

A Ten-Year-Long “EU Mediation Paradox” When an EU Directive Needs To Be More ...Directive

KEY FINDINGS

Ten years since its adoption, the EU Mediation Directive remains very far from reaching its stated goals of encouraging the use of mediation and especially achieving a “balanced relationship between mediation and judicial proceedings” (Article 1). The paradox of mediation – universally praised and promoted, but still used in less than 1 percent of the cases in civil and commercial litigation in the EU – grows disturbingly bigger as official data and multiple studies have clearly shown that the best way, if not the only one, to increase significantly the number of mediated disputes is to require that litigants make a serious and reasonable initial effort at mediation. During this initial stage, they will be allowed the freedom to decide whether or not to continue their efforts at mediation (so called “required mediation with easy opt-out”). Behavioral science, in particular, has long demonstrated the limits of any policy approach based on “opt-in” models, such as those underlying all forms of voluntary mediation. Italy is the only Member State that has adopted an opt-out mediation model, applicable to about 15% of all civil and commercial cases. In those cases mediation is now playing a very significant role in the effective resolution of disputes. This is not the case for the remaining 85%, where mediation remains “opt-in” and, as a result, mediations are extremely rare. In other Member States, renewed regulatory attempts at – simply – encouraging mediation are most likely to prove ineffective (again), while – simply – requiring mediation before trial, without offering an easy opt-out option, is equally likely to be later ruled unconstitutional (again). Presented in late 2016 with the proposal to adopt the opt-out mediation model, in 2017 the European Parliament unfortunately decided to leave the Directive unchanged, thus continuing to leave national legislators without directions as to how to achieve the Directive’s ultimate goals, and EU citizens and businesses without the financial and other benefits that the increased use of mediation would generate.

I. The 2008 EU Mediation Directive—A Question of Balance¹

This year marks the tenth anniversary of the European Union's adoption of Directive 2008/52, a milestone in developing legislation to guide mediation in civil and commercial matters.² The Mediation Directive marked the conclusion of the European Parliament's long path towards formal recognition of Alternative Dispute Resolution (“ADR”) in all the Member States of the EU. But it also signaled the opening of a new path — one towards mediation as a viable form of dispute resolution in the Member States. This second path has been far from short or direct, but some markers along the way have suggested possible ways to make the journey along it less fraught. Consequently, a brief overview of this journey is warranted.

The first decisive steps towards adoption of the Mediation Directive were taken in 1999 when EU political leaders gathered

¹ The author would like to thank Giovanni Matteucci, an Italian mediation scholar, for his help with the underlying research for this paper. In particular, Mr. Matteucci collected, reviewed and organized the responses of numerous EU experts to a questionnaire intended to identify specific aspects of the mediation regulatory framework as well as the mediation market in the EU. See, *infra*, at footnote 35. To each of these experts, too, goes sincere gratitude. Finally, the author is indebted to Leonardo D’Urso, Adi Gavrilă, Elena Koltsaki and Mary B. Trevor for countless stimulating discussions about mediation as well as for their comments about this paper. Any mistake, however, should be attributed exclusively to the author.

² Directive 2008/52, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 OJ (L 136), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0052> [hereinafter Mediation Directive].

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in Tampere, Finland and formally decided that, as part of promoting "[b]etter access to justice in Europe," EU Member States should create "alternative, extrajudicial procedures" for dispute resolution.³ In other words, ADR is beneficial and should be promoted via legislation. It took the EU some nine years, but in May 2008 the Mediation Directive was formally adopted, with a three-year period for Member States to implement it.

The Mediation Directive established minimum regulatory standards for mediation legislation to be transposed by the Member States into their national legal systems. Thus, Member States enjoyed the freedom to adopt this regulatory framework as they chose — including adopting a stricter set of standards.

The Mediation Directive included rules dealing with mediation quality standards, allowing judicial referrals, providing for enforcement of mediated settlements, and protecting confidentiality. As one possible tool to promote mediation, Article 5.2 of the Mediation Directive allowed Member States, although it did not obligate them, to make mediation mandatory — provided citizens' rights to access justice were not infringed.⁴ Accordingly, those States that did not want to implement mandatory mediation to increase its use could resort to regulatory tools such as mandatory information sessions or financial incentives, for example. However, should those tools prove ineffective, the Mediation Directive would require that particular Member States make the necessary regulatory changes to achieve the promotion and greater use of mediation.

Overall, the Mediation Directive's objective, as stated in Article 1, was "to facilitate access to alternative dispute resolution and to promote amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."⁵ The Mediation Directive did not prescribe a particular balance or state how to determine whether a "balanced relationship" has been achieved.

II. The European Mediation Paradox Becomes Clear

Three years after its enactment, in 2011, concerns about the impact of the Mediation Directive were already developing. In that year, the Parliament commissioned a study to measure the impact of the Mediation Directive. The study, "Quantifying the Cost of Not Using Mediation — a Data Analysis" ("2011 Study"),⁶ completed in April 2011, showed very disappointing results: mediation was far from solidly established in the EU. In addressing the presentation of that assessment, the Parliament made note of the countries that were top performers in terms of numbers of mediations and found that a majority of these countries were experiencing around 2000 or fewer mediations per year.

The 2011 Study's methodology included the data published in the World Bank "Doing Business" Report⁷ and especially the index, "Enforcing Contracts."⁸ The Enforcing Contracts index measures the efficiency of the civil justice systems of 189 countries in resolving a specific type of commercial dispute — in particular, the time and costs of solving that dispute.⁹ The 2011 Study was based on the premise that, among many other individual and societal values it promotes, mediation can save both time and money compared to civil litigation. Yet the exact amount of savings was still uncertain.

Therefore, in the 2011 Study, experts from all over the EU were asked to estimate how much it would cost, and how long it would take, to mediate that very same commercial dispute in their country. This approach would allow for an effective comparison of the time and cost of litigation versus that of mediation. The resulting time and cost saving were stunning.¹⁰ Using progressively lower mediation success rates, the 2011 Study then calculated a mediation-effectiveness break-even point representing the minimum success rate for mediation that still would generate time and costs savings in each Member State. When all Member States' data was averaged, the 2011 Study found that the break-even point for time savings was 19% and the break-even point for cost-savings was 24%. Thus, even with very low mediation success rates, savings in time and money could be realized.

