZ, DE, FI, IE, IT and UK.

[42] AT, BE, BG, CZ, EE, EL, ES, IT, HU, IE, LT, PL, PT, RO, SE, SI, SK, UK.

[43] Sec. 173 of the Code of Administrative Court Procedure as amended in 2012.

[44] Regulation 2(1) of the Mediation Regulations.

[45] Article 2(1) is effectively transposed, unlike the other United Kingdom jurisdictions, in the Gibraltar legislation. See Regulation 2, 72C (1) of the Supreme Court Act Regulations 2011.

[46] It is worth noting that Article 59(1) of Regulation (EC) No 44/2001 stipulates that 'in order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law' whereas Article 60(1) states that for the purposes of this Regulation 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business'.

Article 3
For the purposes of this Directive the following definitions shall apply:
(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.
(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

National definitions of both 'mediation' and 'mediator' are in place in twenty-one Member States[47] although the relevant national laws do not always reflect all the elements of these definitions. For instance, Spanish law does not require mediators to conduct mediation in an effective way[48] and Swedish law does not require mediation to be conducted in an 'effective, impartial and competent way'.[49] However, national measures regulating the mediation systems in these countries aim to ensure that, overall, mediation is carried out in such a manner.

On the other hand, Belgian law only defines 'mediator'[50] and Romanian law only defines 'mediation'.[51] Ireland, Poland and the United Kingdom (except for Gibraltar)[52] have not defined either of the concepts. With respect to Ireland[53] and the United Kingdom[54] it is however noted that the national law makes direct cross-reference to the Directive's definitions.

In fifteen Member States[55] the national legal/judicial system does not allow for mediation to be conducted also by judges and thus this provision is not transposed. The United Kingdom legislation makes direct cross-reference to the Directive. In Croatia, while court mediation can only be conducted by a judge who is not involved in the proceedings, the parties may agree otherwise.[56]

Article 3(a), which provides that the term 'mediation' does not encompass attempts made by the court or the judge to settle a dispute in the course of judicial proceedings concerning the dispute in question, has not been explicitly transposed in Croatia, Hungary, Ireland, Malta and Portugal.

2.2.4 Body of the Directive

[47] AT, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, MT, NL, PT, SE, SI, SK.

[48] Article 11(1) and (2) and Article 13(4) and (5) of the Law 5/2012 on Mediation in Civil and Commercial matters.

[49] Section 3 of Act 2011:860 on Mediation in certain Civil and Commercial Disputes.

[50] Article 1726 of the Judicial Code as amended in 2005.

[51] Article 1(1) and (2) of Law No. 192/2006 on mediation and the organisation of the mediator's profession.

[52] Gibraltar has effectively transposed Article 3 of the Directive; the legislation specifically defines 'mediation' and 'mediator'.

[53] Regulation 2(2) of the Mediation Regulations.

[54] For instance, for Scotland, see Regulations 2(2), 5(1), (2) and (3), 6(4), 7(1) and (3), 8(1) and (3) of the Cross-Border Mediation Regulations 2011 No. 234.

[55] BG, CZ, HU, EE, ES, IE, IT, NL, MT, LU, PL, PT, RO, SE, SK.

[56] Article 16(1) and (2) of the 2003 Mediation Act.

Ensuring the quality of mediation and informing the general public

> Article 4
> 1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.
> 2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

The obligation relating to the development and adherence to codes of conduct has been included in the national legislation of twenty-one Member States.[57]

The obligation relating to quality control mechanisms concerning the provision of mediation services has been included in the national legislation of twenty Member States.[58] Croatia transposed Article 4(2), but not Article 4(1). The German legislator leaves the responsibility for the promotion of quality to the mediators themselves.[59]

Nineteen Member States[60] encourage training or regulate it in part or in detail in their national legislation in line with Article 4(2).

> Article 9
> Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Eleven Member States[61] have included the obligation to spread information about mediation in their national legislation. Bulgarian legislation places the requirement to promote mediation on the mediators themselves.[62]

Recourse to mediation and effect on limitation periods

> Article 5
> 1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.
> 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 system.

In all Member States the courts may invite the parties to use mediation. However, Slovenia[63] and the United Kingdom (Scotland)[64] do not apply this possibility for mediation in general, but only for

[57] AT, BE, BG, CY, EL, ES, FI, FR, IE, IT, LT, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK.

[58] AT, BE, BG, CY, CZ, DE, EE, EL, ES, HU, IT, LT, LU, LV, MT, PL, PT, RO, SI, SK.

[59] Section 5 of the Mediation Act.

[60] AT, BE, BG, CY, EL, ES, FI, FR, HU, IE, IT, LT, LV, NL, RO, SE, SI, SK, UK.

[61] BG, CY, EL, ES, HU, IT, LT, PL, PT, RO, SK.

[62] Article 35 of Ordinance No. 2 on the terms and conditions for approval of organisations that train mediators; for the training requirements for mediators; on the order of entry, removal or deletion of mediators from the Unified Register of Mediators and the procedural and ethical rules of conduct of mediators.

[63] Article 2(1) of the 2009 Act on Alternative Dispute Resolution in Judicial Matters.

[64] Rule 47.11 of the Act of Sederunt (Rules of the Court of Session 1994) apply in commercial actions.

certain types of disputes.

Twelve Member States[65] transposed the option to invite parties to information sessions on mediation. Parties may even be required to attend such sessions either on the judge's initiative (for example, in the Czech Republic[66]) or for specific disputes as prescribed by law, such as family matters (this is the case in Luxembourg,[67] Romania[68] and the United Kingdom (England and Wales[69]).

Some Member States (such as Germany,[70] Lithuania[71] and Italy[72] until 2012 and again since 22 June 2013[73]) provide for the option of introducing compulsory mediation for certain types of disputes. In other cases, such as in the United Kingdom, at any time during judicial proceedings judges must consider whether alternative dispute resolution systems, including mediation, could be appropriate to settle the dispute. In such cases, the judge will invite the parties to refer their dispute to that system.[74]

According to the national reports, over a third of Member States[75] provide financial incentives by way of reductions or full reimbursement of the fees and costs related to mediation proceedings or court proceedings suspended to try mediation. Italy,[76] Poland,[77] Romania[78] and Slovenia[79] also provide for sanctions for the breach of different obligations linked to mediation (see section 24.6).

The analysis of financial incentives and sanctions provided by the Member States shows that national mediation legislation does not affect the right of access to justice.

> Article 8
> 1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

[65] CY, CZ, ES, DE, FR, HR, IE, LT, LU, RO, SK, UK. Lithuania foresees the organisation of information sessions at the courts on mediation in relation to family and labour disputes.

[66] Section 100(3) of Act. 99/1963 Coll., Civil Procedure Code.

[67] Article 1251-17 of the Law of 24 February 2012 concerning the introduction of mediation in civil and commercial matters in the New Civil Procedure Code.

[68] Article 2 of Law No. 192/2006.

[69] Part 1 and 3 of the Civil Procedure Rules.

[70] Article 15a of the Introductory Law for the Code of Civil Procedure allows for the Federal States to introduce compulsory mediation pre-trial attempts for small claims and certain other matters.

[71] Article 2(6), paragraph 2, of the Law No X-1702 on Conciliatory Mediation in Civil Disputes of 15 July 2008.

[72] Article 5, Legislative Decree 28/2010.

[73] Article 84, Decree Law of 21 June 2013, n. 69 Urgent rules to re-launch the economy.

[74] Rule 1.4(2)(e) of the Civil Procedure Rules.

[75] CZ, DE, EE, ES, HR, IE, IT, PL, RO, SK, SL.

[76] Article 8 Legislative Decree 28/2010.

[77] Article 103(2) of the 1964 Code of Civil Procedure as amended in 2012.

[78] Article 108^1 of the 1993 Code of Civil Procedure.

[79] Article 19, paragraphs 1, 5 and 6 of the Act on Alternative Dispute Resolution in Judicial Matters.

> 2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

All Member States have transposed Article 8(1) on access to courts. On the other hand, Article 8(2) on limitation periods in international agreements is expressly transposed in Cyprus,[80] Malta,[81] Sweden[82] and the United Kingdom.[83] With respect to the other Member States, the failure to transpose this provision should not be problematic in practice because international conventions ratified by Member States take precedence over national law.

Enforceability of agreements resulting from mediation

> Article 6
> 1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.
> 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
> 3. […]
> 4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Belgium,[84] the Czech Republic,[85] Hungary[86] and Italy[87] do not explicitly require the consent of all parties to the dispute for a request for the enforceability of the mediation agreement. In Greece[88] and Slovakia[89], an enforceability request can be made by one of the parties without explicit consent from the others. Under Polish law, by signing the agreement, one party gives automatic consent for the other party to request the court's approval for enforcement.[90] The United Kingdom (Scotland) did not transpose this measure.

Some Member States[91] do not explicitly provide exceptions for enforceability in their legislation. Belgian legislation only allows a refusal to enforce the mediation agreement when it is contrary to public order or the interests of children in family disputes.[92]

---

[80] Article 27(3) of the Law 159(I)/2012 on certain aspects of mediation in civil and commercial matters.

[81] Article 27A(1) of the Mediation Act (Chapter 474 of the Laws of Malta as amended by Act IX of 2010).

[82] Section 6 of the Act 2011:860.

[83] See, for example, the Foreign Limitation Periods (Northern Ireland) 1985.

[84] Article 1733 of the Judicial Code, as amended in 2005, ensures that within the context of a voluntary mediation the request should be signed by all parties concerned. However, for judicial mediation, it is not explicitly mentioned and the request can be filed by one of the parties.

[85] Section 7 of Act No. 202/2012 Coll., on Mediation and Change of Some Laws.

[86] Article 148(3) and (4) of Act III of 1952 on civil procedures, Article 112(1)-(3) of Act XLI of 1991 on public notaries.

[87] Articles 12(1) and 12(2) of Legislative Decree 28/2010.

[88] Article 9(2) of Law 3898/2010 on mediation in civil and commercial matters.

[89] Section 15(2) of the 2004 Mediation Act.

[90] Article 183^{12} (2^{1}) of the Code of Civil Procedure.

[91] AT, CZ, EL, SI, UK (Scotland, England and Wales).

[92] Article 1736 of the Judicial Code.

All Member States have effectively transposed Article 6(2) on the conformity of mediation agreements with national law.

In connection with Article 6(4), Recital 20 of the Mediation Directive refers to the EU rules applicable to the recognition and enforcement of agreements in a different Member State: Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Only France has expressly transposed Article 6(4).[93] As Regulations have general application, are binding in their entirety and directly applicable in Member States, conformity issues should not arise in practice.

Confidentiality of mediation

> Article 7
> 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall 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, except:
> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
> (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
> 2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

All Member States have provisions in place regarding confidentiality. However, Czech[94] and French[95] law apply the duty of confidentiality explicitly only to mediators and in Germany, Italy, Poland and Sweden it is not clear whether others 'involved in the administration of the mediation process' are also bound by confidentiality. Estonian law does not mention possible subsequent arbitration proceedings. Finnish law provides that, as for court proceedings, court mediation is open to the public.[96] The Dutch legislation adds an extra requirement: the confidentiality of the mediation must be explicitly agreed upon.[97] In Greece, the transposing law implies that parties are not bound to keep confidential the content of the agreement, unless they agree to do so.[98]

Bulgaria,[99] Croatia,[100] Finland,[101] Greece[102] and Portugal[103] have provided exceptions to the

[93] Article 1535 of the Civil Procedure Code.

[94] Section 9 of the Mediation Act.

[95] Article 21-3 of Law 95-125 of 8 February 1995 relating to the organisation of jurisdictions and civil, criminal and administrative procedure.

[96] Section 12 of Mediation Act 394/2011 requires that mediation, the documents relating to mediation and the openness of mediation are subject, as appropriate, to the provisions of the Act on the Publicity of Court Proceedings and the General Courts (370/2007).

[97] Article 5(2) of Law of 15 November 2012 implementing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

[98] Article 10 of Law 3898/2010.

[99] Article 166 (1), item 1 of the Civil Procedure Code and Article 33 of Ordinance No. 2.

[100] Article 14(1) of the Mediation Act.

[101] Act 395/2011 on amending Chapter 17, § 23 of the Code of Judicial Procedure.

protection of confidentiality. However, in some cases, these do not correspond to those set in Article 7(1)(a) and (b). For example, the Finnish legislation foresees exceptions for 'very important reasons'.[104]

Only Cyprus[105] and Malta have introduced stricter confidentiality measures as allowed by Article 7(2). In Malta, mediators must keep confidential whether an agreement was reached during mediation and that information may only be divulged if the parties expressly agree to this in writing.[106] Member States[107] which have not transposed either one or both the exceptions to confidentiality set in Article 7(1) have, *de facto*, a legal context where confidentiality is protected in a stricter way.

2.3 CONCLUSIONS

At the time of this study (up to June 2013), all Member States have notified measures implementing the Mediation Directive to the Commission. Denmark is not bound by the Directive as it has certain opt-outs from the Lisbon Treaty, inter alia, in the field of justice.

The extent of the impact of the Directive in Member States varies according to the pre-existing level of their national mediation systems.

Nine Member States adopted mediation systems for the first time due to the transposition of the Directive. Fifteen Member States already had a comprehensive mediation system in place prior to the adoption of the Directive and the Directive has brought limited or no changes to their system. In other cases, Member States either had scattered rules regulating mediation or mediation in the private sector was based on self-regulation. As the Directive only became applicable in 2011 some national legislators are still in the process of introducing new measures that will further enhance the application of mediation.

Overall, the national legal frameworks in place to regulate the mediation systems do not pose important issues of conformity with the Directive. All Member States reflect the objectives of the Directive either explicitly or through the combined reading of the provisions of the national transposing legislation.

No significant conformity issues have been identified in relation to the definition of the terms 'cross-border disputes', 'mediation', 'mediator' and 'domicile' in national laws. It is worth highlighting, however, that in fifteen Member States, the national legal/judicial systems do not allow judges to act as mediators.

Twenty-one Member States require the development of and adherence to codes of conduct whilst twenty Member States introduced binding quality control mechanisms. Nineteen Member States encourage training or regulate it in part or in detail in their national legislation. Less than half of the Member States have introduced an obligation to spread information about mediation in their

[102] Article 10 of Law 3898/2010.

[103] Article 52 of Law No. 78/2001 on the Courts of Peace, its organisation, competence and functioning.

[104] Chapter 17, § 23 of Act 395/2011.

[105] Article 23(2) of Law 159(I)/2012.

[106] Article 27(2), (3) and (4) of the Mediation Act.

[107] BE, CZ, EL ES, IT, PL, SE. In Greece, no exceptions to the obligation of confidentiality have been introduced with respect to judicial mediation. This means that the confidentiality of judicial mediation can be considered as more strictly protected.

national laws.

Regarding the promotion of mediation, all Member States foresee the possibility for courts to invite the parties to use mediation with twelve Member States introducing the possibility for courts to invite parties to information sessions on mediation. In some Member States, participation to such information sessions is obligatory.

Finally, all Member States provide for the enforceability of mediation agreements, even though in some Member States the consent of all parties to the dispute is not necessary for the mediation agreement to be made enforceable. Some Member States even do not provide exceptions for enforceability.

3. NATIONAL MEASURES BEYOND THE DIRECTIVE'S REQUIREMENTS

This section highlights those cases where the Member States have adopted legislative or other measures that go beyond the minimum requirements of the Mediation Directive. In these cases, the transposition of the Directive provided an opportunity for the national legislator to better address the needs of stakeholders and take a step forward in encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings.

