



**DIRECTORATE GENERAL FOR INTERNAL
POLICIES**

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



LEGAL AFFAIRS

**‘Rebooting’ the Mediation
Directive:** Assessing the Limited
Impact of its Implementation and
Proposing Measures to Increase the
Number of Mediations in the EU

The EU Parliament's Study Goals: Resolving the "EU Mediation Paradox"

- 1) Update the "Costs of Non Mediation" survey
- 2) Analyze the legislation implementing the Mediation Directive in a number of Member States
- 3) Propose legislative and non legislative measures to increase the use of mediation across the EU

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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<http://www.europarl.europa.eu/document/activities/cont.pdf>



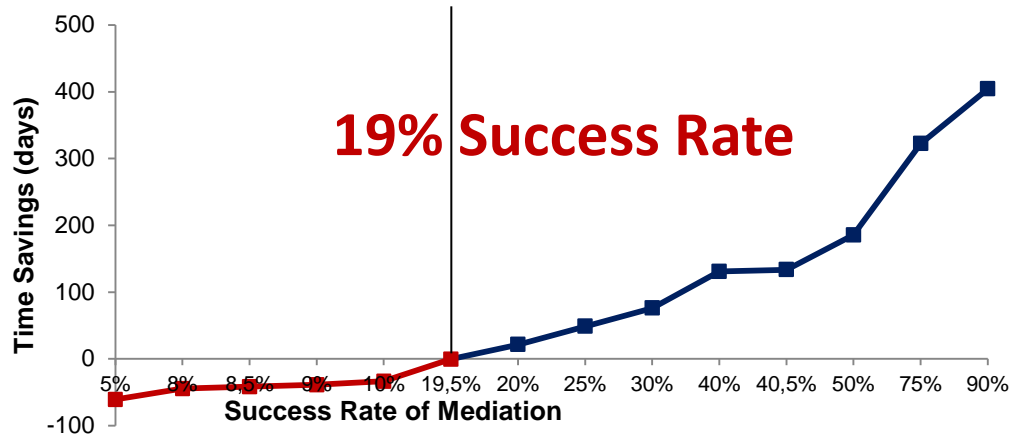
Quantifying the cost of not using mediation – a data analysis

NOTE

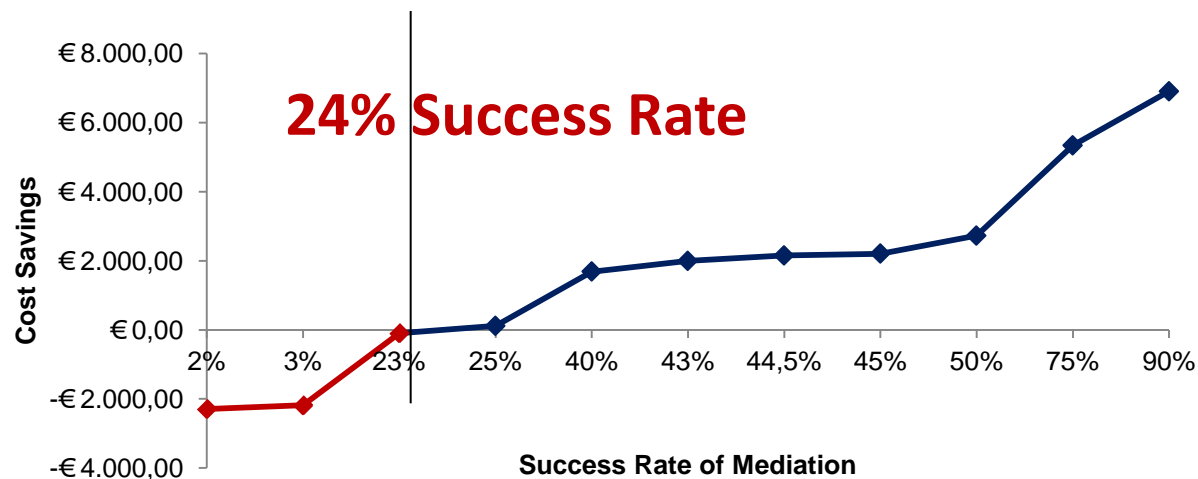
Time and Cost Savings: Break-Even Point in the EU