In light of the 2011 Study's showing of both the financial benefits of mediation and the low number of actual mediations, a quantifiable approach to the balanced relationship requirement — the theory of a Balanced Relationship Target Number, or BRTN — was proposed.¹¹ Using the BRTN approach to determine whether the balance between mediation and judicial proceedings required by Article 1¹² has been achieved in the EU, each country determines its own minimum number or percentage of cases, out of the total number of those filed in civil courts annually, that should be mediated rather than resolved through judicial proceedings. Achieving that number demonstrates that the balance has been achieved.

That number or percentage was proposed as the only quantifiable way of ascertaining whether the balanced relationship called for in Article 1 of the Mediation Directive would effectively be reached. Failure to determine that target number or percentage, or, of course, to reach it, should render a Member State vulnerable to the legal actions for non-compliance

³ Tampere European Council 15 and 16 October 1999, *Presidency Conclusions* ¶130 (1999), http://www.europarl.europa.eu/summits/tam_en.htm, referenced in Mediation Directive Recital 2.

⁴ *Id.* at art. 5.2.

⁵ *Id.* at art. 1.

⁶ Giuseppe De Palo, Ashley Feasley & Flavia Orecchini, *Quantifying The Cost Of Not Using Mediation—A Data Analysis* (2011), <http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf> [Hereinafter 2011 Study].

⁷ THE WORLD BANK GROUP, *DOING BUSINESS 2009*, <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB09-FullReport.pdf>.

⁸ *Id.* at 49-53.

⁹ *Id.*

¹⁰ 2011 Study, *supra* note 6, at 13-14.

¹¹ For a discussion of this theory, see Giuseppe De Palo & Mary B. Trevor, *EU MEDIATION LAW & PRACTICE*, Introduction (2012).

¹² Mediation Directive, *supra* note 1, at art. 1.

with an EU legislative instrument.

Despite the 2011 Study's compelling conclusions about the economic rationale for increasing mediation use, and the BRTN proposal, no action was taken to change the status quo. Because Member States could wait to implement the Mediation Directive into their national legal systems until May 2011, some observers, the European Commission in particular, contended that insufficient time had passed for a meaningful impact assessment. Countering this argument were the facts that some Member States had already transposed the Mediation Directive and, most importantly, that many of the key pro-mediation features enshrined in the Mediation Directive (quality, confidentiality, enforceability, etc.) had already existed in various national legal systems for many years.

The European Parliament revisited the issue of the Mediation Directive's lack of impact at the end of 2012 when its Legal Affairs Committee, during a formal hearing, posed an oral question to the European Commission¹³ concerning whether legal action should be taken against the Member States for having *de facto* failed to implement the Mediation Directive in a way that could reach its clear goal. Three and a half years after its enactment, and one and a half after the deadline for its implementation, mediation was still being used in far less than one case out of a thousand. The European Commission responded that at the end of 2012, it was still too soon to assess the impact of the Mediation Directive.¹⁴

The contrasting developments in the European Union from 2008-2012 brought to light the "EU Mediation Paradox": If increasing the use of mediation brings significant time and cost savings to the parties (as well as the judiciary and taxpayers), why were Member States experiencing such low rates of mediation? Why was the notion of a balanced relationship so hard to achieve?

At first blush, it would seem that the parties and the Member States were simply acting irrationally. But a closer look reveals a more complicated situation. As confirmed by the next major study of the Mediation Directive's impact, there are many, perhaps countless, factors impacting whether and how mediation is used — key among them being regulatory environment rules, incentive rules, concerns about quality of service and professionalism, and levels of awareness among parties. While the logic of time and cost savings is of critical importance in justifying efforts to promote mediation use, something more is needed to overcome the obstacles — both real and apparent — that stand in the way of actual use.

III. A Question of Mandates

A. The 2014 Rebooting Study

Following up on the frustration with the limited impact and enactment of ADR in Member States' national regulatory frameworks,¹⁵ and not convinced by the European Commission's "it's still too soon" approach to assessing the impact of the Mediation Directive, in 2013 the European Parliament commissioned a study examining the implementation of the Mediation Directive. Specifically, the European Parliament invited experts to submit proposals for a comprehensive study focusing on the following topics:

- 1 The Mediation Directive's rules on confidentiality are, by some Member States, deemed not to be strict enough;
- 2 Differing opinions on the role of legal professions involved in mediation procedures;
- 3 Uncertainty as to the precise scope of the exceptions to the duties of confidentiality;
- 4 How the provisions of the Mediation Directive allowing the possibility for courts to refer the parties to mediation may have affected national procedural law.

The successful study proposal chosen by the European Parliament was called the Rebooting Study. The study was presented in Brussels and then published in 2014.¹⁶

The goal of the Rebooting Study was to examine the status of mediation in Member States and establish the root causes of the low levels of mediation. To do this, the study was broken down into four parts:

¹³ The European Commission is the body responsible for controlling the proper implementation of EU legislation in the Member States.

¹⁴ During this time, the goal of achieving a balanced relationship between mediation and litigation through the use of BRTN-type approach was being experimented with in other places. For example, New York County's Commercial Division Advisory Council recommended an eighteen-month experiment with mandatory mediation for commercial cases, with every fifth case going to mediation. This experiment, started at the behest of a 2012 report issued by the Chief Judge's Task Force on Commercial Litigation in the 21st Century, see The Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York* (June 2012), went into effect in July 2014. For information on the pilot program see New York County – Manhattan ADR Overview, NEW YORK STATE UNIFIED COURT SYSTEM, http://www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (last visited Apr. 1, 2015). For a more detailed description of the program and its results, see Melissa A. Rodriguez, "Start Spreading the News" . . . *The Big Apple Gets a Taste of Mandatory Mediation*, 7 Y.B. ARB. & MEDIATION 176 (2015). For information on the current state of the Commercial Division Alternative Dispute Resolution program, see *ADR Overview*, New York County – Manhattan, New York State Unified Court System, http://www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (last visited Nov. 3, 2018).