It should be noted that all Member States have notified to the Commission measures implementing the Directive. In regard to the transposition of the Directive, it can be said that in some Member States,[108] mediation systems have only recently started to operate or are still not yet fully functioning. Latvia is in the process of adopting legislation aiming to bring the already existing mediation system further in conformity with the Directive (see section 23.1).

3.1 SCOPE OF APPLICATION OF THE MEDIATION DIRECTIVE AS TRANSPOSED

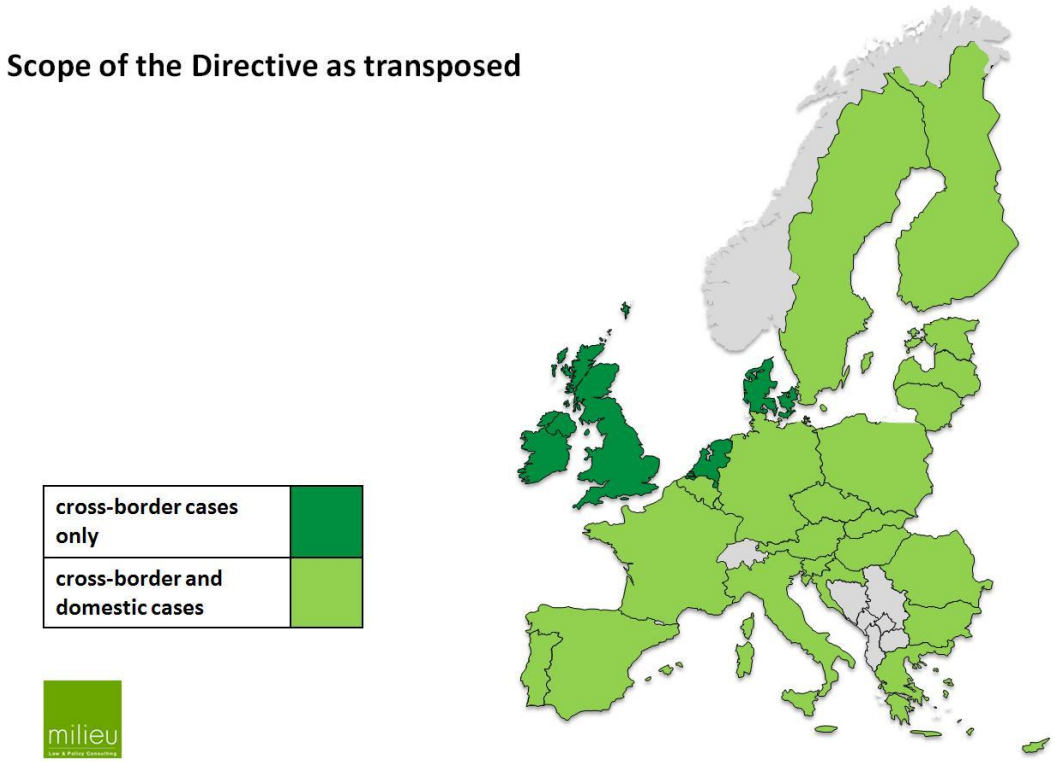
3.1.1 Cross-border or purely domestic cases

As illustrated above and in section 23.1, almost all Member States opted to extend the application of the Mediation Directive requirements covering cross-border disputes to domestic disputes. This possibility, as considered in Recital 8 of the Directive, has resulted in most Member States adopting uniform mediation systems to deal with both cross-border and domestic disputes.

In the three Member States (Denmark, the Netherlands, the UK) where the Directive was transposed only with regard to cross-border cases, national rules or self-regulation pre-dating the Directive are still in place for domestic cases. These rules might diverge from the Directive's provisions. For example, the Netherlands transposed the Directive's provisions only for cross-border mediation; domestic disputes can be mediated through professional organisations in the Netherlands that are well established and self-regulated.[109]

[108] CY, CZ, EE, EL, HU.

[109] Information provided by national reporter.



3.1.2 Civil and commercial disputes

The Mediation Directive applies to civil and commercial cases which, under EU law, include also labour and family matters. On the other hand, the Directive excludes from its scope rights and obligations which are not at the parties' disposal, particularly frequent in family law and employment law,[110] as well as revenue, customs or administrative matters or *acta iure imperii* (Article 1(2) of the Directive).

As mentioned in section 23.2.2, in some Member States more limited or broader types of disputes can be settled by mediation, as compared with the Directive. Concerning labour disputes, some Member States explicitly cover these under the rules transposing the Directive[111] but others already had specific rules in place to solve disputes between employers and employees and those are still applicable even if they do not fall within the scope of the national transposing legislation.[112] The situation is similar also for family disputes as in some Member States (such as Italy[113] and Cyprus[114]) these are covered by specific rules and not by the rules transposing the Directive. Finally, some administrative matters are included in the scope of mediation laws in Germany[115] and France[116] (with the exception of *acta jure imperii)* and Malta (only environmental matters under the Environment and Development Planning Act).[117] In the United Kingdom (England and Wales and

[110] See Recital 13 of the Mediation Directive.

[111] EL, HU, HR, LT, PT, RO, SE, SI, SK, UK.

[112] ES, IE and IT.

[113] Article 768octies of the 1942 Civil Code as amended.

[114] In Cyprus, family law is not included in civil law.

[115] Sec. 173 of the Code of Administrative Court Procedure.

[116] Articles L. 771-3 to L. 771-3-2 of the Administrative Justice Code.

[117] Chapter 504 of the Laws of Malta.

Northern Ireland) tax disputes are also covered by mediation legislation transposing the Directive.[118]

Several Member States mention specific types of disputes in their national legislation as being particularly suitable for mediation, e.g. copyright disputes or disputes arising from traffic accidents. However, the types of disputes that could be subjected to mediation in the different Member States are rather varied and no common trends could be identified.

3.1.3 Compulsory Mediation

Only a few Member States made mediation compulsory.

Only a few Member States made mediation compulsory. For example, in Austria, this is the rule in case of the anticipated termination of an apprenticeship contract.[119] In Slovenia, even though the national transposing legislation states that mediation can be made mandatory by law, no legal provisions requiring parties to have recourse to mediation before accessing the judicial system were identified.[120] Only Italy had legislation in place making mediation compulsory for many types of disputes until 6 December 2012, when compulsory mediation was declared unconstitutional by the Constitutional Court.[121] However, the judgment focused on the fact that the Government exceeded the power granted to it to regulate mediation by the delegating law adopted by the Parliament and not on the compulsory nature of meditation as such. In June 2013, the Italian Government adopted a Decree Law reintroducing compulsory mediation under different rules.[122]

Some Member States are currently considering the introduction of compulsory mediation. For example, compulsory mediation is being discussed in Hungary for child custody cases,[123] in Greece for over-indebted households,[124] in Croatia for divorce and child custody cases. [125] France is running a pilot project that includes an obligation to meet with a mediator in the case of family law disputes.[126]

With the aim of increasing the use of mediation, other Member States introduced different obligations going beyond the limited scope of the Directive (see also section 24.7). For example, in Romania, the attendance of an information session on the advantages of mediation is compulsory.[127] According to Irish legislation, such a session can be ordered by the judge.[128] Under

[118] See, for example, the Rules of the Court of Judicature (Northern Ireland) 1980 as amended.

[119] According to §15a of the Act on the Professional Training of Apprentices and §135 Federal Act in Employment in Agriculture.

[120] According to Article 2, paragraph 3, of the 2008 Mediation in Civil and Commercial Matters Act, a case can be referred to mediation if it is prescribed by law.

[121] Judgment of the Constitutional Court of 6 December 2012, n. 272, O.J. 12 December 2012.

[122] Article 84, Decree Law of 21 June 2013, n. 69 Urgent rules to re-launch the economy (*Disposizioni urgenti per il rilancio dell'economia*), GU n. 144 of 21 June 2013) which entered into force on 22 June 2013. The Decree Law excludes traffic accident disputes from the previous list of compulsory cases. Judges can now order mediation instead of inviting the parties to use it. In these compulsory cases, only one mediation session is obligatory. If no agreement is found, parties pay moderate costs up to a threshold fixed by law and can then bring their dispute to court.

[123] Article 176 of the Draft Civil Code.

[124] Information provided by national reporter.

[125] Information provided by national reporter.

[126] Based on Article 373-2-10 of the Civil Code and Decree 2010-1395 of 20 January 2012.

[127] Article 2 of Law No. 192/2006.

the Czech Civil Procedure Code, the court can order the parties to attend a three hour meeting with a mediator.[129] Moreover, besides the information sessions, under the Irish Civil Liability and Courts Act 2004, a judge may order the parties to mediate even if one party does not wish to attempt mediation.[130]

3.2 MEDIATION PROCESS

According to the national reports, in line with the Directive's definition, mediation is understood throughout Europe as a process whereby parties to a dispute attempt to reach an agreement with the assistance of a mediator. The Directive did not set any specific requirements as regards the functioning of the mediation processes and sessions. Significant differences in the way national laws regulate mediation emerge from the national reports. Stakeholders reported that the flexibility of the Directive allowed mediation processes to be adapted to the national situations.

The Directive did not set any specific requirements for the functioning of mediation processes. The national reports show significant differences in the way national laws regulate mediation.

The Directive does not refer to the context where this process takes place. In many Member States[131] mediation can take place (only or also) within the structure of the judicial system: this is referred to as 'court' mediation for the purposes of this study.[132] National legislation regulates court mediation in a variety of ways. Court mediation may be administered by judges, lawyers or mediators. It can be accessed by parties to a proceeding when they are referred to it by the judge presiding the dispute.

As regards the process, the national reports show that face-to-face mediation is the most commonly used procedure throughout the Member States in both court and out-of-court mediation. However, written forms also exist. For example, in Belgium a mediation protocol between the parties should be drafted before the start of mediation proceedings which are then conducted face-to-face.[133] In Estonia, the parties must first try to reach an agreement in a written procedure and, only if they fail to do so, can face-to-face mediation start.[134] The application for a mediation procedure can, in some Member States, be filed electronically (e.g. in court mediation in Slovenia[135] and for family matters in Portugal[136]). Under Hungarian law, the parties may agree to conduct the mediation via video-conference, a practice that, according to stakeholders, is likely to facilitate cross-border mediation procedures.[137]

---

[128] Regulation 3(2) of the Mediation Regulations.

[129] Section 100(3).

[130] For instance, as regards personal injury actions, Section 15 of the Act provides that mediation may be initiated at the request of one of the parties if the court determines that mediation might assist a settlement.

[131] BE, DE, DK, EL, FI, FR, HU, LT, LU, SI, HR, UK (Scotland).

[132] This type of mediation could also be referred to as 'judicial' mediation.

[133] Article 1731 of the Judicial Code.

[134] According to § 23 of the Mediation Act.

[135] Information provided by national reporter.

[136] Electronic mediation requests are currently available for Family, Labour and Criminal Mediation Systems: http://www.dgpj.mj.pt/sections/gral/mediacao-publica.

[137] Conclusion based on consultation with national stakeholders (Ministry of Justice, judges, mediators).

National reports confirmed that national laws do not prohibit the parties from being assisted by a lawyer during the mediation process. Some Member States even prescribe their presence in some instances. For example, under Austrian law, mediators may be required to advise the parties to consult a lawyer if the legal complexity of the matter so requires.[138] In case of court mediation in France, the assistance by a lawyer is mandatory in cases where it is also mandatory in court proceedings for the same type of dispute.[139]

National legislation regarding the information to be provided to the mediation parties (obligations, procedure, costs and consequences) is not uniform. Some provide that the mediator must inform the parties on the nature and the legal consequences of the mediation.[140] Other Member States require that, prior to the start of the mediation procedure, a written mediation agreement must be concluded between the parties which includes also clauses on their obligations (e.g. Belgium[141] and Luxembourg[142]).

Not all Member States make explicit reference to the right of the parties to withdraw from the mediation process (e.g. Luxembourg, Romania and Sweden do not do so). However, in light of the voluntary nature of the mediation, stakeholders confirmed that this is possible in practice. In Finland, parties can test the agreement during a trial period. At the end of this period, parties meet for another mediation session to discuss whether the agreement has worked and whether any alterations are needed before it is finalised.[143]

Special rules applicable to mediation in family matters were identified in several Member States.[144] In Croatia, the draft Family Act requires the parties to refer their case to mediation in disputes on parental and marital issues before accessing a court.[145] In Luxembourg, the New Civil Procedural Code regulating court mediation contains a separate section on family mediation including a requirement for the judge to hold a free information session which the parties are required to attend.[146] Polish legislation provides that the court may refer the parties to mediation at every stage of divorce or separation proceedings.[147] The Finnish Mediation Act establishes that court mediation for child maintenance and child custody must be carried out so that the best interests of the child are ensured.[148] In these cases, a mediation agreement is equivalent to a court judgment.[149]

3.3 ENFORCEABILITY

[138] According to §§ 16(2) and (3) of the Act on Mediation in Civil Matters.

[139] Malfre G., Ministry of Justice, *La médiation, avenir du procès?*, 2013.

[140] Including AT, BG, PT and RO.

[141] Article 1731 of the Judicial Code.

[142] According to Article 1251-9(1) of the New Civil Procedure Code.

[143] Information provided by national reporter.

[144] Including FI, LU, PL, PT, RO and SE.

[145] Information provided by national reporter.

[146] Articles 1251-17 to 1251-20 in the Chapter on Judicial Mediation.

[147] Article 445^2 of the Code of Civil Procedure.

[148] Section 10(1).

[149] Section 10(2).

The Mediation Directive does not regulate the nature of the mediation agreement and Member States apply differing rules. Most of them consider a mediation agreement as a contract.[150] In other cases, such as Austria, mediation agreements are considered as enforceable titles.[151] In Ireland[152] and Malta[153] new provisions were introduced to ensure enforceability of the mediation agreements following the transposition of the Directive.

In line with the Directive, Member States provide ways to make mediation agreements enforceable. The national procedures vary significantly and include approval by notaries, lawyers, mediation organisations and courts.

3.4 ACCESS TO JUSTICE

According to the national reports, access to justice is to be ensured in all Member States. This means that EU citizens and businesses can choose to either use mediation or have recourse to courts to solve their disputes. In those cases where an attempt to solve the dispute through mediation is obligatory, parties can still bring the dispute to court if mediation is not successful. The vast majority of Member States have not established any caps for the duration of mediation procedures.

According to national law, in some Member States, parties to a contract that included a mediation clause might be required to comply with that clause and try mediation before referring their dispute to courts. If not, in most cases the judge will declare the proceedings inadmissible until mediation is attempted.[154]

All national laws also protect access to justice by ensuring that the right to bring an action in court is not impeded by the operation of limitation and prescription periods.
Mediation suspends the period set to bring an action to court. The start of mediation, and hence the start of the suspension, depends on the relevant procedure. For example, in Lithuania, the limitation period is suspended when one party proposes in writing to settle the dispute by mediation.[155] In Romania[156] and Belgium[157] suspension starts with the signature of the preliminary mediation contract regulating the mediation procedure. In most Member States, the suspension is lifted automatically when the mediation procedure is concluded.

Moreover, if a court proceeding is already pending, it can be suspended to allow for mediation. If mediation is not successful, court proceedings will automatically resume (e.g. Denmark[158]) or upon the request of the parties (or one of them). In Germany, the limitation period starts running again

---

[150] E.g. BG (where it is binding even if it has been made just orally), DK (only if in written form), ES, NL, SI.

[151] According to § 1 of the Execution Order.

[152] Order 56A of the Rules of the Superior Courts (Mediation and Conciliation) was amended by the Rules of the Superior Courts 2012.