Time Savings



Cost Savings



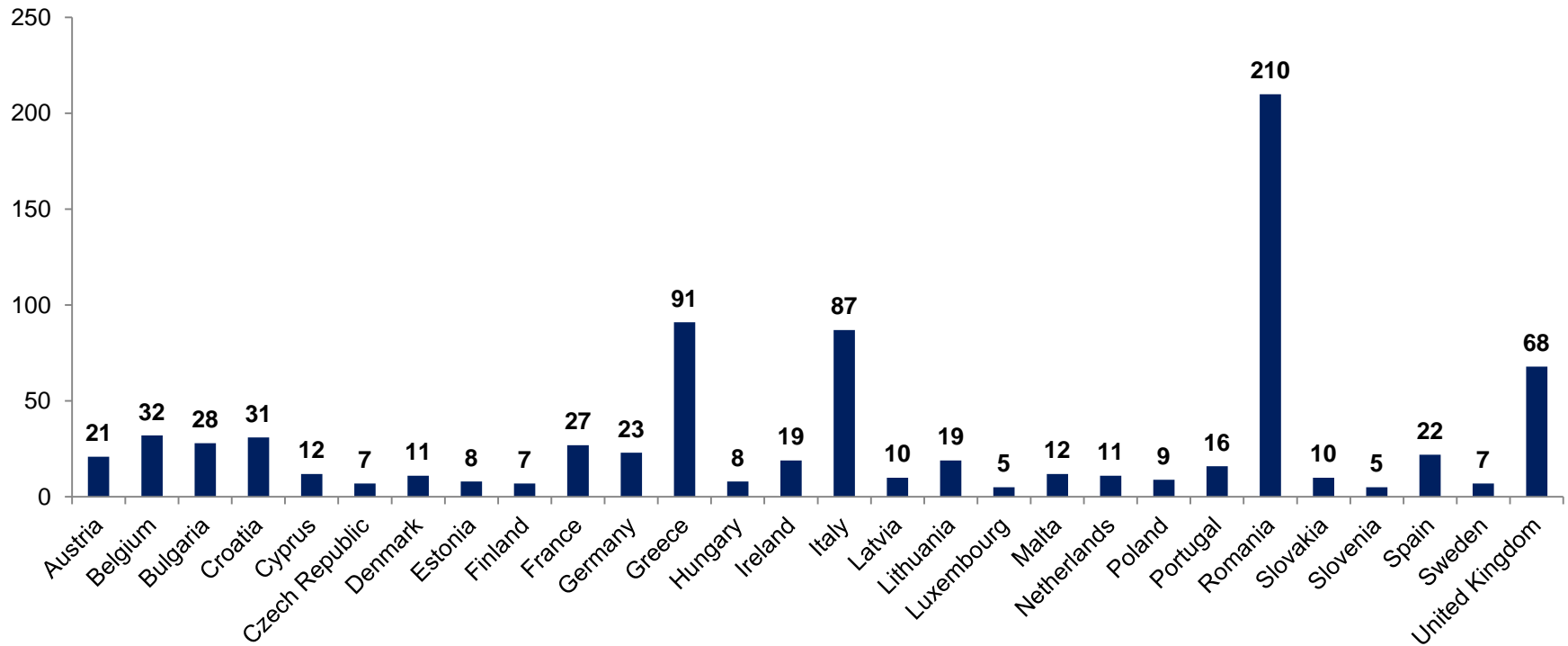
High Performance Even at Low Success Rates

Savings of successful mediation are much greater than extra costs (ie, mediation then litigation) when mediation fails