¹⁵ It is worth noting in this context that by 2013, the European Parliament had become so convinced that mediation and ADR generally were not taking hold in the EU that the preamble to the Consumer ADR Directive provided that, "[i]t is regrettable that . . . ADR has not been correctly established and is not running satisfactorily in all geographical areas or business sectors in the Union." Directive 2013/11 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), 2013 OJ (L 165), Preamble ¶ 5 [hereinafter Consumer ADR Directive], <https://publications.europa.eu/en/publication-detail/-/publication/2f3efba7-fb97-41b2-953a-69c6080dfbcc>.

¹⁶ Giuseppe De Palo, Leonardo D'Urso, Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer & Reagan Florence, Rebooting The Mediation Directive: Assessing The Limited Impact Of Its Implementation And Proposing Legislative And Non-Legislative Measures To Increase The Number Of Mediations In The Eu (2013), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET\(2014\)493042](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042)[hereinafter REBOOTING STUDY].

- 1 Updating the 2011 "Costs of Not Using Mediation" Survey (the 2011 Study);
- 2 Analyzing the legislation implementing the Mediation Directive in the Member States;
- 3 Proposing legislative measures to increase the use of mediation across the EU;
- 4 Proposing non-legislative measures to increase the use of mediation across the EU.

To protect the integrity of the study, the European Parliament insisted that any recommendations of the study reflect the view of as many stakeholders as possible. In order to achieve this end, a forty-five question questionnaire was developed and tested by senior experts. The questionnaire was then made available online, and the study team invited mediators, lawyers, and business associations to complete the survey. In total, 1226 completed responses were received; every country in the EU was represented. Of the completed responses, 816 were received in time to be included in the published version of the study.

The first part of the study updated the time and cost savings data from the 2011 Study. Using the same methodology as used in the 2011 Study, but with the most recent data, respondents in the Rebooting Study were asked to estimate the number of civil and commercial mediations occurring annually in their country. It is important to note that almost no EU country has an official count of mediations; as a result, the estimates provided by each Member State's respondents (which were in actuality quite consistent) were averaged for each EU country, with the results throughout the EU varying greatly from Member State to Member State.

The time savings were estimated using the average duration of litigation in the EU (based on the then-most-recent World Bank's Doing Business Report's "Enforcing Contracts" index updated from the data used in the 2011 study) and the average duration of mediations (as reported by respondents in the Rebooting questionnaire). The result: for each dispute, if all cases in the EU went to mediation first, and the procedure succeeded in 50% of the cases, the average number of days saved would be 240 days; if mediation succeeded in 70% of the cases, time savings would increase up to 354 days.

The same methodology was applied to cost savings. Money savings per single dispute were multiplied by the number of disputes in the EU annually, resulting in savings around thirty to forty billion Euros at a 50% success rate. Savings would of course be far greater if the settlement rate was higher than 50%.

As of the end of 2013, only four countries — Italy, the United Kingdom, the Netherlands, and Denmark — reported more than 10,000 mediation cases. The majority of the countries, thirteen, reported less than 500 cases per year. Only one country registered around 200,000 mediation cases per year, Italy. The Italian experience will be discussed in detail below.

In the second part of the study, respondents were asked to rank a number of pro-mediation regulatory features in their national legislation on a scale from weak to strong. The premise of this inquiry was that where pro-mediation regulatory features exist in national legislation, there would be more mediations. Therefore, countries with fewer mediations could simply strengthen those regulatory features common among countries with pro-mediation regulatory features in order to see an increase in mediations. Contrary to the premise, however, pro-mediation features did not appear to be significant or decisive factors enhancing the use of mediation, even when implemented at their strongest setting. Even in countries where these features already existed in their strongest form, mediations were still very few. Consequently, increasing mediation quality requirements, for example, or strengthening confidentiality protection, were found not to have significant impact.

Temporarily skipping over the third part of the study, which warrants special attention below, the fourth part of the study asked respondents to rank, on a scale from 1 to 5, the likely impact, in terms of increasing the number of mediations, of a certain number of non-legislative measures. These included measures such as increasing or improving mediation advocacy education, implementing pilot projects, and an EU-wide system of mediator certification. The majority of the 1226 study respondents indicated that the impact of non-legislative measures would be far less than that of legislative ones.

The third part of the study was, perhaps, its most significant and innovative section. In it, respondents were asked to indicate what they thought would be the single most effective legislative measure to increase the number of mediations. The majority of study respondents indicated, with one exception, that no current legislative measures in place to promote mediation were seen as particularly effective. For example, the study showed that confidentiality protection does not appear to increase the number of mediations. In fact, the majority of respondents from all EU Member States, even those with less than 500 mediations per year, reported strong confidentiality protection in their countries. In addition, countries that implemented incentives for people to mediate also did not realize an increase in the number of mediations. In sum, the Rebooting Study revealed that the regulatory features currently in place to promote mediation are not decisive factors in favoring mediation use.

However, the responses to this same question showed that the introduction of a mandatory system would be desirable and did correspond to a higher frequency of mediations taking place. In summary, two hundred and seventy respondents ranked mandatory mediation in certain cases as the most effective legislative measure, with options such as economic sanctions and judicial referrals receiving around one hundred votes. Indeed, if one combines the score of mandatory mediation information sessions (212 votes) with mandatory mediation with an easy opt-out (85 votes), the total equals 297 — almost three times the amount of votes received for the next most popular feature. The reason for combining the scores is that the two measures are very similar, in that they both mandate *consideration* of mediation in certain cases, as

opposed to full mandatory mediation, and they both demonstrate the highly desirable feature of mandatory elements in mediation.

The difference between the two options is that mandatory mediation information sessions are an opt-in model; that is, people need to first sit down with the mediator, or a mediation counselor, and then may decide, possibly, to start a formal mediation process. In the mandatory mediation with an easy opt-out model,¹⁷ the first meeting is already part of a formal mediation process. Nevertheless, either party can withdraw at the beginning of the procedure at little or no cost (easy opt-out). Only if all parties agree will mediation continue beyond that first meeting.

A classic example of the difference between opt-in and opt-out models in policy-making is the 2003 Study by Johnson and Goldstein¹⁸ regarding organ donation programs (the "Donation Study"). The two researchers looked at the percentage of people willing to donate their organs in case of death in various EU countries. The study examined the difference among eleven EU Member States, which at the time had opt-in or opt-out registration for participation in the state's organ donation program as part of the driver permit registration process. The Donation Study found the key difference was the way the choice for organ donation participation was presented. The Donation Study found that where the application process included the requirement to mark a box to "opt in" to donate, participation rates varied from 4.25% to 27.5%. In contrast, in Member States where the application process included the requirement to mark a box to "opt out" of donating, donation participation rates were very near 100%, with the exception of one country for which the participation rate was 85%. The policy implication of the Johnson and Goldstein study is pretty compelling: the opt-out approach saves many more lives than the opt-in one. The difference shows the power, and very disparate outcomes, that can result between opt-in systems and opt-out systems.