[153] Act IX of 2010 dated 2 July 2010.

[154] DE, ES, HR, LT and SI.

[155] Article 8 of Law No X-1702.

[156] Article 49 of Law No. 192/2006.

[157] Articles 1730 to 1733 of the Judicial Code.

[158] Information provided by national reporter.

three months after the end of the suspension.[159] Under French law, the limitation period runs after the end of suspension for at least six months.[160] In some cases, access to court is granted even in the event that an agreement has been reached by the parties through mediation but subsequently the dispute has not been solved (e.g. Bulgaria,[161] Hungary[162] and Spain[163]).

3.5 MEDIATORS AND QUALITY CONTROL MECHANISMS

The Mediation Directive defines 'mediator' and requires Member States to encourage the development of quality control mechanisms (Article 4(1)). Most Member States[164] made full use of this provision to set up obligatory accreditation procedures for mediators and run registries for mediators.

In other countries, registration/accreditation procedures are obligatory to be able to exercise the profession of mediators (such as Italy[165] and Greece[166]). The same might apply also to mediation organisations (such as in Austria[167] and Italy[168]). The registration could be granted for a limited period (e.g. five years in Austria[169] and the Czech Republic[170]) with a possibility to extend it.

Most Member States have set up obligatory accreditation procedures for mediators and some run registries for mediators.

The criteria set for accreditation/registration either at the national level or by mediation organisations vary significantly among Member States. In many Member States full legal capacity[171] and full civil rights[172] are explicitly required for someone to be accredited as a mediator. Other personal criteria are: clean criminal record;[173] having the right to exercise a profession (e.g. Bulgaria[174]); not being under guardianship (e.g. Cyprus[175]) and having an

[159] Sections 203 and 204 of the Civil Code.

[160] Article 2238 of the Civil Code.

[161] Articles 11a and 15(3) of the Mediation Act.

[162] Article 36(1) of Act LV of 2002 on mediation.

[163] See for instance, 'Mediation complementary system of justice Administration', Fernando Martin Diez, General Council of the Judiciary, 2010.

[164] AT, BE, BG, CY, CZ, DK, EL, ES, HR, HU, IT, LT, LU, MT, NL, PT, RO, SI, SK.

[165] Article 7 of Ministerial Decree 180/2010 on the mediation organisations' register and list of mediation trainers.

[166] Article 4(c) of Law 3898/2010.

[167] According to §24 of the Act on Mediation in Civil Matters.

[168] Article 4 of Ministerial Decree 180/2010.

[169] According to §13 of the Act on Mediation in Civil Matters.

[170] Section 22(1) of the Mediation Act.

[171] CY, CZ, HU, PL, RO, SI and SK.

[172] ES, FR, HU, LU and PL.

[173] AT, BE, BG, CY, CZ, FR, HU, LU, SI and SK.

[174] Article 8(3) of the Mediation Act.

appropriate state of health (Romania[176]). Austria requires mediators to be at least 28 years old.[177] Some Member States forbid certain public officials from working as mediators (e.g. Bulgarian officials of the administration of justice, except in pro-bono cases;[178] all Cypriot public officials;[179] Polish judges[180]). On the contrary, other national laws limit mediation to certain professions (e.g. in Denmark[181] and Finland[182] only lawyers can act as court mediators). In Greece, in judicial mediation the most senior judge in each district court is appointed as court mediator whereas only lawyers can be accredited as out-of-court-mediators.[183] The draft Latvian law requires mediators in court to be certified.[184] Only in Sweden can everyone be listed on the mediation register and there is no quality assurance or control of the mediators.[185]

In some cases, under national legislation, registered/accredited mediators co-exist with non-registered ones and it is up to the clients to make their choice (Austria,[186] Lithuania[187] and United Kingdom[188]). For example, some Member States apply qualification criteria only to mediators who conduct court mediation.[189]

When the legislation does not provide for registries or accreditation procedures, mediation organisations might have set their own such as in France,[190] Ireland,[191] Lithuania[192] and Luxembourg.[193]

As regards family mediation, special requirements might apply and the registration/accreditation

---

[175] Article 7(d) of Law 159(I)/2012.

[176] Article 7 of Law No. 192/2006.

[177] According to §9 of the Act on Mediation in Civil Matters.

[178] Article 4 of the Mediation Act.

[179] Article 7(b) of Law 159(I)/2012.

[180] Article 183^2 (2) of the Code of Civil Procedure.

[181] Section 273 of the Administration of Justice Act.

[182] Section 5(1) of the Mediation Act.

[183] Article 214B(2) of the Code of Civil Procedure as amended in 2012.

[184] Information provided by national reporter.

[185] Information provided by national reporter.

[186] According to § 5(2) of the 2011 Federal Act on certain aspects of cross-border mediation in civil and commercial matters in the European Union.

[187] Conclusion based on consultation with national stakeholders (mediators).

[188] Information provided by national reporter.

[189] LU, NL and SI.

[190] The National Federation for Mediation Centres, http://www.fncmediation.fr.

[191] The Mediator's Institute of Ireland.

[192] The Vilnius Court of Commercial Arbitration.

[193] The Luxembourg Association of Mediation and Certified Mediators.

system for mediators might be independent from the general one.[194] Luxembourg, for example, requires a clean criminal record, 150 hours of mediation training and submission of information on budget, concept and infrastructure of mediation (except if mediators are affiliated to a certified organisation).[195] Polish legislation requires special qualifications if the family matter is referred to mediation by the court.[196]

In the Member States which maintain a registry for mediators, failure to meet the legal requirements to be registered or violation of the rules applicable to mediators result in the removal from the list of approved mediators. For example, the failure to attend further training may result in removal from the list under Austrian legislation.[197] In addition, mediators breaching the applicable rules may be sanctioned with penalties. In Hungary, the Minister of Justice is assisted by auditors to periodically audit the activity of mediators and establish a range of penalties that the Minister of Justice can impose against those mediators who breach their obligations.[198] Austrian law provides for an administrative penalty of 3,500 euros for a number of offences under the Mediation Act, e.g. unlawful use of the title 'mediator'.[199]

A few Member States have complaint procedures in place (e.g. Slovenia for court mediation[200]). In most cases, complaint procedures might be established by the mediation organisations themselves. In the Netherlands, for example, in case of confirmed infringement of the code of conduct, the Disciplinary Committee and the Appeals Board of the Dutch Mediation Institute for disciplinary judgments for mediators may sanction the mediator with a warning, a reprimand, suspension of the registration for up to one year or removal of the mediator from the registry.[201]

3.5.1 Training

According to Article 4(2) of the Mediation Directive, Member States must encourage the initial and further training of mediators to ensure that mediation is conducted in an effective, impartial and competent way in relation to the parties.

Most Member States[202] currently have legislation in place that regulates and makes mandatory the initial training of mediators, therefore going beyond the minimum requirements of the Directive.

Many national laws[203] also contain a requirement for further training. In Belgium, the Judicial Code specifies that accredited mediators are required to follow a permanent training programme which is recognised by

Most Member States have legislation that regulates and makes mandatory the training of

[194] EE, LU, NL and PL, UK (England and Wales and Scotland).

[195] The Grand Ducal Regulation of 10 November 2006 implementing Articles 1 and 2 of the Act of 8 September 1998.

[196] Article 436(4) of the Code of Civil Procedure.

[197] According to §9 of the Act on Mediation in Civil Matters.

[198] Articles 18(1) and 20(3), (5) of Act LXXV of 2009 on the amendment of certain acts related to justice services.

[199] For instance, under § 16, § 17, § 19, § 21 and § 27 of the Act on Mediation in Civil Matters.

[200] Article 32(3) of the 2010 Rules on Mediators in the Programmes of the Court.

[201] Clause 2(2) of the Disciplinary Rules for registered mediators at the Dutch Mediation Institute, http://www.nmi-mediation.nl/english/nmi_rules_and_models/nmi_disciplinary_proceedings.php.

[202] AT, BE, CY, EL, ES, FR, HR, HU, LT, NL IT, LU, MT, PT, RO, SL and SK.

[203] AT, BE, HU, LT, NL IT, MT, RO and SK. In Cyprus, this applies only for civil mediation, in Greece only for out-of-court mediators, in Croatia only for obligatory for registered mediators and in Slovenia only for court mediators.

the Federal Mediation Commission.[204] In some Member States, like Bulgaria[205] or Finland,[206] further training is only encouraged without being regulated. In Denmark, according to the Ethical Guidelines, court mediators must take steps to keep their skills up to date.[207]

In other cases, such as under Czech legislation, training for mediators is not required but lawyers who intend to register as mediators need to pass an exam organised by the Czech Bar.[208] In practice, candidates often undergo training organised by the Bar prior to their examination. In the United Kingdom, training is a compulsory element of accreditation by the main mediation organisations.[209] In Germany, the legally protected title 'certified mediator' can be awarded to persons having followed training but no specific educational standards have been developed yet. Currently, mediators have the duty to ensure they have sufficient training and education.[210]

Training in family mediation is often organised on an ad hoc basis and in a more structured and tailored way than for other kinds of disputes. In 2004, France established a State diploma in family mediation with training provided by centres recognised by the Regional Health and Social Services Offices (DRASS).[211] In Luxembourg, initial training is obligatory for court mediation and for out-of-court mediation in family disputes.[212] The Netherlands Mediation Institute runs a specific family mediation educational programme.[213]

Finally, in the Member States where no national rules have been set[214], mediation organisations provide training on a voluntary basis. The Mediators' Institute of Ireland sets training standards and a compulsory programme of continuing professional development.[215] In Latvia, the draft mediation law requires mediators to attend training courses to obtain certification.[216]

3.5.2 Codes of conduct

The Mediation Directive also encourages Member States to develop and promote adherence to voluntary codes of conduct for mediators (Article 4(1)).

---

[204] Article 1726.

[205] Article 11a of Ordinance No. 2.

[206] The Finnish Bar Association (FBA) provides training in mediation, also with the opportunity to specialise, for example, in mediation for family matters. The Ministry of Justice also provides training for judge mediators, which is similar to the training provided by the FBA.

[207] Paragraph (h) of the Ethical Guidelines, http://www.domstol.dk/saadangoerdu/retsmaegling/Pages/Etiskeretningslinjerforretsmaegling.aspx.

[208] According to Section 49a(1) of Act No. 85/1996 Coll. the Czech Bar arranges the training of lawyers in the area of mediation and arranges examinations of mediators for them under the Mediation Act.

[209] For example, the Civil Mediation Council Provider Accreditation Scheme in England and Wales, http://www.civilmediation.org/about-cmc/15/accredited-mediation-providers.

[210] Sections 5 and 6 of the Mediation Act.

[211] Article R451 of the Code of Social Action.

[212] Article 1251-3 (2) (2nd indent) of the New Civil Procedure Code.

[213] http://www.nmi-mediation.nl/news/specialisatie_familiemediation.php.

[214] CZ, EE, DE, IE, LV, MT, NL, PL, SE, UK. In LU and SI, this is the case for extra-judicial mediation.

[215] http://www.themii.ie/accredited-trainings.jsp.

[216] Article 19(3) of the Draft Mediation Law.

About half of the Member States, provide rules on codes of conduct. In Hungary, the National Judicial Council is preparing a handbook on mediation including rules of conduct.[217] The draft Latvian law requires the elaboration of codes of conduct.[218] In Poland, the Code of Conduct of Polish Mediators applies (voluntarily).[219]

In numerous Member States (e.g. Austria,[220] France,[221] Germany,[222] Slovakia[223] and Ireland[224]) providers of mediation set their own codes of ethics. In Finland, for example, the Finnish Bar Association adopted Mediation Rules[225] and Swedish chambers of commerce have developed their own.[226] Ethical Guidelines have been adopted in Denmark by a working group of court mediators.[227]

In some cases, Member States went beyond the minimum requirement of the Directive, making adherence to codes of conduct compulsory for mediators and mediation organisations.[228] In Italy, by law, all mediation organisations must adopt a compulsory code of conduct for their affiliated mediators.[229] In the United Kingdom as well, mediators who want to be accredited by an organisation must adhere to its code of conduct.[230] In the Netherlands, mediators who want to be eligible for court-referred mediation must comply with the codes of conduct set by the Netherlands Mediation Institute and the Council for Legal Aid.[231]

The European Code of Conduct for Mediators plays a key role in this context by being directly used by stakeholders or having inspired the applicable national

The European Code of Conduct for Mediators is used by stakeholders and has inspired national and

[217] Report of the National Judicial Council, http://www.birosag.hu/engine.aspx?page=OBH_Elnokenek_beszamoloi.

[218] Article 18(2)(8) of the draft Mediation Law.

[219] Information provided by national reporter.

[220] The Austrian Network Mediation has adopted ethics guidelines for mediators, http://www.servicestellemediation.at/Ethikrichtlinien.pdf.

[221] A Code of Professional Ethics for mediators and mediation in France was adopted by the main mediation organisations in 2009, http://www.fncmediation.fr.

[222] For example, Lawyer's Professional Code of Conduct; Code of Conduct for German Tax Consultants; Ethical Principles of the German Psychological Society (DGP) and the Association of German Professional Psychologists (BDP).

[223] Ethical Code of the Slovak Association of Mediators, http://www.komoramediatorov.sk/kodex.html.

[224] The Mediators' Institute of Ireland 'Code of Ethics and Practice,' http://www.themii.ie/code-of-ethics.jsp.

[225] http://www.asianajajaliitto.fi/asianajotoiminta/sovintomenettely/sovintomenettelysaannot.

[226] Information provided by national reporter.

[227] http://www.domstol.dk/saadangoerdu/retsmaegling/Pages/Etiskeretningslinjerforretsmaegling.aspx.

[228] CY, BE, BG, EL, ES.

[229] Articles 16(1) of Legislative Decree 28/2010.

[230] In Northern Ireland, for example, the Code of Ethics and Practice of the Mediation Institute of Ireland, http://www.themii.ie/code-of-ethics.jsp.

[231] Decision of the Board of the Council for Legal Aid of 11 December 2012 on the basis of Article 33 b of the Law for Legal Aid.

or sectorial codes. Lithuania, for example, prescribed adherence to the European Code of Conduct for Mediators by judges for court mediation.[232] Other Member States apply it in practice without making any reference to it in their laws.[233] The Luxembourg Association of Mediation and Certified Mediators has adopted the European Code of Conduct for Mediators.[234] In Slovenia[235] and Portugal[236] civil society organisations that carry out out-of-court mediation adhere to the European Code of Conduct for Mediators.

Organisations that require mediators acting under their auspices to respect the European Code of Conduct for Mediators may inform the Commission which will then include them on a list of mediation organisations. This list is regularly updated by the Commission and is available online for information purposes.[237]

3.6 FINANCIAL ASPECTS

Many Member States regulated the financial aspects of mediation setting thresholds for fees or establishing financial incentives or sanctions.

Many Member States regulated the financial aspects of mediation setting thresholds for fees or establishing financial incentives or sanctions.

Member States such as Croatia,[238] Hungary,[239] Lithuania[240] and Slovenia[241] (in certain cases, e.g. labour and family) provide court mediation for free.

Other Member States introduced reductions or refund of stamp duties or court fees if an agreement is reached through mediation during suspended court proceedings. These include:

- Portugal (30% refund of the fees paid to access the mediation services of the Courts of Peace);[242]
- Bulgaria (50% of the stamp duty deposited is refunded to the plaintiff when parties to a judicial proceeding reach a settlement agreement that is subsequently implemented by the court);[243]
- Estonia (50% of the paid State fee is refunded if parties to judicial proceedings settle outside the

[232] Article 4(1) of Law No X-1702.