Due to the documented failure of other regulatory models in the EU, and the far better performance of the Italian one, discussed below, the Rebooting Study concluded that the European Union should do one of two things to increase the use of mediation. First, mandatory mediation with a readily-available ability to opt out should be introduced, albeit on a temporary trial basis, in the Mediation Directive (which was scheduled for revision in 2016) and in other EU legal instruments on ADR (both those in force and those being proposed).

Alternatively, the Study proposed that the EU affirm the existing theory of the BRTN, discussed earlier. The advantage of this approach was that it did not require changing any legislation. Based on the very low number of mediations taking place in Europe, the Study concluded that almost all Member States still had an unmet statutory obligation under existing EU law to increase mediation numbers. Using the BRTN approach, as noted earlier, each Member State, using any pro-mediation policy of its choice, would have to determine a clear target number representing a minimum percentage of mediations to take place each year in order to reach the balanced relationship between mediation and judicial proceedings called for in Article 1 of the Mediation Directive.¹⁹

B. The Italian Experience — An On/Off Switch

In Italy, before 2011, despite pro-mediation legislation that went into effect as early as 1993²⁰ there were virtually no commercial mediations (either mandatory or voluntary). Things changed dramatically in 2011, when a government decree made mediation a condition precedent to trial in certain cases, including banking and insurance contracts, real estate, medical malpractice, and a few others. With the decree, several hundred thousand mediations were started on an annual basis, 20% of which were voluntary cases.

In late 2012, however, the rate of mediations declined drastically from 200,000 to a few thousands per year when the country's Constitutional Court ruled that a parliamentary statute was needed — not a governmental decree — to require litigants to try mediation before going to court.²¹ The constitutionality per se of mandatory mediation was thus not addressed by the decision, which left the matter in the hands of the legislator.

As the number of mediations plummeted, including almost all of the voluntary mediations, in September 2013, Italy

¹⁷ The addition of the adjective "easy" here to the opt-out model reference is important. Of course, every participant in any mediation can opt out; that idea is not, in itself, new or revolutionary. But under ordinary circumstances, opting out can result in such costs as accusations of bad faith or loss of fees paid up front. In an easy opt-out model, such consequences would not result from opting out.

¹⁸ Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 MED. POL'Y F. 1338 (2003), https://www.academia.edu/5104501/Save_default_save_life.

¹⁹ The Rebooting Study was not without its critics. The criticisms were addressed in Giuseppe De Palo & Romina Canessa, *Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713 (2014). Key criticisms included the assertions that mandatory mediation improperly "forces" a voluntary process to take place, and that litigants who have paid for court services should have unrestricted access to those services. Still another critique questioned whether mandatory mediation would generate improved satisfaction for the parties who wanted to litigate, while another criticism suggested that nothing should be mandated absent more significant efforts to create a mediation culture first. A final critique raised the question of whether the survey results were biased, suggesting that respondents may have been mediators providing self-serving responses to require mandatory mediation. In response, and first and foremost, the article pointed out that the recommendation is not about mandatory participation in mediation, but instead about mandating only attendance at an initial meeting. Second, the costs of court services are borne by all to some degree, and the cost savings of increasing the use of mediation could therefore benefit all. Third, user satisfaction is not one of the goals of the Mediation Directive, but even if it were, an outside study suggests that such satisfaction does not vary according to whether any sort of participation was mandated. Fourth, trying to create a mediation culture before people are participating in mediation in any significant numbers is, essentially, putting the cart before the horse. People generally are not open to new ways of doing things without being at least nudged into trying them first. Finally, with regard to bias, the respondents were asked to address both pros and cons of various measures, not to recommend certain measures, and the ultimate Study recommendation was based on the numbers of actual mediations in the surveyed countries.

²⁰ Legge 29 dicembre 1993, n. 580 (It.).

²¹ Corte Cost., 24 ottobre 2012, n. 272 (It.).

reintroduced the mandatory requirement.²² This time by an Act of Parliament, with another notable change: Italy removed the obligation to go through, and pay for in advance, a full mediation process in the abovementioned categories of cases.²³ Under the new law, parties must participate at the first meeting with the mediator; if not, they can both face certain sanctions.²⁴ However, at the first meeting, anybody can decide to stop mediation immediately, by paying only a nominal fee (from 40 to 80 Euros).²⁵ Under this system, Italy has since been experiencing upwards of 150,000 mediations a year, keeping in mind that the obligation to attempt mediation first only applies to less than 10% of the country's civil litigation cases.²⁶

In effect, the Italian experience provides a concrete example for the proposition that introducing mandatory elements, more specifically mandatory mediation with the ability for parties to opt out easily, will likely increase the number of mediations in any Member State. Experience has also shown that the incidence of voluntary mediation is increased by the introduction of mandatory mediation when provided in one regulatory framework. In Italy, when mandatory mediation was introduced, the number of mediations, including voluntary mediations, increased.

It is also important to note that the Italian mechanism has been lauded as a model to follow. Following the presentation of the Rebooting Study before the European Parliament, the former Vice-President of the European Parliament and Rapporteur for the Mediation Directive, Arlene McCarthy, wrote a public letter to the then Minister of Justice of Italy, indicating that the opt-out Italian mediation model was "an example the entire EU should learn from."²⁷

IV. A Panoply of Models Leads to Updating the BRTN

In 2016, the EU Parliament's Briefing Note titled "Achieving a Balanced Relationship between Mediation and Judicial Proceedings" again analyzed whether the purpose of the Mediation Directive as stated in Article 1, the "balanced relationship between mediation and judicial proceedings", had been achieved.²⁸ It concluded, as had multiple studies before, that "the key goals of the Directive remain far from being achieved."²⁹ In fact, on average mediation was still being used, in the majority of Member States, in less than 1% of cases that reached court.³⁰ The only exception to this sad statistic was again in Italy, where a Required Initial Mediation Session model was being used.

The Briefing Note proposed two possible options for ameliorating the situation. One was a rewrite of Mediation Directive Article 5.2, mentioned in the opening of this paper, originally written to grant the Member States the option to make mediation mandatory. The proposed revision would require, not just allow, legislation requiring the parties to go through an initial mediation session with a mediator before a dispute could be filed with the courts in all new civil and commercial cases, including certain family and labour disputes where the parties' rights are fully disposable. This "opt-out" approach was recommended because it has been shown to have a significant impact in achieving a balanced relationship between mediation and judicial proceedings.³¹

Alternatively, the Briefing Note proposed more precise use of Article 5.2 to achieve the Mediation Directive's balanced relationship through requiring the Member States to measure whether they are in fact achieving the balanced relationship, and if not, to determine why not.³² It further proposed specific indicators that could be used to do this measurement. These indicators will be discussed below.

But initially, in order to assess the then-current state of mediation use in the Member States and determine the best way to determine the balance, or lack thereof, in each Member State, the Briefing Note identified the various models of mediation being used in the Member States. As opposed to the common misconception that mediation is either voluntary or mandatory, four distinct models were considered:

- 1 Full Voluntary Mediation: the parties can engage a mediator to facilitate the resolution of any dispute that they have not been able to settle by themselves. In this case, a mediation legal framework is not even required.
- 2 Voluntary Mediation with Incentives and Sanctions: the parties are encouraged to have recourse to mediation, thus fostering the practice. This model requires a mediation law in place. This option, or variations on it, is sometimes referred to as the "opt-in" option.
- 3 Required Initial Mediation Session: the parties are required to attend an initial meeting with a mediator,

²² Decreto Legislativo 4 marzo 2010, n. 28 (It.).

²³ *Id.* at art. 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Studi, analisi e ricerche della DG-Stat ("Studies, analyses, and investigations of DG-Stat"), ITALIAN MINISTRY OF JUSTICE, https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Stud%20analisi%20e%20ricerche.aspx (last visited Apr. 1, 2017).

²⁷ Letter from Arlene McCarthy, Member of the European Parliament, to Anna Maria Cancellieri, Minister of Justice of the Republic of Italy (Jan. 13, 2014), <http://www.giustizia.it/giustizia/protected/980005/0/def/ref/NOL979449>.

²⁸ Giuseppe De Palo & Leonardo D'Urso, *Achieving a Balanced Relationship between Mediation and Judicial Proceedings* (2016), prepared at the request of the European Parliament's Committee on Legal Affairs and published by the Policy Department for Citizens' Rights and Constitutional Affairs as part of the compilation, THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE (29 Nov. 2016) [hereinafter Briefing Note].

²⁹ *Id.* at 7.

³⁰ *Id.*

³¹ *Id.* at 8.

³² *Id.*

free or at a moderate fee, to establish the suitability of mediation. This model, too, requires a mediation legal framework. This option, or variations on it, is sometimes referred to as the "opt-out" option.

- 4 Full Mandatory Mediation: the parties must attend and pay for a full mediation procedure as a prerequisite to going to court. The mandatory aspect applies only to attending the full procedure, while the decision to reach a settlement is always voluntary.

Many of the Member States had more than one of the models in place, depending on the nature of the dispute (commercial and civil law, family law, and labour law, for example), and the different states were using different combinations of those models in different situations.

In light of the multiplicity of models and the variation among the Member States overall, the Briefing Note recommended what is, essentially, an updated and more refined version of the BRTN approach recommended years before in 2012 to determine, under the alternative version of Article 5.2, whether a given Member State has achieved the Mediation Directive's required balance. In particular, it recommended just two data points that can serve as effective performance indicators for a national mediation system. Considered together in a visual matrix format, these two data points form a powerful tool to help evaluate whether a particular system serves, and to what extent, any public mediation policy. The two data points are the Balanced Relationship Index and the Success Mediation Rate.

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

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

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

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

As a result, any public policy seeking to increase the number of mediations should also make sure that an enabling environment for mediation exists so that the chances are that a good percentage of them will result in an amicable settlement.

Already in use at the individual level, this type of index—widely known as the mediation success rate—is typically applied

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

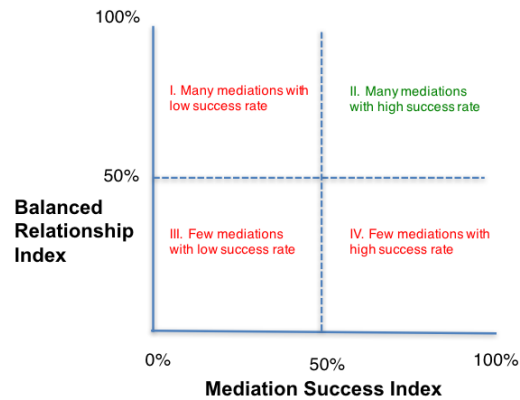
by mediation professionals as a personal performance indicator. Full-time professional mediators frequently have a personal index above 70%. However, apart from the personal skills and capabilities of the mediators, this index also depends on the willingness of the parties to start a mediation procedure and their decision that a settlement is better than the alternative of risking a drawn-out court proceeding.

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

In presenting the mediation matrix visualization tool in the Briefing Note, some target performances were suggested for each of the indicators (balance index and success rate) to serve as "high/low" minimum performance dividing lines. These targets should not be arbitrary; they should be chosen to reflect what is realistically possible in current mediation systems. As systems improve, policymakers may choose to set more ambitious targets. When viewed in graphic form, these dividing lines comprise a matrix with four performance quadrants.

Considering the current low use of mediation, and being conservative, the Briefing Note suggested that an effective mediation model should be positioned in the second quadrant with at least 50 mediations for every 100 court proceedings and at the same time a success rate of at least 50% of mediated cases. The visualization is set out in the following figure:

Figure 1: The Mediation Effectiveness Matrix



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

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

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

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

Quadrant IV: Few mediations with high success rate. This is a typical result of a completely voluntary mediation system or an "opt-in" system, which achieves a high mediation success rate — above 70% — but with a very low number of mediations. The 2014 Rebooting Study of the European Parliament, discussed earlier, unveiled a surprising, disappointingly low number of mediations in the EU Member States as compared with cases in court: mediations did not even reach 1%.