[233] E.g. stakeholders in FR, IE, HU, SK.

[234] Information provided by national reporter.

[235] The Rakmo Institute and the Institute for Mediation Concordia.

[236] Information provided by national reporter.

[237] The list of organisations complying with the European Code of Conduct for Mediators is available at http://ec.europa.eu/civiljustice/adr/adr_ec_list_org_en.pdf.

[238] Information collected through consultation with national stakeholders (Ministry of Justice, judges).

[239] Article 56(4) of Act XCIII of 1990 on duties.

[240] Article 231 of the Civil Procedure Code of 2002 as amended and paragraphs 3 and 4 of the Judicial Mediation Rules adopted by Resolution No. 13P-348 of the Judicial Council of 29 April 2011.

[241] Information provided by national reporter.

[242] http://www.dgpj.mj.pt/sections/gral/mediacao-publica/mediacao-anexos/perguntas-frequentes#a9.

[243] Article 78(9) of the Civil Procedure Code.

courtroom);[244]
- Latvia (50% of the stamp duty paid for the commencement of judicial proceedings is repaid upon approval of a settlement agreement by court);[245]
- Spain (refund of 60% of the judicial proceedings fee if an extrajudicial solution is reached);[246]
- Germany (where when legal proceedings come to an end through in-court-mediation, the claimant's side will recover two-thirds of the legal fees, which in Germany have to be paid in advance by the claimant);[247]
- Lithuania (refund of 75% of the stamp duty paid when filing a lawsuit);[248]
- Poland (3/4 of the fee paid for the claim instituting first instance proceedings will be refunded to the party, if the parties reach an agreement before a mediator during the proceedings);[249]
- Czech Republic (reimbursement of 80% of court fees);[250]
- Slovakia (30% to 90% of the court fee, depending on at what stage of the proceedings they reach conciliation);[251]
- Italy (combination of refunds with other fiscal deductions on personal income).[252]

Financial incentives also take the form of legal aid.[253] However, most Member States apply different rules for different types of disputes or mediation processes. For example, in Germany, legal aid applies always to court mediation but is limited for out-of-court mediation;[254] in Slovenia, it applies only for court mediation;[255] in Luxembourg, legal aid is available for court mediation and family mediation led by a certified mediator;[256] in Italy, legal aid is available for compulsory mediation.[257] In Lithuania, the introduction of favourable conditions for the use of state-guaranteed legal aid for mediation is being discussed.[258]

For family mediation special rules might apply. In Estonia, with the support of the City Government, the Crisis Centre in Tallinn is offering family mediation for free,[259] whereas in

[244] According to §150 (2.1) of the Code of Civil Procedure.

[245] Article 37(1)(5) of the Civil Procedure Law.

[246] Article 8(5) of the Regulatory Law of the Rates in Judicial Procedures (Law 10/2012).

[247] Information provided by national reporter.

[248] Article 87(2) of the Civil Procedure Code of 2002 as amended.

[249] Article 79 of the Act of 28 July 2005 on judicial costs in civil cases.

[250] Section 10(7) of Act No. 549/1991 Coll., on court fees.

[251] Section 11(7) of the Mediation Act.

[252] Articles 17 and 20(1) of Legislative Decree 28/2011.

[253] E.g. in BE, DK, FI, HR, MT, PT, RO and UK.

[254] The German Act on Legal Aid and Section 15a of the German Introductory Act to the German Code of Civil Procedure.

[255] According to the 2004 Free Legal Aid Act.

[256] Article 6 of the Grand Ducal Regulation of 25 June 2012.

[257] Article 76 (L) of Decree of the President of the Republic on 30 May 2002, n. 115.

[258] Implementing measures No. 2.2-2.4 of the 2011 'Plan for promotion of conciliatory mediation (mediation) and the amicable settlement of disputes' by the Ministry of Justice.

[259] Information provided by national reporter.

Ireland, such services are provided for free by the state-run Family Mediation Service.[260] In Luxembourg, family mediation services are often provided free of charge or parties are asked to make a symbolic contribution.[261] In France, different thresholds according to the economic situation of the parties are determined by the National Fund for Family Allowances.[262] The first information session is free and then the parties' financial participation for each session is estimated according to their income.

Some countries also opted to impose sanctions as a means to ensure the use of mediation. In Hungary, sanctions are foreseen for those who, after concluding a mediation agreement, go to court or where a party does not fulfil the obligations assumed under a mediation agreement;[263] in Ireland, [264] they apply for unreasonable refusal to consider mediation (but they were never actually imposed);[265] in Italy, the successful party in litigation proceedings cannot recover costs if he/she rejected a mediation proposal that had the same terms as the court judgment.[266] In Italy, sanctions exist also for cases where mediation is compulsory and parties do not make use of it.[267] In Poland, if a party who previously agreed to mediation refuses to mediate, the court may, inter alia, order it to pay the costs of the proceedings, irrespective of the outcome of the case.[268] In Slovenia, the court may order the party who unreasonably rejects referral to court-annexed mediation to pay all or part of the judicial expenses of the opposing party.[269]

3.7 INFORMATION AND PROMOTION OF MEDIATION

3.7.1 Dissemination of information

On the occasion of the transposition of the Directive, and especially in the Member States that set up new mediation systems, a variety of measures were adopted to inform citizens and businesses about mediation. These differ significantly from one country to another and depend mostly on the national budget allocated for this purpose. In all Member States, information on the advantages of mediation and useful practical information on costs and procedure is also provided by associations of mediators, bar associations, or the mediators themselves.

Information on mediation is provided online in some Member States.[270] Some of those Member States that maintain a registry for mediators publish the list of approved mediators on the website

---

[260] http://www.legalaidboard.ie/lab/publishing.nsf/content/Family_Mediation_Service.

[261] Information provided by national reporter.

[262] Funds for Family Allowances (CAF), http://www.caf.fr.

[263] Pursuant to Article 80(4) of Act III of 1952 (Civil Procedure Code).

[264] According to Order 56A of the Rules of the Superior Courts (Mediation and Conciliation).

[265] Information provided by national reporter.

[266] According to Article 60(3)(p) of Law 69/2009 and Article 13 of Legislative Decree 28/2010.

[267] The judge can condemn the party that does not participate, without a justified reason, in mediation proceedings before having recourse to courts, to pay to the State treasury an additional fee equal to the fee (*contributo unificato* - lump sum payment) due for the court proceedings (Article 8(5) of Legislative Decree 28/2011).

[268] Article 103(2) of the Code of Civil Procedure.

[269] Article 19, paragraphs 1, 5 and 6 of the Act on Alternative Dispute Resolution in Judicial Matters.

[270] BE, CZ, DE, FR, RO, UK.

of the competent body. [271]

In addition, according to the national reports, some Member States held public conferences on mediation.[272] In France, 2013 has been declared as the 'Mediation Year' by the Paris Bar Association which organised many events, such as seminars and conferences, and published information on mediation.[273] In Poland, the Ministry of Justice has conducted public promotion campaigns, TV spots, radio broadcasts and published posters promoting mediation.[274]

In some cases, the transposition of the Directive has led to a debate concerning the possible inclusion of modules on mediation in the curricula of certain studies to make students aware of this way of dispute resolution (e.g. in education studies at the University of Malta).[275]

Information in writing has also been used. For example, a leaflet specifically explaining the modalities of mediation in family matters is provided on the website of the French Ministry of Justice.[276] The Citizens Information website[277] in Ireland provides information on the concept of mediation and outlines the ways in which mediation can help in family matters.

3.7.2 Promotion to interested parties

Some Member States adopted rules beyond the minimum requirement of the Directive and have provisions in place requiring lawyers to inform their clients of the possibility to use mediation for dispute resolution.[278] In Italy, for example, lawyers must inform their client in writing about compulsory mediation and judges verify this in the introductory phase of the proceedings.[279] If proof of compliance with this obligation is not provided, the contract between the client and the lawyer can be declared void. In Portugal, the bar association might require its associates to inform clients about mediation.[280]

In line with Article 5 of the Directive, Member States foresee that the court can inform the parties of the option to use mediation. This may be an obligation[281] or an option and can often be done at any stage of the proceedings. In Germany, court actions have to indicate whether the parties tried mediation or another way of alternative dispute resolution and whether there are any reasons excluding such a procedure.[282] In this way, every party who intends to bring an action before a civil

[271] AT, BE, IT, PL, PT, SK.

[272] AT, LT, LU, PL, SI.

[273] Information provided by national reporter.

[274] As part of the campaign within the framework of the European Social Fund Priority V 'Good governance' of the Operational Programme 'Human Capital' 2007-2013 – 'Facilitating access to justice'.

[275] Promotion Programme, Malta Mediation Centre, October 2012.

[276] http://www.justice.gouv.fr/publication/fp_mediation_judiciaire_civile.pdf.

[277] http://www.citizensinformation.ie/en/birth_family_relationships/separation_and_divorce/family_mediation_service.html.

[278] CY, IE, EE, FI, FR, LU, UK (England, Wales and Northern Ireland).

[279] Article 4(3) of Legislative Decree 28/2010.

[280] Information provided by national reporter.

[281] AT, BE (for family matters), DK, ES, FI, HU, SI and UK (England and Wales).

[282] Section 253 (3) of the Civil Procedure Code.

Some Member States have provisions in place requiring lawyers to inform their clients of the possibility to use mediation for dispute resolution.

court is made aware of this option. In the Netherlands, mediation officers in courts can answer questions from (potential) parties to a court proceeding.[283] As mentioned above, Romania established mandatory informative sessions. In Luxembourg, the judge can order the parties to attend a family mediation information session.[284] Croatia is currently adopting a new Civil Procedure Act which will introduce an obligation for judges to inform the parties on mediation.[285]

In some Member States, such as Belgium for parental custody disputes, judges hearing family matters must inform the parties of the possibility to resort to mediation.[286] In Estonia, the court will draw the attention of the parties to settle a divorce case through mediation and the option of receiving guidance from a family counsellor if there are chances of preserving the marriage.[287] Under Irish law, the legal representatives of the parties to a separation/divorce are required to discuss with the applicant or respondent the possibility of engaging in mediation.[288]

3.8 CONFIDENTIALITY OF MEDIATION

Confidentiality in mediation is protected in all Member States. The Mediation Directive provides for a number of specific rules (see section 23.2.4) but some Member States went beyond those requirements and introduced stricter rules.[289]

In addition to providing that mediators may not be compelled to give evidence in civil and commercial proceedings or arbitration, some national laws prescribe that mediators (and others involved in the administration of the mediation) must keep the information they obtain in the course of the mediation confidential.[290] In Austria, for example, the confidentiality requirement regarding documents provided to the mediator in the course of the mediation cannot be waived by the parties.[291]

In other cases, Member States have established sanctions for the breach of the confidentiality requirement. In Luxembourg, for instance, the New Civil Procedure Code specifies heavy sanctions for breach of professional secret including imprisonment from eight days to six months and a fine of 500 to 5,000 euros which can be imposed on any person involved in the administration of the mediation process.[292]

3.9 CONCLUSIONS

Member States have adopted legislative or other measures that go beyond the minimum

[283] www.rechtspraak.nl.

[284] Article 1251-17 of the New Civil Procedure Code.

[285] Information collected through consultation with national stakeholders (Ministry of Justice).

[286] Articles 387bis and 387ter of the Judicial Code.

[287] Article 357(2) of the Code of Civil Procedure.

[288] Section 5(1)(b) of the Judicial Separation and Family Law Reform Act 1989.

[289] BE, BG, DK, EL, PL, PT.

[290] AT, BE, CZ, DK, EE, EL, ES, FI.

[291] According to §18 of the Act on Mediation in Civil Matters.

[292] Article 1251-7.

requirements of the Mediation Directive. In these cases, the transposition of the Directive provided an opportunity for the national legislator to better address the needs of stakeholders and take a step forward in encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings.

The Directive applies to cross-border disputes but provides that Member States can extend its application to domestic disputes too. Almost all Member States opted to extend the Directive's requirements to domestic cases.

Few Member States made mediation compulsory. Some Member States are currently contemplating whether to introduce compulsory mediation for specific types of disputes.

The Directive did not set any specific requirements for the functioning of the mediation processes. Thus, there are significant differences in the way national laws regulate mediation. According to stakeholders, this flexibility allowed mediation processes to be adapted to the national situations.

Regarding the quality of mediation, most Member States have set up obligatory accreditation procedures for mediators and mediation organisations and some run registries. Additionally, most Member States have legislation in place that regulates and makes mandatory the training of mediators, at least initially.

About half of the Member States have enacted codes of conduct whereas in other Member States providers of mediation set their own codes of ethics. The European Code of Conduct for Mediators is used by stakeholders and has inspired national and sectorial codes.

Many Member States regulated the financial aspects of mediation by: setting thresholds for fees; establishing financial incentives (legal aid, free mediation services, refund of stamp duties and legal costs); and, introducing sanctions. These incentives and sanctions do not affect the right of access to justice.

With regard to the dissemination of information on and promotion of mediation, Member States that set up new mediation systems took a variety of measures to inform citizens and businesses about mediation. These differ significantly from one country to another and depend mostly on the national budget allocated for this purpose (e.g. online information on the websites of competent national bodies; public conferences; public promotion campaigns, TV spots; radio broadcasts; posters, etc.). Furthermore, some Member States require lawyers to inform their clients of the possibility to use mediation for dispute resolution. Courts also can or are required to inform the parties of the option to use mediation.

Finally, confidentiality of mediation is protected in all Member States, even though in some Member States the duty of confidentiality applies only to mediators or confidentiality is not applicable to court mediation. Furthermore, some Member States have adopted stricter rules on confidentiality than those of the Directive, including through the imposition of sanctions.

4. EVALUATION OF THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE

This section provides an ex-post evaluation of the Mediation Directive according to a number of fixed criteria:[293]

- Relevance of the Directive in relation to the needs of the stakeholders;
- Consistency and complementarity with other instruments at EU and national level;
- Effectiveness in achieving the Directive's objectives in practice and allowing a smooth application in all Member States;
- Efficiency in achieving the effects of the Directive at reasonable cost;
- Utility in terms of added value of the Directive.

In light of this evaluation, building upon positive and negative experiences and taking into account stakeholders' suggestions as described in the 28 national reports, suggestions/recommendations for action by EU institutions and Member States to make the best use of mediation as an alternative dispute resolution system will be put forward.

4.1 RELEVANCE

To what extent are the objectives of the Directive – i.e. securing better access to justice, providing a cost-effective and quick extra-judicial resolution of disputes – still pertinent to the needs of stakeholders?

National reporters confirmed that securing better access to justice and providing cost-effective and quick extra-judicial resolution of disputes are issues at the top of the agendas of national justice policies and broader policies aimed at coping with the economic crisis throughout Europe.[294]

The objectives of the Mediation Directive are pertinent to the needs of stakeholders.

From the information gathered at national level, it emerges that the objectives of the Directive are pertinent to the needs of stakeholders in almost all the countries analysed. For example, in Luxembourg, an attempt to regulate and promote mediation in 2002 had failed and the transposition of the Directive was key to overcoming internal political conflicts and adopting a comprehensive mediation system.[295] In very few cases, the relevance of the Directive was not considered very significant. In Germany, stakeholders found that the judicial system was already providing cost-effective and quick resolution of disputes. In Denmark, only court mediation is regulated since 2008[296] and stakeholders considered that the regulation of out-of-court mediation would impede the functioning of the system.[297] In the Netherlands as well, the existing mediation system, based mostly on self-regulation, worked well.[298]

[293] Annex III presents the questionnaire used to consult stakeholders on the evaluation of the implementation for the Directive. The questionnaire is organised by indicators (such as costs and rapidity) to identify the nature and scale of the problems.