The findings of the Rebooting Study showed that, in the absence of public policy measures to strongly encourage or require parties to at least attempt mediation, low numbers of mediations will result.

V. A Missed Opportunity ... and a Growing EU Paradox

In 2017, in recognition of the evidence found in the studies mentioned in this paper and some other sources, the European Parliament passed *Resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*.³³ The Parliament noted, among numerous other concerns, that

*the objectives stated in Article 1 of the Mediation Directive aimed at encouraging the use of mediation and in particular at achieving a 'balanced relationship between mediation and judicial proceedings' have clearly not been achieved, as mediation is used in less than 1 % of the cases in court on average in the majority of Member States.*³⁴

Despite making numerous recommendations, however, the Parliament did not mention any form of mandatory mediation, opt-out mediation in particular.

The European Parliament decision not to act, despite the increasing evidence of what works and does not work in the field of mediation policy, is difficult to understand. A very recent survey conducted amongst European experts confirms that in countries where mediation remains voluntary, even where certain incentives to mediate are provided, the number of mediated cases remains extremely low.³⁵ A ten-year-long paradox thus continues, along with the loss of billions of Euros

³³ Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0321+0+DOC+XML+V0//EN&language=EN>

³⁴ *Id.*

³⁵ This statement is based on the responses to a questionnaire received in November 2018 from the following national experts: Avi Schneebalg (Belgium), Sevdalina Aleksandrova (Bulgaria), Srdan Šimac (Croatia), Eleni Charalambidou (Cyprus), Hana Láňíková (Czech Republic), Benjamin Lundström (Denmark), Carri Ginter and Liisa Kuuskmaa (Estonia), Petri Taivalkoski (Finland), Sylvie Mischo Fleury (France), Olga Tsiptse (Greece), Liam Moore (Ireland), Giovanni Matteucci (Italy), Valts

annually, based on the analysis of the Rebooting study.

The paradox is even harder to accept because, while mediation struggles in most EU countries, the opt-out model continues to produce clear and positive results. Table I shows the "performance" of the model, in terms of cases that go through mediation first and settle.

Table I: Mediations in Italy – First Semester 2018

Type of Mediation Organization	Nr. of Organizations	Nr. of mediation processes concluded (first semester 2018)	Settlement rate
Chamber of Commerce	79	7 609	47,0%
Private Organizations	381	41 514	49,4%
BAR Associations	103	29 469	38,1%
Other Professional Associations	45	567	62,2%
Totals	608	79.159	44,3%

Source: Statistical Department – Italian Minister of Justice

The 44,3% settlement rate in Italy, when litigants decide to go all the way in their mediation efforts, is a stunning percentage and one that invites serious reflection because it debunks a common misconception in certain anti-mediation circles. The misconception is that mediation, in reality, has almost no actual space to exist, at least in legal disputes, because if settlement is possible the litigants' lawyers should be able to reach it via direct negotiations. Where settlement is not possible (for example, where the parties' legal positions are far apart), only a judge can take the matter to rest by issuing a final and binding decision.³⁶ The astounding relevance of the 44,3% settlement rate is the following: those lawyers could have settled those same disputes by direct negotiation if they had wanted to avoid mediation altogether, but evidently they could not settle without the help of a third-party neutral. Only the "necessity" of seeing a mediator (albeit briefly) as a pre-condition to filing in court led to an amicable solution.³⁷

Finally, in addition to the sheer number of mediations and settlement agreements generated by the opt-out model, and its effectiveness as a way to reach the "balanced relationship" mentioned by Article 1 of the Mediation Directive, legislators should focus very carefully on another effect produced by effective mediation policy: the dramatic deflation in the number of new litigated cases in the areas where mediation is required. This last October, Italy's most prominent financial newspaper published an article showing that, over the last four years, the Italian "opt-out mediation model" has cut the number of new litigated cases by 30%, reaching almost 50% in certain types of disputes, such as those involving real estate.³⁸ Table II shows the impact of mediation by comparing the number of new incoming litigated cases in 2013 and 2017 in first instance courts.

Table II: Number of incoming civil litigious cases in some dispute matters in Italian first instance courts

Dispute matters with opt-out mediation model from 30 Sept. 2013	2013	2014	2015	2016	2017	2017/2013 %
Real estates/Property rights	27 162	14 984	13 618	15 104	13 927	-49%
Business lease	1 508	942	918	845	839	-44%
Insurance contracts	7 565	5 525	4 770	5 066	4 702	-38%
Landlord/tenant	30 808	23 592	20 561	19 996	19 700	-36%

Nerets and Inita Cima (Latvia), Jurgita Karvele and Dobile Minkute (Lithuania), Jan Kayser (Luxembourg), Herman Zandt (Malta), Manon Schonewille (The Netherlands), Cezary Rogula (Poland), Ursula Caser and Cătia Sofia Marques Cebola (Portugal), Marin Padeanu (Romania), František Kutlík (Slovakia), Pablo Cortes (Spain), Gert Nilson (Sweden), Pablo Cortes (UK). The responses to the questionnaire are on file with the author. The questionnaire is Annex I to this paper.

³⁶ This misconception, which obliterates the whole idea of the "value added" that a third party neutral brings to the settlement table, is much more frequent than most people would think.

³⁷ It is worth underscoring that the number of mediations initiated in Italy is far greater than in any other EU country, despite the fact that the first mediation meeting is required in less than 10% of all civil litigation. In this regard, an "Italian paradox" could be not to expand this model immediately to other types of disputes and monitor the results.

³⁸ Giuseppe De Palo, *Opt-out mediation model cuts real estate litigation in Italy by almost 50%*, LINKEDIN (Oct. 28, 2018), <https://www.linkedin.com/pulse/opt-out-mediation-model-cuts-real-estate-litigation-italy-de-palo/>. Of note: the same statistics show that the number of disputes not subject to mediation fell by only 15%, possibly reflecting the ongoing economic struggle of the country.

Inheritance	8 118	4 681	4 770	5 432	5 449	-33%
Neighboards/Condominium	9 452	7 573	7 114	7 121	6 786	-28%

Source: Elaborated from data of the Statistical Department – Italian Minister of Justice

Lots of the "vanishing" court cases get mediated successfully. Others are settled directly by the parties, perhaps to avoid mediation or while they prepare for it.³⁹ A study is currently underway to verify whether, in addition to a significant reduction in the number of civil cases, the disposition time of those cases reaching the court system is significantly shorter. Among other theories explaining this effect, the idea — only seemingly contradictory — is that by devoting more concentrated time to each case, judges are able to adjudicate cases in fewer days.