[294] See, for instance, the Council of the European Union 'Recommendation on Italy 2013 national reform programme and delivering a Council opinion on Italy's stability programme for 2012-2017', point 11: 'Completing the civil-justice reform by swiftly implementing the revision of courts' organisation and reducing the excessive duration of case-handling, court backlogs and high level of litigation is necessary to improve the business environment' (http://ec.europa.eu/europe2020/pdf/nd/csr2013_italy_en.pdf).

[295] Information provided by national stakeholders (mediators).

[296] Court mediation is regulated by the Administration of Justice Act as amended in 2008.

[297] Conclusion based on consultation with national stakeholders (trainer of mediators).

[298] Information provided by national reporter.

According to the national reports, the Directive allowed Estonia[299] and Greece[300] to understand the necessity and usefulness of family mediation. Stakeholders, e.g. in Bulgaria[301] and Denmark[302], also underlined the importance of mediation for family disputes as it takes into account the feelings and emotions of the parties and the mediation process is carried out in a more amicable setting. These advantages are the reason why in countries such as Finland, mediation in family matters has proven far more popular than mediation for other civil disputes.[303] In Hungary, 25% to 30% of mediation cases concern family disputes.[304] In Sweden, it was reported that the number of cross-border family disputes is increasing and the Directive's provisions could be useful in solving them.[305]

To what extent does the scope of the Directive match the current needs?

Some stakeholders underlined that the scope of the Directive could have been broader and the minimum standards could have been higher in order to address specific needs in certain countries. For example, in Greece,[306] the Netherlands,[307] Slovenia[308] and Spain,[309] stakeholders highlighted the positive outcomes mediation could potentially have for administrative disputes. In some cases, disputes in family and labour issues have not been covered by the transposition of the Directive as specific legislation regulates mediation in these fields (see section 24.1.2).

4.2 CONSISTENCY AND COMPLEMENTARITY

To what extent are the initial objectives of the Directive consistent with the objectives of further EU policy objectives, such as the overall objectives of the EU internal market, of the Europe 2020 Strategy for Growth, of the policy of "Justice for Growth"?
That is, does the Directive contribute to growth? To what extent is the Directive consistent with other EU instruments in the civil and commercial area (in particular proposals on Alternative Dispute Resolution/On-line Dispute Resolution (ADR/ODR) for consumers, mediation clauses in instruments on financial services and insurance)?

Stakeholders agreed that mediation can contribute to growth and the objectives of the Mediation Directive are consistent with the ones of further EU policies.

Mediation is a means to improve the efficiency of the justice system and to reduce the obstacles that lengthy and costly judicial procedures create for citizens and businesses. In light of the results of this study, it can be

[299] Information collected through consultation with national stakeholders (Ministry of Social Affairs).

[300] Information collected through consultation with national stakeholders (Ministry of Justice).

[301] Information collected through consultation with national stakeholders (Ministry of Justice, mediators, trainers of mediators).

[302] Information collected through consultation with national stakeholders (trainers of mediators).

[303] Information collected through consultation with national stakeholders (judges).

[304] Conclusion based on consultation with national stakeholders (Ministry of Justice, judges, mediators).

[305] Conclusion based on consultation with national stakeholders (judges).

[306] Information collected through consultation with national stakeholders (Ministry of Justice, Mediators' Accreditation Committee, mediators).

[307] Information collected through consultation with national stakeholders (judges).

[308] Conclusion based on consultation with national stakeholders (mediators).

[309] Conclusion based on consultation with national stakeholders (judges).

concluded that mediation can contribute to growth and all national stakeholders interviewed agreed that mediation has this potential. However, stakeholders also reported a very limited number or no cross-border mediation cases and, therefore, they clarified that the contribution of mediation to growth is greater where the transposition of the Directive covers also domestic cases.

At the same time, even when domestic cases are covered by the national transposing legislation, the practical functioning of the mediation system in some Member States might have limited the full potential of mediation, especially where there is no smooth application of the Directive (as analysed further on in this section).

As also mentioned in the introduction to this final report, in light of the findings of this study it could be concluded that the objectives of the Directive are consistent with the objectives of further EU policies, such as the EU internal market, the Europe 2020 Strategy for Growth and the Justice for Growth agenda. In particular, the recent EU initiatives on consumer ADR and online dispute resolution are going in the same direction as the Directive aiming to reach at national level the same objectives as the Directive. Not all stakeholders were fully familiar with EU instruments in the civil and commercial areas but those who knew about EU initiatives agreed with this finding.

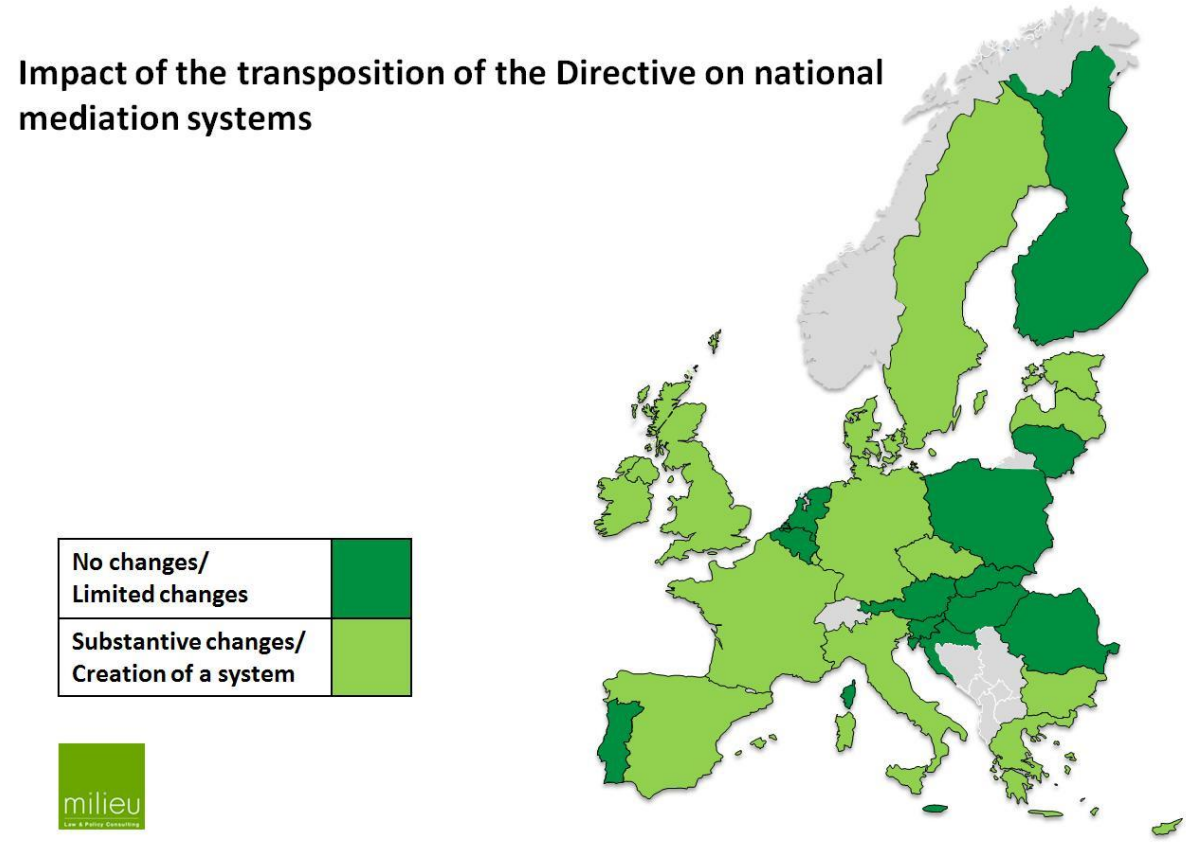
The national reporters did not report problems linked to gaps or overlaps among instruments for ADR. Confusion in the use of ADR procedures for different disputes was not considered a difficulty which could undermine the functioning of mediation.

4.3 EFFECTIVENESS

4.3.1 Achievement of the Mediation Directive's objectives

To what extent have the objectives of the Directive been achieved in practice (access to alternative dispute resolution, a balanced relationship between mediation and judicial proceedings)?

In order to assess the extent to which the Directive's objectives have been achieved, a distinction needs to be made between (i) Member States that already had mediation systems in place; (ii) Member States that did not have a mediation system in place and (iii) Member States having a mediation system in place which is not, however, operational yet. Where mediation systems were already in place, possible changes to national legislation introduced to transpose the Directive need to be taken into account.



In some Member States, where mediation systems were already in place and where the entry into force of the Directive has led to limited or no changes, stakeholders confirmed that the promotion of access to alternative dispute resolution and a balanced relationship between mediation and judicial proceedings is not linked to the transposition of the Directive. For instance, in Austria and Finland, it was reported that the system in place before the Directive worked well and a balanced relationship between mediation and judicial proceedings already existed to a certain extent.[310] Thus, the Directive only slightly changed national legislation to cover cross-border disputes and enforceability of mediation agreements. In Croatia[311] and Slovenia,[312] it was reported that the transposition of the Directive improved the national legislation in place but in practice the objectives were not reached as mediation is not very popular yet. In Malta, the obligation to encourage the dissemination of information has helped to raise awareness on mediation but this did not lead to a direct increase in mediation cases.[313]

In other Member States, the proposal for a Directive and the EU initiatives on mediation already inspired the national legislators to set up mediation systems. For example, Belgium did not have to amend its legislation for the transposition of the Mediation Directive as it already took into account its elements when adopting the national legal framework in 2005. In Lithuania as well, the legislation adopted in 2008 followed the proposed Directive and was only slightly amended after the entry into force of the Directive to ensure full compliance.[314] In Hungary, the Green Paper presented in 2002 by the Commission[315] also influenced the regulation of mediation adopted that

[310] Information provided by national reporters.

[311] Conclusion based on consultation with national stakeholders (Ministry of Justice, mediators).

[312] Conclusion based on consultation with national stakeholders (mediators).

[313] Information provided by national reporters.

[314] Information provided by national reporter.

[315] Green Paper on alternative dispute resolution, COM(2002)196 final, http://eur-

year.[316] In Romania, the mediation legislation was adopted before its accession to the EU following the main lines of the proposal for the Directive.[317] In all these cases, the EU initiatives relating to mediation contributed to the national measures adopted to promote access to alternative dispute resolution and to a balanced relationship between mediation and judicial proceedings.

Where the transposition of the Directive has triggered the adoption of substantial changes to the existing mediation framework or introduced a comprehensive mediation system,[318] a step forward in promoting access to alternative dispute resolution and achieving a balanced relationship between mediation and judicial proceedings has been made. For example, stakeholders in Bulgaria reported that the transposition of the Directive, which triggered several changes to the existing systems, led to a revived interest in mediation and an increase in its use due to its safeguards (suspension of limitation periods for court actions, confidentiality of the mediation process and enforcement of mediation agreements).[319] When used, mediation seems successful in reaching these objectives. For example, in Denmark between 65% and 75% of mediation cases are concluded with an agreement.[320] In Germany, the success rate for court mediation varies between 58% and 86%.[321] In Italy, from March 2011 to March 2012, 48.3% of the 59,293 mediation cases concluded were successful.[322] Some stakeholders throughout Member States also highlighted that mediation processes, even when not successful, helped the parties to reach closer positions and contributed to less conflictual subsequent judicial proceedings. In France, in 18% of the family cases where an agreement had not been reached in the framework of mediation the mediation process allowed for a significant progress in solving the dispute in subsequent court proceedings.[323]

Stakeholders confirmed that mediation processes, even when not successful, helped parties to reach closer positions and contributed to a smoother functioning of subsequent judicial proceedings.

However, the transposition of the Directive has not always resulted in the full achievement of its objectives. For example, in Germany, in 2010, there were between 40,000 and 50,000 mediation cases and 1,586,652 judicial proceedings in civil matters.[324] This situation is widespread throughout Europe as also Member States that already had a mediation system in place which was

Mediation Directive's objectives have not always been fully achieved. For stakeholders, the main reason is the lack of information and the low level of awareness on mediation.

---

lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf.

[316] Information collected through consultation with national stakeholders (Ministry of Justice, mediators).

[317] Information provided by national reporter.

[318] BG, CY, CZ, DE, EE, EL, ES, FR, IE, IT, LV, LU, SE, UK.

[319] Conclusion based on the statistics for the period 2010-2012 of the Court Settlement Centre at Sofia Regional Court.

[320] Estimation provided by national stakeholders (judges).

[321] Estimation based on project done in Niedersachsen analysing mediation procedures in six courts.

[322] Ministry of Justice 'Data on mediation from the 21 March 2011 to 30 June 2012', http://www.giustizia.it/giustizia/protected/787709/0/def/ref/NOL787710.

[323] Détraigne Y., Report N394 (2010-2011) on the proposal for the sharing of judicial review and the relief of certain judicial procedures, 2011, http://www.senat.fr/rap/l10-394/l10-394.html.

[324] Estimation based on the report on 'Evaluation of Court Mediation in Berlin' (2008 – 2010) and a project done in Niedersachsen analysing mediation procedures in six courts.

not changed by the Directive (such as Poland[325]) experience the same low rate in the use of mediation. This is due to a number of reasons according to stakeholders. The main one is the lack of information and the low level of awareness on mediation, although other factors such as the quality of mediation also hinder its widespread use (see following subsections).

Finally, in some countries, the Directive has been transposed only recently or the mediation system has just started to operate.[326] In these cases, the data available is insufficient to draw conclusions. However, stakeholders agreed on the potential of the new mediation systems to reach the Directive's objectives.

To be able to monitor the situation in these Member States and ultimately to evaluate whether EU citizens and businesses have better access to justice and are provided with cost-effective and quick extra-judicial resolution of disputes, the gathering of statistics on the number of mediation cases and their success rate is crucial.

4.3.2 Smooth application of the Mediation Directive

> Does the Directive apply smoothly in your Member State and to all categories of civil and commercial disputes?
> Have there been any unintended results and impacts of the Directive?

As mentioned above, in some Member States there was already a well-functioning mediation system in place prior to the adoption of the Directive and the minor changes introduced by the Directive did not lead to any problems in their smooth operation. In these cases, no unintended results or impacts could be detected. For the rest of the Member States, stakeholders mentioned a number of difficulties hindering the smooth application of the Directive but these were very specific and often linked to the particular national contexts and, thus, no common trends could be identified. For example, no specific categories of civil or commercial disputes could be singled out as being less suitable for mediation and no specific difficulties in the enforcement of mediation agreements were identified throughout Europe.

Nonetheless, some considerations may be made regarding compulsory mediation. In some cases (such as in Germany[327] and Italy[328]), stakeholders concluded that the limited application or absence of compulsory mediation impeded the role of mediation. This is true also for court mediation in Denmark[329] (out-of court mediation is not regulated) where stakeholders felt that the mandatory nature of mediation could have boosted the functioning of the mediation system. In Croatia, the Family Act is being revised and it is proposed to make family mediation compulsory to fully benefit from the advantages of mediation.[330] To the contrary, others consider that mediation has to be voluntary in order for it to work and that it would lose its appeal in comparison to court proceedings if it was rendered compulsory. For example, the possibility of making mediation mandatory was considered by the Belgian legislator when introducing its mediation law, but was not eventually adopted as it was considered to be contrary to the voluntary nature of mediation. Stakeholders in the Netherlands also felt strongly about this: they are not in favour of compulsory mediation as they consider it not in line with the nature of the mediation process.[331]

[325] Information provided by national reporter.

[326] CY, EE and EL, ES, HU for court mediation, NL, LU, LV.

[327] Information provided by national reporter.

[328] Conclusion based on consultation with national stakeholders (Ministry of Justice, mediation organisation).

[329] Information provided by national reporter.

[330] Information collected through consultation with national stakeholders (Ministry of Justice).

[331] Conclusion based on consultation with national stakeholders (mediators, judge).

In light of these contradictory experiences and stakeholder opinions, also within the same national context, it appears that compulsory mediation is a controversial issue.

Difficulties in reaching the objectives of the Mediation Directive are partly linked to traditions and cultures of conflict rather than of compromise.

Although national situations are varied, several stakeholders highlighted one element which is common to many Member States. Widespread dispute management traditions and cultures which follow a more adversarial approach (form of adjudication) than the compromise approach ('win-win' situation) which characterises mediation[332] are impeding the smooth application of the Directive. In the Netherlands, for example, where a number of initiatives to spread information about mediation have been in place for many years, the use of this ADR system is still not frequent.[333] In Italy, compulsory mediation was effective in ensuring that the objectives of the Directive could be achieved in practice:[334] since the transposition of the Directive, mediation cases increased (with about 50% concluded with an agreement) and court cases decreased by about 30%. From April 2011 to June 2012, the new monthly applications for mediation in Italy increased from 5,070 to 19,051.[335] However, when the Constitutional Court declared compulsory mediation unconstitutional, the number of new cases dropped significantly, showing the lack of a 'mediation culture' in Italy.[336]

4.4 EFFICIENCY

4.4.1 Costs of mediation systems and services

To what extent have the effects of the Directive been achieved at a reasonable cost?

None of the national reporters identified significant costs sustained for the transposition of the Directive. Changes to the judicial and mediation systems introduced by the Directive were achieved by incurring reasonable costs often covered by the funds for the ordinary running of the justice administration and, therefore, drawing mostly on existing resources.

It has been pointed out that, in most cases, costs related to the organisation of mediation systems and only limited funds were allocated to information and awareness-raising activities, which are also central to the efficient implementation of the Directive (Czech Republic[337]).

Can the costs of the mediation procedure be considered moderate and proportionate (fees of experts, mediators, attorneys, taxes, costs for enforceability and any other cost involved)?

An overview of the measures adopted by Member States to regulate the costs of mediation services is provided in section 24.8. From the information included in the national reports, it emerges that

[332] CZ, DE, IT, FR, HR, HU, MT, PT, RO, SI.

[333] Information provided by national reporter.

[334] In Italy, mediation in certain cases was compulsory until 6 December 2012 when the Constitutional Court ruled it unconstitutional (judgement n. 272 of 6 December 2012). Article 84, Decree Law of 21 June 2013, n. 69 Urgent rules to re-launch the economy reintroduced compulsory mediation since 22 June 2013.

[335] Ministry of Justice 'Data on mediation from the 21 March 2011 to 30 June 2012', http://www.giustizia.it/giustizia/protected/787709/0/def/ref/NOL787710.

[336] Judgment of the Constitutional Court of 6 December 2012, n. 272, O.J. 12 December 2012.

[337] Information collected through consultation with national stakeholders (mediators).

financial incentives adopted by some Member States were not always efficient and the same is true for sanctions. The impact of these measures depends very much on the national context and their functioning and therefore no general conclusions could be drawn. Many stakeholders underlined that sanctions run contrary to the voluntary nature of mediation and others mentioned that financial incentives are efficient only if they are so substantial to make parties choose mediation over other dispute resolution systems. In Slovenia, it was underlined that the number of mediation cases diminished when mediation for certain types of disputes was no longer free of charge.[338]

For most Member States, the costs of mediation procedures are moderate.

In most Member States, mediation procedures are of a moderate cost and this is a key element of their attractiveness as compared to judicial proceedings.[339] In Belgium, the 2012 Mediation Barometer showed that mediation is significantly less expensive than judicial proceedings even if there is no fixed cap by law on the costs of mediation.[340] In Spain, court mediation for family disputes amounts to around 300 euros while a similar judicial proceeding is estimated at 1,300 euros.[341] In Croatia, it was underlined that the whole mediation procedure could be less costly than a single procedural act in court.[342] In the Netherlands, a similar remark was made: the cost of 10 hours of mediation might be equivalent to the court fee to lodge a case.[343] In Ireland, stakeholders reported that the cost of judicial proceedings to resolve a domestic dispute of 200,000 euros is estimated at approximately 54,000 euros[344] while the estimated cost for resolving the same dispute through mediation is about 7,000 euros.[345] In some cases, the costs of mediation were reported to be lower than those of other ADR systems, therefore incentivising the use of mediation over arbitration, for example.

In the case of Poland, the very low costs for mediation imposed by the State (e.g. 15 euros for a court mediation session of a dispute the value of which is not defined) cause difficulties for mediators for whom this activity is not lucrative.[346] Problems linked to exempting parties from paying the fees due to mediators and obligatory low fees were also reported in Portugal.[347]

In a limited number of Member States, the costs of mediation are not considered by stakeholders to be always moderate and lower than the costs of judicial proceedings. This could be due to the fact that thresholds have not been regulated and therefore there is no cap on the fees and costs related to mediation (e.g. in Austria). In other cases, e.g. in Germany,[348] the judicial system is cost effective

[338] Information collected through consultation with national stakeholders (trainers of mediators).

[339] BE, BG, DK, EE, FI, HR, HU, IE, MT, LU, LV, PT.

[340] Results of the Mediation Barometer 2012, http://www.bmediation.eu/index.php/fr/a-propos-de/news.

[341] Information collected through consultation with national stakeholders (Ministry of Justice).

[342] Information provided by national reporter.

[343] Information collected through consultation with national stakeholders (mediators).

[344] ADR Centre's Report on 'The Cost of Non-ADR – Surveying and showing the actual costs of intra-community commercial litigation'.

[345] Estimation made by national stakeholders consulted for the purposes of this study.

[346] Costs are defined in the Regulation of the Minister of Justice of 20 November 2005 on the remuneration and reimbursable expenses of a mediator in civil proceedings.

[347] Information collected through consultation with national stakeholders (mediators).

[348] Information provided by national reporter.

for small claims and in Romania[349] and Sweden[350] the costs of court proceedings are low or even non-existent for some types of disputes.

No differences in the costs of domestic or cross-border mediation were detected besides the intrinsic costs linked to possible translations and travels to attend mediation sessions in different Member States.

4.4.2 Rapid mediation procedures

Does mediation lead to rapid dispute resolution?

An overview of the measures adopted by Member States to regulate the duration of the mediation procedures is provided in section 24.4.

In all countries analysed, mediation is recognised as a quick dispute resolution system even when national legislation does not put a limit on the duration of the mediation process (for example, in Austria[351]). In Belgium, it was reported that a mediation process lasts on average between 8 and 12 hours.[352]

In almost all Member States, mediation procedures are quicker than judicial procedures and can also start faster.

Moreover, in almost all Member States, mediation procedures are quicker than judicial procedures and can also start faster. For example, in the Czech Republic, stakeholders underlined that mediation could start within two days from the mediation application while it takes around 60 to 100 days from the lodging of a court action to start a judicial proceeding.[353] In Greece, actions submitted to courts in early 2013 are expected to be heard in 2018[354] while the parties to court mediation have their first meeting 10 to 15 days after submitting an application.[355] In Latvia, court proceedings last between 8 and 36 months while mediation lasts between 3 and 4 weeks.[356] In Italy, the average duration of a court proceeding is 1,066 days while for mediation it is 61 days.[357] In Ireland, a court dispute of 200,000 euros is estimated to last 515 days while a mediation process for the same dispute would take about 45 days.[358] In Poland, the average length of civil proceedings is 540 days, of arbitration proceedings 310 days and of mediation proceedings only 42 days.[359] In Slovenia, it was underlined that a judge

[349] Information provided by national reporter.

[350] Information collected through consultation with national stakeholders (mediators).

[351] Information provided by national reporter.

[352] Results of the Mediation Barometer 2012, http://www.bmediation.eu/index.php/fr/a-propos-de/news.

[353] Information collected through consultation with national stakeholders (mediators, judges).

[354] Information collected through consultation with national stakeholders (mediators).

[355] Information collected through consultation with national stakeholders (judge-mediator).

[356] Informative report on court practice regarding terms in which cases are adjudicated, 8 November 2011, http://www.tm.gov.lv/lv/tiesibu_akti/pol_plan_dok2.html, p. 2.

[357] Ministry of Justice 'Data on mediation from the 21 March 2011 to 30 June 2012', http://www.giustizia.it/giustizia/protected/787709/0/def/ref/NOL787710.

[358] Information collected through consultation with national stakeholders and the ADR Centre's 2010 Report on "The Cost of Non-ADR – Surveying and showing the actual costs of intra-community commercial litigation".

[359] ADR Council's 'Outlines for proposals aimed at making better use of the potential of mediation as an effective method of resolving disputes and conflicts', 2012.

acting as mediator solves almost twice the number of disputes.[360] Germany could be considered as an exception as judicial proceedings can also provide quick dispute resolution.[361]

4.4.3 Efficient mediation services

Has the way Member States organised mediation in practice made it efficient?

An overview of the measures adopted by Member States to regulate the functioning of mediation services aiming at ensuring its efficiency is provided in section 24.2.
In a number of Member States, the Ministry of Justice plays a main role in monitoring the mediation system and controlling its functioning to ensure its efficiency. In some cases, it operates a registry of mediators and mediation institutions.[362]

In various Member States,[363] the low level of awareness regarding mediation and the lack of information to potential parties to judicial proceedings negatively affects the efficiency of mediation services. This is, for example, the case in Belgium where, notwithstanding the sound mediation system in place since 2005, less than 0.5% of disputes are dealt with by mediators.[364] In Croatia, despite the numerous measures undertaken by the Ministry of Justice to promote mediation, including through the media, more awareness-raising measures are necessary according to the stakeholders consulted.[365] In Sweden, all stakeholders interviewed agreed that the transposition of the Mediation Directive was a positive development but pointed out that, if the public or practitioners are not aware of mediation, it will not be used.[366] In the United Kingdom, a survey among mediators carried out in 2012 showed that 66% strongly favoured the civil justice system taking a more direct approach towards the promotion of mediation. Several stakeholders pointed out a lack of financial resources allocated to the promotion of mediation or the withdrawal of funds due to the economic crisis.[367] In some cases, larger mediation organisations or institutes under private law act as the main information providers supplementing public action but according to the national reports, this is not always efficient.

The main recommendation shared by almost all stakeholders interviewed is indeed linked to the spreading of information on mediation and its advantages. This seems to be the most urgent measure where immediate action should be taken.

In many Member States,[368] stakeholders also pointed out the lack of information on mediation and lack of cooperation of the legal professionals (such as lawyers, clerks, judges) which hinders the potential widespread use of mediation. This is accentuated by the deepening of the economic crisis as legal professionals are under pressure and increasingly need to look for clients (e.g. Ireland[369]).

[360] Information collected through consultation with national stakeholders (trainers of mediators, judges).

[361] Information provided by national reporter.

[362] AT, IT, HR.

[363] BE, BG, CZ, DK, EE, FI, FR, HR, HU, IE, IT, MT, LU, LV PT, RO, SI, SE.

[364] Results of the Mediation Barometer 2012, http://www.bmediation.eu/index.php/fr/a-propos-de/news.

[365] Conclusion based on consultation with national stakeholders (Ministry of Justice, mediators, trainers).

[366] Information collected through consultation with national stakeholders (mediators).

[367] http://www.cedr.com/docslib/TheMediatorAudit2012.pdf.

[368] BE, BG, DK, FR, IT, HR, IE, LU, PL, PT.

[369] Information collected through consultation with national stakeholders.

To overcome these difficulties, in the United Kingdom (England and Wales)[370] for example, potential parties to family disputes are required to attend an information session on mediation with a recognised mediator, who assesses the suitability of mediation for this particular dispute.

In light of this information, Member States could consider targeting their information measures specifically at legal professionals. The national legislators might also consider the possibility of introducing an obligation to inform potential parties to a dispute about mediation and its advantages.

Various stakeholders also favoured the introduction of an obligatory preliminary court procedure whereby a mediator assesses whether the dispute could be better dealt with in the context of mediation rather than judicial proceedings and refer the parties to it ('screening agency'). However, the feasibility of this option considering its possible costs and infrastructure requirements as well as the functioning of the national legal and judicial system would need to be carefully assessed.

On the other hand, setting targets for judges to refer a specific percentage of the cases brought before them to mediation was not considered useful by stakeholders as this would not take full account of the voluntary nature of mediation and the suitability of mediation to resolve the dispute.

Finally, in many cases, national reporters stated that there are more mediators than cases and therefore no problem of infrastructure was detected.[371] Stakeholders highlighted that an excessive number of mediators and mediation organisations have been set up as EU citizens and businesses try to cope with a job market crisis. For example, in Germany, mediation providers on average deal with between one and five mediation procedures per year.[372]

Moreover, stakeholders did not report any difficulties linked to the functioning of the mediation process and sessions, which in general were considered transparent and easy to understand. This is true throughout the EU, notwithstanding the different national rules which often regulate in detail the functioning of the mediation process.

4.4.4 Quality control

Are the quality control mechanisms in place sufficient to ensure effective impartial and competent mediation services?

An overview of the quality control mechanisms put in place by Member States is provided in section 24.7. As regards their effective, impartial and competent functioning, there is a variety of opinions among stakeholders in different Member States.

Where limited or no quality control mechanisms are in place, stakeholders raised concerns about the quality of mediation.

Where limited or no quality control mechanisms are in place, stakeholders raised concerns about the quality of mediation.[373] In Sweden, the lack of an identified authority in charge of monitoring the functioning of mediation (and the dissemination of information) was stressed by stakeholders as the main issue undermining the quality (and the widespread use) of mediation.[374] In the United Kingdom, a 2012 survey among mediators showed that 61.7% of the respondents

[370] According to the Pre-Application Protocol on Mediation 2011.

[371] DE, IT, HR, HU.

[372] Information provided by national reporter.

[373] FR, IT, HR, LT, LV, PT, SE, UK.

[374] Information collected through consultation with national stakeholders (judges, mediators).

favoured a single regulatory body for setting and monitoring professional standards of practice.[375]

The registries of mediators and/or mediation organisations operated in some Member States are considered a positive and effective quality control mechanism by stakeholders, because the conditions to be listed and to maintain the registration serve as initial and further checks on the experience of mediators and the quality of mediation services by organisations.[376]

The adoption of obligatory codes of conduct at national level is perceived by stakeholders as an important tool to ensure the

The adoption of obligatory codes of conduct at national level is also perceived by stakeholders as an important tool to ensure the quality of mediation (e.g. in Belgium,[377] Croatia[378] and Italy[379]). The national legislators should consider the possibility of introducing an obligation to adopt codes of conduct for all mediation organisations or, when accreditation measures exist, to make subscription to codes of conduct obligatory. The European Code of Conduct for Mediators could be used as inspiration for the drafting of such codes when they do not exist.[380]

Finally, the mandatory nature and detailed regulation of training is also considered crucial by some stakeholders to ensure that mediators have the right competences for conducting high-quality mediation processes.[381] However, the national reports for some Member States, such as Italy[382] and the United Kingdom,[383] stressed that the assessment of mediators' competences is left to the same organisations who train them and this might undermine the quality of mediation, due to a possible conflict of interest. It was also underlined in some countries that the quality checks have decreased due to the economic crisis and the restricted financial resources of the monitoring bodies.