In light of these overall very positive results, the EU Mediation Paradox appears even greater, almost frustrating, especially if one looks at the most recent legislative attempts at making mediation work. After a decade of regarding the introduction of any kind of mandatory requirement in pro-mediation mechanisms as nearly "taboo", legislators in EU countries other than Italy have started taking stock of the failure of all their other regulatory mechanisms. Yet a review of the mandatory mechanisms resulting from their new efforts reveals they are very unlikely to deliver the expected results, whether or not they face or survive challenges to their constitutionality.

Examples of this new wave include Romania, where the Constitutional Court has twice quashed attempts to introduce mandatory elements. In 2014, the Court ruled⁴⁰ unconstitutional a requirement to attend a mediation information session before trial. Among other reasons, the judges wrote that imposing the requirement — not even an attempt at settlement, but a mere information session — and the related sanction of case inadmissibility when failing to meet the requirement, impose an unreasonable burden on litigants. Most recently, in September 2018, a new legislative attempt was made, one that would have simply required mediation in certain cases before trial. The Romanian Constitutional Court's detailed arguments have not been published yet,⁴¹ but one could imagine that the blunt, simplistic, and overly-general imposition of a pre-trial requirement to "try" mediation — without, for example, any ability to opt out easily — makes the decision of unconstitutionality correct.⁴²

Another example is Greece, where after many years of debate the legislature had finally adopted a statute capable of significantly increasing the number of mediations. The Greek statute was modeled after the Italian one, even to the extent of the mandatory mediation requirement becoming operational nine months after the approval of the law to allow the creation of a suitable mediation infrastructure to deal with the significantly increased numbers of mediations. But before the mandatory mechanism could kick in, an application for an advisory opinion from the country's Supreme Court led a narrow majority of the judges to conclude that the costs imposed on litigants were disproportionately high. Hence, the Government decided to postpone the mandatory mechanism to September 2019, pending discussion about revisions of the statute. Another year lost, in addition not only to those lost since mediation reform discussion began back in 2016, but also to the many years lost since the introduction of mediation in the Greek legal system (2010) resulted in only a few tens of cases mediated.

It is worth noting that the judges of the Greek Supreme Court did not challenge the constitutionality of mandatory mediation, nor did they deem that mediation costs, per se, would be too high. Rather, they were concerned because under the existing law litigants would in some cases be expected to pay too much taking into account lawyers' fees and even bailiff's fees.⁴³ Clearly, the statute lacked sufficient clarity about the costs to be incurred by litigants in all the types of disputes falling within the scope of mandatory mediation to ensure the statute's full conformity with the indications of the European Court of Justice in the "Alassini" case regarding the parameters of a pre-trial mediation requirement.⁴⁴

With regard to recent legislative efforts far less likely to face constitutional challenges, Belgium has recently changed its mediation rules. Among other changes that seem to have energized the mediation community, the new rules empower judges, early in the proceedings, to direct parties in a trial pending before them to try mediation, provided at least one of the parties does not object. Later in the proceeding, a mediation referral requires the consent of all parties. While the impact of the law cannot be assessed at this time, this type of mechanism does not favor the amicable resolution of disputes *before* they reach the courts, when settlement might be both easier and less expensive. Moreover, the overall impact on the total number of mediations generated by this type of referral mechanism has been far from significant in other countries, at least in comparison to opt-out mechanisms.⁴⁵

³⁹ Of course, certain people may simply decide to forego litigation and do nothing altogether. But to assume that this is due, at least in a large percentage of cases, to the obligation to consider mediation seriously before trial, appears hard to believe.

⁴⁰ Decision no. 266/2014, Romanian Constitutional Court, <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-90>.

⁴¹ Press release, Romanian Constitutional Court, Sept 18, 2018, <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-324>.

⁴² Discussion with Adi Gavrilă, Romanian mediator. On file with author.

⁴³ Discussion with Dr. Elena Koltsaki, mediation expert and member of the Law Drafting Committee on the Reform of Mediation at the Greek Ministry of Justice, on file with author.

⁴⁴ On 18 March 2010, in the joined cases of *Rosalba Alassini and Others* (C-317/08 and C-320/08) the ECJ found that the Italian requirement to undertake ADR before court proceedings was a legitimate objective of Italian law, and that it was in the general interest, for parties to pursue less expensive methods of dispute resolution and to reduce the burden on the court system.

⁴⁵ A key limit of any judicial referral mechanism is its reliance on the activism of the individual judge. Thus, for example, in Italy in 2017 there were only 1,700 mediation referrals out of over 1 million pending cases (or 0,02%). Still, data also show that certain judges have been able to achieve significant result by assuming

Finally, at the time of submitting this paper, a draft bill in France would make mediation information meetings mandatory in certain disputes. This approach, too, does not appear capable of making a significant impact on mediation numbers. Mediation information assessment meetings, or MIAMs, when not unconstitutional as in Romania, have not been found to be as effective as opt-out mechanisms for mediations that begin before trial. As discussed earlier, mediation information and assessment meetings remain, effectively, an "opt-in" mechanism that requires litigants, after participation in the information session, to make numerous decisions, including whether to mediate, what mediator to choose, when to convene before the mediator, and so on.

VI. Conclusion

Timid and presumably ineffective attempts, on the one hand, and plainly unconstitutional attempts, on the other. These efforts to craft legislation capable of reaching the balanced relationship required by Article 1 of the Mediation Directive are the consequence of several factors. To this author, the major factor, one could say, is a Mediation Directive that is not sufficiently ... "directive", i.e., it lacks specificity about the single most effective mechanism for its success, which is mandatory, reasonable but serious consideration of a mediation effort⁴⁶ rather than simply *allowing* Member States to require mediation, as Article 5.2 does. It has taken way too much time for the Member States to realize that the fully voluntary model, and even the voluntary model with incentives described about in this paper, are not effective. Moreover, even where Article 5.2 was first implemented, in Italy, it took a few years, and a string of litigation before the Constitutional and other courts of the country, before a viable model was found. What has recently happened in Romania, and to a lesser degree in Greece, should be a reminder to legislatures trying to impose a misguided mediation model, such as either inefficient or fully mandatory ones.