When no action has been taken to regulate training, this has been perceived by stakeholders in countries such as Estonia,[384] France[385] and Poland,[386] as a factor hindering the quality of mediation. For example, according to the Polish report, many judges in Poland are reluctant to refer cases to mediation, because the quality of mediation is not ensured. In Ireland, 71% of mediators consulted welcomed a single standard of basic professional training and accreditation for commercial mediators.[387] Stakeholders in Romania also stressed the importance of common training

[375] http://www.cedr.com/docslib/TheMediatorAudit2012.pdf.

[376] Including in BE, HU, IT.

[377] Information provided by national reporter.

[378] Information provided by national reporter.

[379] Information provided by national reporter.

[380] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

[381] BE, BG, HR, HU, IE.

[382] Conclusion based on consultation with national stakeholders (mediation organisations, judges).

[383] Information provided by national reporter.

[384] Conclusion based on consultation with national stakeholders (mediators).

[385] Conclusion based on consultation with national stakeholders (Ministry of Justice, mediators, judges, users of mediation and trainers of mediators).

[386] Conclusion based on consultation with national stakeholders (Ministry of Justice, mediators, judges, users of mediation and trainers of mediators).

[387] The Mediation Audit, CEDR Ireland in association with the Irish Commercial Mediation Association: A survey of

standards.[388]

Another important recommendation shared by stakeholders concerned the initial and further training of mediators.

4.5 UTILITY

Has the Directive provided EU added value? Could its results have been achieved by your Member State without EU intervention?

The Mediation Directive has provided EU added value in a number of ways without any

The Mediation Directive has provided EU added value in a number of ways. As illustrated above, the Directive has raised awareness among national legislators about the advantages of mediation, especially in family disputes. In a number of countries, it led to the creation of comprehensive mediation systems; in others, it triggered the extension of the scope of existing mediation systems and it improved national mediation legislation to secure better access to justice and provide cost-effective and quick extra-judicial resolution of disputes. As mentioned in the previous sections, these improvements have taken different forms in the various Member States, ranging from ensuring safeguards for a smooth mediation process (suspension of limitation periods, protection of confidentiality, enforcement of the agreement and ensuring access to court) to creating quality control mechanisms, organising mediators' training and introducing codes of conduct, as well as adopting measures to inform the public about mediation.

Most stakeholders agree that these positive developments would have not been possible without EU intervention. This is true also where plans to amend the relevant legislation already existed but EU intervention complemented them (e.g. in Hungary[389] and Ireland[390]) and/or inspired them (e.g. in Belgium). However, while some stakeholders called for more measures at EU level, others praised the fact that the Directive was flexible enough for its measures to be adapted to each national context. Varying viewpoints were expressed not only in different Member States but also by different stakeholders within the same Member State.

Finally, it should be underlined that all these advantages of the Directive have been achieved without any significant costs on the budget of Member States, therefore ensuring the feasibility of implementing the transposing measures also in times of economic crisis.

4.6 CONCLUSIONS AND RECOMMENDATIONS

The implementation of the Mediation Directive has had a significant impact on the legislation of many Member States. In Member States that did not have a mediation system in place, the Directive triggered the establishment of appropriate legislative frameworks regulating mediation. In Member States that either had only scattered rules regulating mediation or where mediation in the private sector was based on self-regulation, the transposition of the Directive improved the existing rules. In fifteen Member States, which already had a comprehensive mediation system in place prior to adoption of the Directive, its implementation only brought limited or no changes to

commercial lawyer and mediator attitudes and experience, http://www.cedr.com/news/?item=CEDR-Ireland-ICMA-Mediation-Audit.

[388] Conclusion based on consultation with national stakeholders (mediators).

[389] Conclusion based on consultation with national stakeholders (Ministry of Justice, judges, mediators).

[390] Conclusion based on consultation with national stakeholders (mediators).

their system. Certain difficulties in the implementation of the Directive have been identified concerning the functioning of the national mediation systems in practice. These difficulties are mainly related to the adversarial tradition prevailing in many Member States, the low level of awareness of mediation and the functioning of the quality control mechanisms.

Relevance, Consistency and complementarity

The objectives of the Directive are pertinent to the needs of stakeholders and consistent with the objectives of further EU policies. Stakeholders agreed that this alternative dispute resolution mechanism has the potential to contribute to growth. No problems linked to gaps or overlaps amongst instruments for alternative dispute resolution were identified.

However, stakeholders also reported a very limited number or no cross-border mediation cases and, therefore, clarified that the contribution of mediation to growth is greater where the transposition of the Directive covers also domestic cases.

Effectiveness

Where the transposition of the Directive triggered the adoption of substantial changes to the existing mediation framework or introduced a comprehensive mediation system, a step forward in promoting access to alternative dispute resolution and achieving a balanced relationship between mediation and judicial proceedings has been made.

However, as mentioned above, certain difficulties in the practical implementation of the Directive have been identified which hinder the achievement of its objectives. Moreover, the adversarial tradition prevailing in many Member States (rather than the compromise approach which characterises mediation) further hinders the smooth application of the Directive.

Efficiency

None of the Ministries interviewed reported significant costs for the transposition of the Directive. For most Member States the costs of mediation procedures are moderate and in almost all Member States mediation procedures start and are concluded faster than judicial procedures, even when national legislation does not put a limit on the duration of the mediation process. Stakeholders highlighted this as an important advantage of mediation.

Nonetheless, the low level of awareness of mediation and the lack of information available to potential parties negatively affects the efficiency of mediation services as confirmed by stakeholders in eighteen Member States. The lack of information and cooperation of legal professionals constitutes an additional obstacle to the potential widespread use of mediation in at least ten Member States.

The adoption of obligatory codes of conduct at national level is perceived by stakeholders as an important tool to ensure the quality of mediation. In this respect, stakeholders raised concerns about the quality of mediation in Member States with limited or no quality control mechanisms. The obligatory nature and detailed regulation of training is also considered crucial to ensuring the quality of mediation services provided.

Utility

Overall, it could be concluded that the Directive has provided EU added value, namely by raising awareness amongst national legislators on the advantages of mediation, by introducing mediation systems or by triggering the extension of existing mediation systems. These advantages have been brought without any significant costs on national budgets. Most stakeholders agree that these positive developments would not have been possible without EU intervention.

Recommendations:

In light of the above key difficulties and building upon the positive experiences, the following recommendations have been put forward based on stakeholders' views throughout the EU.

1) The European Commission could recommend and encourage Member States to gather and exchange data to draw lessons and evaluate the effectiveness of the Directive and its national transposing measures. The sharing of best practices and the identification of difficulties would allow mediation to contribute to the achievement of the goals of the EU internal market, the Europe 2020 Strategy for Growth and the Justice for Growth agenda.
2) EU financing could be crucial to helping national justice administrations to spread information about mediation and its advantages to citizens and businesses throughout Europe. The upcoming Civil Justice Programme 2014-2020 could be the main instrument for this action. The European Commission could also support and coordinate Member States' efforts in planning and carrying out awareness-raising activities by favouring the exchange of experiences and best practices and producing information material that could be then translated and tailored to each national context by the Member States.
3) Member States should consider:
    - Targeting information measures about mediation at legal professionals;
    - The feasibility of introducing an obligation to inform potential parties to a dispute about mediation and its advantages;
    - The feasibility of introducing an obligatory preliminary procedure in court where it would be assessed whether the dispute could be better dealt with in the context of mediation rather than judicial proceedings and refer the parties to it ('screening agency').
4) Member States could consider introducing an obligation to adopt codes of conduct for all mediation organisations or, when accreditation measures exist, to make subscription to codes of conduct obligatory. The European Code of Conduct for Mediators could be used as inspiration for the drafting of such codes where they do not exist
5) The European Commission could be a key actor for the exchange of experiences and best practices among training organisations while taking into account the different needs and national contexts. More specifically, it could:
    - Organise seminars to identify solutions for efficient training organisation and possibly minimum common voluntary standards;
    - Support the drafting of a handbook to be used throughout Europe.

ANNEX I – LITERATURE REVIEW AT EU LEVEL

1. EU law

- Resolution of the European Parliament of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117 (INI)) (available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-449)
- Directive 2008/52/EC of the European Parliament and of the Council of 24 March 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 3–8 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF)
- Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 33–50 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF)
- Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 37, 7–8 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:037:0007:0008:EN:PDF)
- Council Regulation (EC) No 2001/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338, 1–29 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF)
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 01 - 23 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:html)
- Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, 2001/310/EC (notified under C(2001) 1016) (available at: http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf)
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 1–16 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF)
- Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ L 101, 24–47 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:101:0024:0047:EN:PDF)
- Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 31–34 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF)
- Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 043 , 0025 – 0030 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0005:EN:HTML)

2. International law

- Recommendation of the Committee of Ministers (Council of Europe) to Member States on family mediation, R(98)1 (available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2)
- Recommendation of the Committee of Ministers to Member States on mediation in civil matters, R(2002)10 (available at: https://wcd.coe.int/ViewBlob.jsp?id=306401&SourceFile=1&&BlobId=1154059&DocId=295916&Index=no)

3. Case-Law of the Court of Justice of the European Union

- Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, Case Alassini and Others, ECR- 2010 I-02213 (available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=79647&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=402414)
- Case C-185/07, Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. [2009] I-

00663 (available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72841&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=402627)

4. Other EU documents

- Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), 29 November 2011, COM(2011) 794 final (available at: http://ec.europa.eu/consumers/redress_cons/docs/odr_regulation_en.pdf)
- Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), 29 November 2011, COM(2011) 793 final (available at: http://ec.europa.eu/consumers/redress_cons/docs/directive_adr_en.pdf)
- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee -Alternative dispute resolution for consumer disputes in the Single Market-, 29 November 2011, COM(2011)791 final (available at: http://ec.europa.eu/consumers/redress_cons/docs/communication_adr_en.pdf)
- Commission Staff Working Paper Executive Summary of the Impact Assessment- Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) And Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR), 29 November 2011, SEC(2011) 1409 final (available at: http://ec.europa.eu/consumers/redress_cons/docs/summary_impact_assessment_adr_en.pdf)
- European Parliament Resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters, 2011/2117 (INI) (available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0449+0+DOC+XML+V0//EN)
- European Parliament Resolution of 13 September 2011 on the implementation of the Directive on Mediation and its take-up by the courts, 2011/2026 (INI) (available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN)
- European Parliament Note, "The Slovenian legislation implementing the EU Mediation Directive", Directorate General for Internal Policies, 2011 PE 453.172 (available at: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19582/20110518ATT19582EN.pdf)
- European Parliament Study, "Cross-Border Alternative Dispute Resolution in the European Union", 2011 PE464.424 (IMCO) (available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf)
- European Parliament Note, "Quantifying the cost of not using mediation – a data analysis", 2011 PE 453.180 (available at: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf)
- Conclusions of the ministerial seminar organised by the Belgian Presidency concerning international family mediation in cases of international child abduction, November 2010 (available at: http://register.consilium.europa.eu/pdf/en/10/st16/st16121.en10.pdf)
- DG JUST (JLS) Study (ADR Center Rome), "The Costs of Non ADR – Surveying and Showing the Actual Costs of Intra-community Commercial Litigation, Survey Data Report", 9 June 2010 (available at: http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf)
- DG SANCO Study (Civic Consulting), "Study on the use of Alternative Dispute Resolution in the European Union", Final Report 16 October 2009 (available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf)
- DG COM Eurobarometer Qualitative study (Tnsqual+), "Consumer redress in the EU : consumers' experiences, perceptions and choices", Aggregated Report August 2009 (available at http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf)
- DG SANCO Study (KUL), "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings", Final Report January 17 2007 (available at: http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf)
- DG JUST (JLS) Study (HOCHE), "Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union", December 2007 (available at: http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf)
- Economic and Social Committee Opinion on the proposal for a Directive of the European Parliament and

of the Council on certain aspects of mediation in civil and commercial matters (2005/C 286/01) (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:286:0001:0001:EN:PDF)

- Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 22 October 2004, COM(2004)718 final (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0718:FIN:EN:PDF)
- Commission Staff Working Paper Annex to the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 22 October 2004, SEC(2004) 1314 (available at: http://ec.europa.eu/civiljustice/adr/adr_ec_annex_mediation_en.pdf)
- Commission, European Conduct for Mediators, 2 July 2004 (available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf)
- Commission, Summary of responses to the Green Paper on alternative dispute resolution in civil and commercial law, 31 January 2003, JAI/19/03-EN (available at: http://ec.europa.eu/civiljustice/adr/adr_ec_en.pdf)
- Green Paper of the Commission on alternative dispute resolution in civil and commercial law, COM(2002)0196 final (available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf)
- Communication from the Commission on "widening consumer access to alternative dispute resolution", 4 April 2001, COM(2001)161 final (available at: http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just11_en.pdf)
- Council, Council of Justice and Home Affairs Ministers, 29 May 2000, Conseil/00/183 (available at: http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/00/183&format=HTML&aged=0&lg=et&guiLanguage=en)
- Council Resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, 25 May 2000, 2000/C 155/01 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:155:0001:0002:EN:PDF)
- Green Paper of the Commission on Legal aid in civil matters: The problems confronting the cross - border litigant, 9 February 2000 COM(2000)51 final (available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2000/com2000_0051en01.pdf)
- Second report on the implementation of Council Directive 85/374/EEC (the product liability Directive), COM (2000) 893 final (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0893:FIN:en:PDF)
- Proposal for a Directive of the European Parliament and of the Council on Insurance Mediation of September 2000, COM (2000) 511 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0511:FIN:EN:PDF)
- European Council, Tampere, 15-16 October 1999, Presidency Conclusions (available at: http://www.europarl.europa.eu/summits/tam_en.htm)
- European Council, Vienna, 11-12 December 1998, Presidency Conclusions (available at: http://www.europarl.europa.eu/summits/wie1_en.htm)
- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the 'out-of-court settlement of consumer disputes' and Commission Recommendation on the principles applicable to the bodies responsible for out-of- court settlement of consumer disputes, 30 March 1998, COM(1998)198 final (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1998:0198:FIN:EN:PDF)
- Communication from the Commission, Action plan on consumer access to justice and the settlement of consumer disputes in the internal market, 14 February 1996, COM(96) 13 final (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0013:FIN:EN:PDF)
- Green Paper of the Commission on access of consumers to justice and the settlement of consumer disputes in the single market, 16 November 1993, COM(93)576 final (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0576:FIN:EN:PDF)
- Public consultation on the use of alternative dispute resolution (ADR) as a means to resolve disputes related to commercial transactions and practices in the EU, summary of the responses received (available at: http://ec.europa.eu/consumers/redress_cons/Feedback_Statement_Final.pdf)
- Statement on Articles 15 and 73- Joint Declaration of the Commission and the Council (available at: http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf)
- European Parliament Note, "The Consumer Experience of Mediation in England and Wales", Directorate General for Internal Policies, 2011 PE 453.184 (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40811)

- European Parliament Note, "The Development of Mediation in Poland", Directorate General for Internal Policies, 2011 PE 453.183 (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40751)
- European Parliament Note, "Lessons Learned from Implementation of the Mediation Directive the Judges' Point of View", Directorate General for Internal Policies, 2011 PE 453.169 (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=43070)
- European Parliament Note, "Lessons Learnt from the Implementation of the EU Mediation Directive in Germany : the Point of View of Lawyers", Directorate General for Internal Policies 2011 PE 453.176 (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40775)
- European Parliament Note, "Italian legislation on mediation", Directorate General for Internal Policies, 2011 PE, 453.175 (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40797)
- European Parliament Note, "Lessons Learnt from the Implementation of the EU Mediation Directive : the Business Perspective", Directorate General for Internal Policies, 2011 PE, 453.173 (available at: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40797)

5. International/regional organisation documents

- Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), "European Judicial systems Edition 2010 (data 2008): Efficiency and quality of Justice" (available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2)
- Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), "Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters", 7 December 2007, CEPEJ (2007) 14 (available at: https://wcd.coe.int/ViewBlob.jsp?id=1223897&SourceFile=1&&BlobId=337213&DocId=1191560&Index=no)
- Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), "Working group on Mediation, Analysis on the assessment of the impact of Council of Europe recommendations concerning mediation", 3 May 2007, CEPEJ (2007)12 (available at: https://wcd.coe.int/ViewBlob.jsp?id=1155425&SourceFile=1&BlobId=274087&DocId=1129304)
- ILO, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives", October 2007 (available at: http://www.ilo.org/public/english/region/eurpro/geneva/download/events/cyprus2007/cyprus_dialogue.pdf)
- OECD, Consumer Dispute Resolution and Redress in the Global Marketplace, OECD 2006 (available at: http://www.oecd.org/dataoecd/26/61/36456184.pdf)
- Council of Europe, European Commission for the Efficiency of Justice (CEPEJ) - Mediation, report prepared at the request of the Delegation of Switzerland, CEPEJ(2003)25 (D2) (available at: https://wcd.coe.int/ViewBlob.jsp?id=1032675&SourceFile=1&BlobId=324898&DocId=1008356)
- Council of Europe, European Commission for the efficiency of Justice (CEPEJ), Evaluating Judicial Systems, 'A balance between variety and generalisation' CEPEJ(2003) 12 (available at: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PimAlbers.pdf)
- UNCITRAL 2002 Model law on International Commercial Conciliation, adopted by United Nations General Assembly Resolution 2003/A/ 57/18, with Guide to Enactment and Use (available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html)
- International Mediation Institute, Code of Professional Conduct (available at: http://imimediation.org/imi-code-of-professional-conduct)

6. Articles, Studies

- Esplugues, C., (ed) *Civil and Commercial Mediation in Europe*, vol. II, Cross-Border Mediation, (Intersentia, 2013)
- Esplugues, C., Iglesias, J.L., Palao G., (eds) *Civil and Commercial Mediation in Europe*, vol. I, National Mediation Rules and Procedures (Intersentia, 2013)
- De Palo, G., Trevor, M.B., *EU Mediation Law and Practice* (Oxford University Press, Oxford, 2012)

656
- Hodges, CJ.S., Benoehr, I., Creutzfeldt-Banda, N., *Consumer ADR in Europe* (Beck/Hart Publishing 2012)
- Oddy, A., 'EU Mediation Directive: implementation and key changes' (2011) International Law Office 2011 (available at: http://www.internationallawoffice.com/newsletters/detail.aspx?g=3d738a24-a4de-40d0-95ee-95d79452790a)
- Academy of European Law, Conference "Cross-border mediation with a focus on e-Mediation", Background Document, 24-25 March 2011 (available at: https://www.era.int/upload/dokumente/12209.pdf)
- Academy of European Law, Conference "Cross-border mediation with a focus on e-Mediation", Speakers Contribution, 24-25 March 2011 (available at: https://www.era.int/upload/dokumente/12210.pdf)
- Bosnak, J.M., 'The European Mediation Directive: More questions than answers' in Ingen-Housz, A. (ed) *ADR in Business: Practice and Issues across Countries and Cultures* (Wolters Kluwer Law in Business, 2011) Volume II Chapter 29 (available at: http://www.scuolasuperioreavvocatura.it/tf_docs/bosnak.pdf)
- Henke, E-M., *Confidentiality in the Model Law and the European Mediation Directive: A comparison of solutions offered in the Mediation Directive and the Model law on Conciliation with examination of the selected Civil and Common Law Countries* (E-fellows.net, Stellenbosch University, 2011)
- Prof. Hakenberg, M., 'Die Mediationsrichtlinie und ihre Umsetzung in der Europäischen Union' (2011) (available at : http://www.cecluxembourg.lu/online/www/content/10/18/6517/6893/6899/6902/containercenter/6921/1492/FRE/Hakenberg%20Manuskript%2011%2010%202010.pdf)
- Wagner, G., 'Harmonization of Civil Procedure – Policy Perspectives, Civil Litigation in a globalising world' (2011) 93-121 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777233)
- Goldsmith, JC., Ingen-Housz, A., Pointon, G.H., *ADR in Business: Practice and Issues across Countries and Cultures* (Wolters Kluwer Law in Business, 2011) 688
- Benichou, M. 'Les enjeux de la transposition de la directive en matière de médiation' (2011) Le journal des bâtonniers 10
- Cortes,P., 'Online dispute resolution for consumers in the European Union' in *Routledge Research in IT and E-Commerce Law* (Routledge law, 2011) Chapter 10
- *The Costs of Non ADR – Surveying and Showing the Actual Costs of Intra-community Commercial Litigation*, (Project funded by the European Union and implemented by a consortium led by ADR Center) Rome, 9 June 2010, (available at http://www.adrcenter.com/international/cms/)
- ECC-Net (The European Consumer Centre's Network), 'Cross-Border dispute resolution mechanisms in Europe - Practical reflections on the need and availability', December 2009 (available at: http://www.forbrukereuropa.no/filer/adr-report-final.pdf)
- Pētersone, Z., 'The Implementation of the Mediation Directive in Latvia' (2009) (available at: http://gemme.eu/en/article/the-implementation-of-the-mediation-directive-in-latvia?codeglueV2=g5mteq4nhc8ipid0tiijpidsu6)
- Cornes, D., 'Mediation Privilege and the EU Mediation Directive: An opportunity?' [2008] 74 Arbitration 395-405 (available at: http://www.mediatewithcornes.co.uk/Mediation%20Privilege%20and%20the%20EU%20Mediation%20Directive%20-%20an%20Opportunity.pdf)
- Hopt, K.J., Steffek, F., *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen* (Tübingen, Mohr Siebeck, 2008)
- *The new EU Directive on Mediation – First insights* (Maklu, Association for International Arbitration (ed.), Antwerpen-Apeldoorn, 2008)
- Bühring-Uhle, C., Kirchhoff, L. Scherer, G., *Arbitration and Mediation in international business*, (2nd ed., Alphen ann den Rijn: Kluwer Law International, 2006)
- Pr. Alexander, N., *Global Trends in Mediation* (2nd ed., Kluwer Law International, 2006, 32)
- Cadiet, L., Clay, T., Jeuland, E. eds., 'Les mesures provisoires dans l'arbitrage en droit allemand' in *Médiation et arbitrage* (LexisNexis, 2005)
- Casals,M.M., 'Divorce in Mediation in Europe : An Introductory Outline', [2005] ECJL 9(2) (available at: http://www.ejcl.org/92/art92-2.html)
- Cebola, C. M., "The Transposition into Portuguese Law of Directive 2008/52 EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters"; published IN: Mediation and Consensus Building: the new tools for empowering citizens in the European Union, MEDIARCOM/MinervaCoimbra, 2010.
- Bates, D.M., 'A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border

Consumer Disputes?' [2003] Fordham International Law Journal 27(2) Article 11 (available at: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1932&context=ilj)
- Nordic Council of Ministers, *A study on alternative dispute resolution and cross-border complaints in Europe* (TemaNord, Copenhagen, 2002) 88
- Diaz, D.ML., Oretskin, N., 'The U.S. Uniform Mediation Act and the Draft UNCITRAL Model Law on International Commercial Conciliation' (2002) Mediate.com (available at: http://www.mediate.com/articles/daiz2.cfm#top)
- ECAS Report, Enforcing your European Rights: Informal redress mechanisms available for citizens, A report by ECAS for the European Commission

7. Websites

- Council of Europe - European Commission for the Efficiency of Justice: http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp
- Hague Conference on Private International Law - The World Organisation for Cross-border Co-operation in Civil and Commercial Matters: http://www.hcch.net/index_en.php?act=home.splash
- European Mediation Network Initiative: http://www.mediationeurope.net/
- European Judicial Civil Atlas in Civil Matters: http://ec.europa.eu/justice_home/judicialatlascivil/html/me_information_en.htm
- European Parliament mediator for International Parental Child abduction: http://www.europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html
- European E-justice- Mediation: https://e-justice.europa.eu/content_mediation-62-en.do
- DG SANCO: http://ec.europa.eu/dgs/health_consumer/index_en.htm
- Wolters Kluwer Mediation Blog: http://kluwermediationblog.com/

ANNEX II – STAKEHOLDERS CONSULTATION AT EU LEVEL

- Association for International Arbitration (AIA): http://www.arbitration-adr.org
- European Mediation Network Initiative (EMNI): www.mediationeurope.net
- European Network of Council of the Judiciary (ENCJ): www.encj.eu
- European Mediation Association (MEDIARCOM): http://www.mediarcom.com/uk/
- International Mediation Institute (IMI): www.IMImediation.org
- Council of Bars and Law Societies of Europe (CCBE): www.ccbe.eu
- European Association of Judges for Mediation (GEMME): www.gemme.eu/
- ADR Center - International Division: adrcenter.com

ANNEX III – QUESTIONNAIRE FOR STAKEHOLDER CONSULTATION

QUESTIONNAIRE FOR [COUNTRY]

Study for an evaluation and implementation of Directive 2008/52/EC-
the 'Mediation Directive'

Name of organisation
Name of interviewee
Position and department
Telephone
E-mail address
Date and time of interview
Interviewer

1 BACKGROUND INFORMATION

Issues to be covered at the beginning of your interview (please check the guidelines on how to carry out an interview):

- Which systems for civil and commercial mediation were in place prior the transposition of the Directive?
  - Scope (coverage)
  - Limitations (what was not covered by the scope)
- In your view did you Member State already have a well-functioning mediation system in place prior to the transposition of the Directive?
- To what extent were there problems – prior to the Directive's transposition - with overly burdensome and costly and lengthy dispute resolution procedures prior to the Directive?
  - Scale of problems
  - Implications of problems
  - Any other problems
- Did your Member State plan to regulate/modify mediation before the adoption of the Directive – irrespectively of the Directive?

2 RELEVANCE

- Did you find that the scope and coverage of the Directive are considered the right ones given the problems that existed in your country prior to the transposition of the Directive? If not, what are the issues which should have been covered?
- From your findings, what are the strengths and weaknesses of the scope of the Directive – considering mediation procedures and practices in your country?
- Did you find that the scope of the Directive (only cross-border cases and voluntary mediation) is considered too limited to call for changes/introduce measures to address the needs for mediation?

3 CONSISTENCY/COMPLEMENTARITY

- Did you find that the Directive covers types of disputes which are sufficiently important in terms of cases and in financial terms in order to have a potential leverage effect on the efficiency of judicial procedures (especially as regards commercial mediation)? Please consider in particular family mediation.
- To what extent did you find that the measures covered by the Directive - at an EU level overall - are likely to strengthen the EU internal market and support growth?
- From your findings, are there gaps in mediation services (types of disputes not covered by any

instruments in the area)?
- From your findings, are there overlaps in mediation services (types of disputes covered by more than one instrument in the area)?
- From your findings, is it clear which instruments apply to which disputes?

4 EFFECTIVENESS

4.1 Achievement of the Mediation Directive's objectives

- How has use of mediation evolved since the entry into force of the Directive? Please choose the most relevant description from the options below.
  - ✓ It introduced mediation for cross-border cases
  - ✓ It introduced mediation for cross-border and domestic cases
  - ✓ It extended the application of mediation from domestic cases to cross-border cases
  - ✓ It modified the scope of application of mediation to domestic cases? Please explain how below
  - ✓ It modified the scope of application of mediation to cross-border cases? Please explain how below
  - ✓ It modified the scope of application of mediation to cross-border and domestic cases? Please explain how below
  - ✓ It did not modify anything because the Directive is not transposed

- What factors explain the situation (no system in place – and the Directive represented an opportunity to introduce mediation; already a comprehensive system in place – and no interest in changing the system, low interest in mediation, the Directive represented an opportunity to review, etc.)?
- In the event that national legislation specifically mentions any type of disputes as suitable for mediation – or alternatively excludes any (in civil and commercial matters) – what may explain this situation? Please consider in particular family mediation.
- To what extent has the settlement procedure led to enhanced efficiency as regards extra-judicial and judicial resolution of conflict – in your country?
  - Coverage of more type of cases for mediation (please consider in particular family mediation)
  - Freeing courts of a great number of cases?
  - Efficient settlement procedures
  - Other effects

4.2 Smooth application

- Are there any problems linked to the way the settlement process is functioning in your country?
  - Are there any problems related to limitations in the scope of application in your country (e.g., if applicable only to cross-border cases or for certain types of disputes and no comprehensive system is in place for national mediation or other disputes)? Please consider in particular family disputes.
  - If the use of mediation is compulsory, does this lead to any specific problems (for the parties, for the courts, for other legal professions)?
  - Are there any problems related to sanctions or incentives or limitation and prescription periods?
  - Is the infrastructure for mediation adequate? In particular, is the number and quality of mediators such that they can meet needs?
  - Where applicable: what are the consequences of using a non-accredited mediator for the parties?
  - Is there a backlog of mediation cases?
  - Are the costs of a mediation procedure high?

5 EFFICIENCY

5.1 Costs of mediation services

- Are these costs less than for a court procedure? Or other alternative dispute resolution methods?
- If legal aid is available, is it under the same conditions as for court or are more advantageous conditions offered?
- Are financial incentives interesting? Are financial sanctions dissuasive?
- Are there differences in terms of cost for cross-border and purely domestic disputes? Are those differences reasonable (such as for coping with language issues)?

5.2 Rapid mediation procedures

- Is the mediation procedure quicker than court proceedings? How significant is the difference?
- Are deadlines appropriate to ensure a speedy but thorough process?

5.3 Efficient mediation services

- Have the measures taken to disseminate information and promote mediation, if any, made mediation well known and easily accessible?
- Is mediation a transparent and easy process to understand? (e.g., the rules in place ensure that the parties are informed about the procedure and estimated costs, that the procedure is simple - on-line or oral -, etc.)

5.4 Quality control

- Are the safeguards in place for ensuring competence and impartiality of mediators described under section 2.6 (describe them to the interviewee) adequate?
- Is the training of mediators adequate and uniform?

6 UTILITY

- Above we discussed problems encountered related to the implementation of mediation prior to the transposition of the Directive - to what extent have these issues been addressed by the transposition and implementation of the Directive - or are likely to be addressed by the Directive?
- Overall, it is your impression that the implementation of the Directive has improved the settlement of civil and commercial disputes in your country – or is it likely to do so in the future? If yes how? Please consider in particular family mediation.
- Overall, it is your impression that the Directive ensures a well-functioning system of mediation for cross-border disputes contributing to strengthen confidence in the internal market – or is it likely to do so?
- Would a recommendation or another non-binding EU intervention have yielded the same results?

7 ANY OTHER COMMENTS OR SUGGESTIONS FOR IMPROVEMENT?

- If the Directive was reviewed, what should be considered in priority and be reviewed/improved and why?
- Beyond a possible revision, which other measures could the EU take to improve the transposition and implementation of the Directive (e.g. guidelines? and if yes what should these contain?)
- Any other comments or suggestions for improvement?

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
  via EU Bookshop (http://bookshop.europa.eu);

- more than one copy or posters/maps:
  from the European Union's representations (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries
  (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
  or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

  (*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

Priced subscriptions:

- via one of the sales agents of the Publications Office of the European Union
  (http://publications.europa.eu/others/agents/index_en.htm).

DS-01-14-825-EN-N

doi: 10.2838/4122