A better version of Article 5.2 has been presented to this Parliament on at least two occasions: first in 2014, in the context of the often-quoted Rebooting Study, and then in November 2016.⁴⁷ The proposed revision would have introduced an opt-out mediation model throughout the European Union. As noted, in 2017 the EU Parliament decided not to amend Article 5.2 or any other part of the Directive. In light of this inaction, as well as the expected time it would take to have the Directive modified should that still be a possibility, Member States looking for guidance in developing effective mediation policy should simply assess carefully the mediation regulatory frameworks of other countries. By so doing, they can determine what has worked and what has not, and implement policies allowing them to stop losing the multiple benefits that mediation can generate.⁴⁸

And when it comes to fundamental mediation policy choices, legislators should be mindful of what science has been teaching about "opt-in" as opposed to "opt-out" policies. In fact, Professor Richard Thaler, co-author of the best-selling book *Nudge – Improving Decisions About Health, Wealth And Happiness*, received the 2017 Nobel Prize for his contribution to Behavioral Economics, "exploring the consequences of *limited rationality, social preferences, and lack of self-control*" and "how these human traits systematically affect individual decisions as well as market outcomes."⁴⁹ His book includes discussion of the opt-out approach. Furthermore, the idea of "nudging" people to mediate more, by virtue of various mechanisms, and primarily via an opt-out mechanism, is not at all new in the alternative dispute resolution field.⁵⁰ Still, many people today remain firmly convinced that the only choice is a simplistic binary one: voluntary mediation or mandatory mediation. The "required mediation model with easy opt" out offers a more thorough and refined analysis of possibilities and appears to produce far better results.

a very pro-active stand when it comes to recommending mediation, or acting as a conciliator. For example, judge Massimo Moriconi of the Civil Tribunal of Rome was able to resolve amicably 116 out of 200 disputes in his docket (58%) between September 2013 and October 2014. In 2017, he managed to resolve by amicable means 57 out of 110 disputes (48%). See, among others: Moriconi M., *Un bilancio a otto anni dall'entrata in vigore del Decreto Legislativo 28/2010*, at <https://www.mondoadr.it/articoli/un-bilancio-a-otto-anni-dallentrata-in-vigore-del-decr-lgs-282010.html>. Similarly, at the Civil Tribunal of Bari, Judge Mirella Delia and other colleagues, between January 1, 2016 and June 30, 2018, managed 914 disputes with ADR methods. Of these disputes, 414 have already been concluded and only 82 (or 20%) ended up needing to be adjudicated. Most interestingly, the same judges established what is perhaps the first public repository of mediated settlements and ADR-related judicial orders in a court (BDDC - Banca Dati Digitale Conciliativa). See: http://www.giustizia.bari.it/buone_prassi_menu.aspx.

⁴⁶ An effort of this kind could hardly interfere with one's right to access the courts, if the means used are in balance with the purpose sought.

⁴⁷ See Briefing Note to the EU Parliament, where the following rewrite was proposed:

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

⁴⁸ A discussion about all the benefits, both individual and societal, mediation can bring about is beyond the scope of this paper.

⁴⁹ See <https://www.nobelprize.org/prizes/economic-sciences/2017/press-release/>. This theory of nudging — highly simplified here — addresses how to get people to do beneficial things they would not do on their own by "nudging" them to do them. One of the ways is by setting up situations in which people opt out rather than having to opt in to something. See Ben Chu, *What is 'nudge theory' and why should we care? Explaining Richard Thaler's Nobel economics prize-winning concept*, INDEPENDENT (Oct. 9, 2017), <https://www.independent.co.uk/news/business/analysis-and-features/nudge-theory-richard-thaler-meaning-explanation-what-is-it-nobel-economics-prize-winner-2017-a7990461.html> (briefly describing various ways in which governments around the world have used opt-outs to nudge citizens into making decisions).

⁵⁰ In addition to designing an opt-out mechanism by changing legal or procedural rules, a similar effect can be obtained through organizations adopting pro-mediation "pledges," i.e., making a unilateral commitment to consider mediation in appropriate cases. At the World Bank, for example, employees intending to sue their employer have known since 2008 that if they ask their employer to mediate, the Bank is committed to participate. Recently, the Office of the Ombudsman for United Nations Funds and Programmes has proposed a similar approach within the five UN agencies it serves. <http://fpombudsman.org/wp-content/uploads/2018/05/Annual-Report-2017.pdf>, pp. 12-14.

Annex I - Questionnaire

The goals of this very short questionnaire is to understand whether and to what extent your national legislation has implemented article 5.2 of the Directive, stating that:

“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.”

Please answer, as concisely as possible, the following questions.

1 *Has your country implemented article 5.2 of the Directive?*

If so, please describe briefly any ‘Mandatory Requirements’ of the national legislation or court rules, such as whether:

- a. *before court proceedings the parties are obliged to attend:*
 - a.1 *a mediation information session only*
 - a.2 *a mediation*
 - a.3 *a first meeting of a mediation, with an opt-out option, with no charge*
- b. *after court proceedings have been issued, but before trial, the court can require the parties to undertake a mediation when:*
 - b.1 *all parties request it*
 - b.2 *one of the parties requests it, or*
 - b.3 *none of the parties request it*
 - b.4 *all parties are not against it*

If any Mandatory Requirements relate only to certain types of disputes (such as real estate, or banking etc.), or for disputes within a defined value, please provide details.

- 2 *Please explain any procedural and/or financial sanctions that may exist or be imposed for failing to comply with*
 - 2.1 *any Mandatory Requirements (referred to in para a above) or*
 - 2.2 *any court requirement (referred to in para b above).*
- 3 *Please provide an estimate of the percentage of civil and commercial cases in your jurisdiction*
 - 3.1 *which are resolved by mediation before proceedings are issued, and*
 - 3.2 *where no mediation is attempted before court proceedings are issued.*
- 4 *If you are unable to provide a specific percentage, please indicate whether you would estimate that for every 100 cases going straight into the judicial system*
 - 4.1 *only one is mediated before judicial proceedings begin, or*
 - 4.2 *more than one is mediated before judicial proceedings begin.*

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