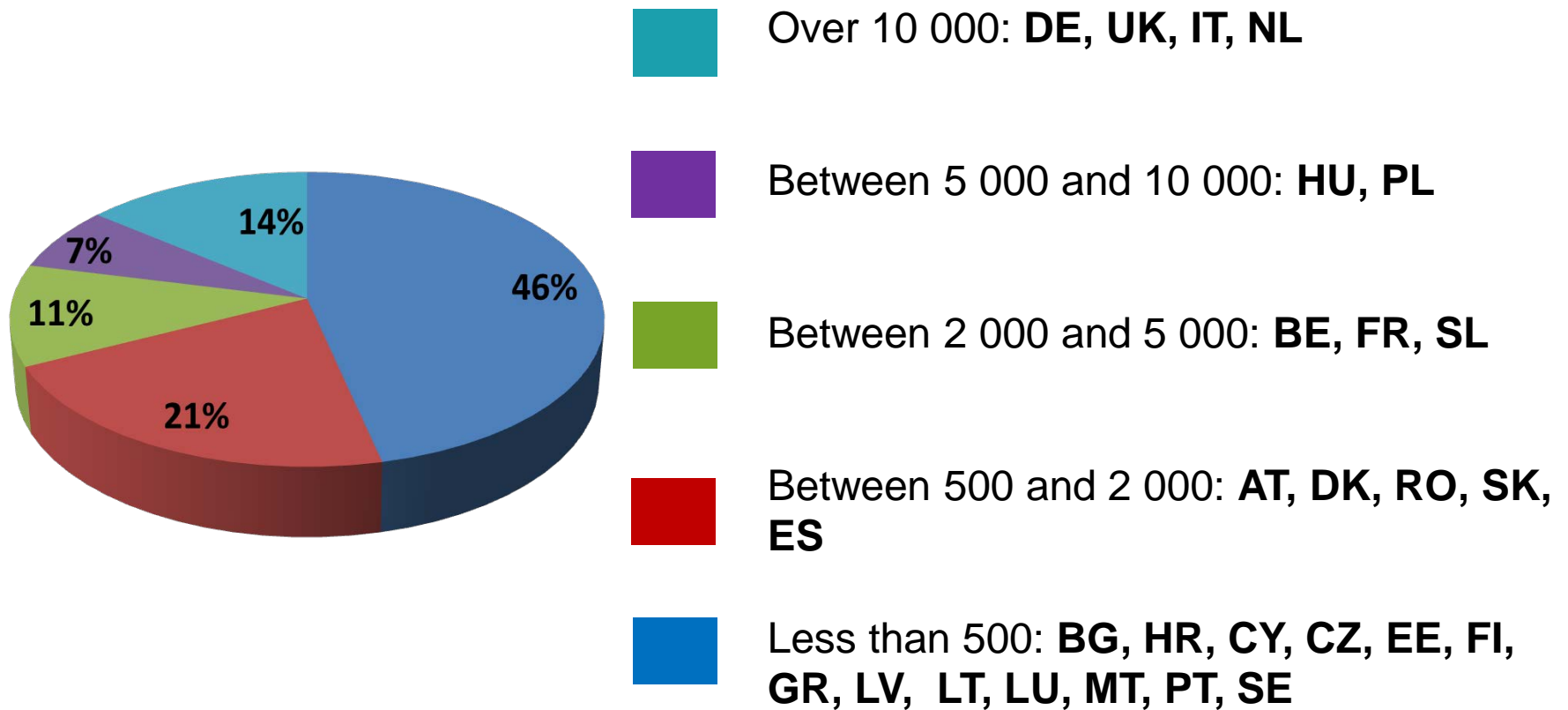


816 Responses From Across the EU

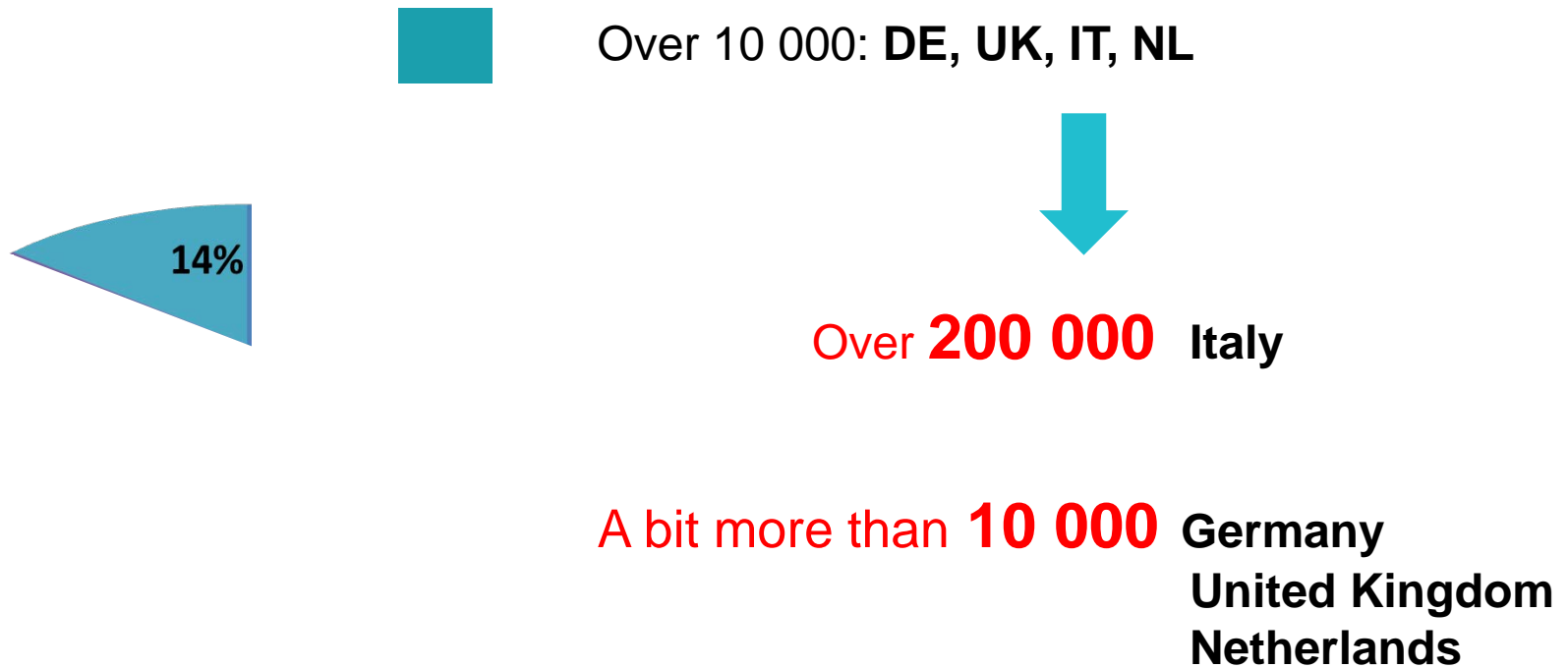
Nr. Responses



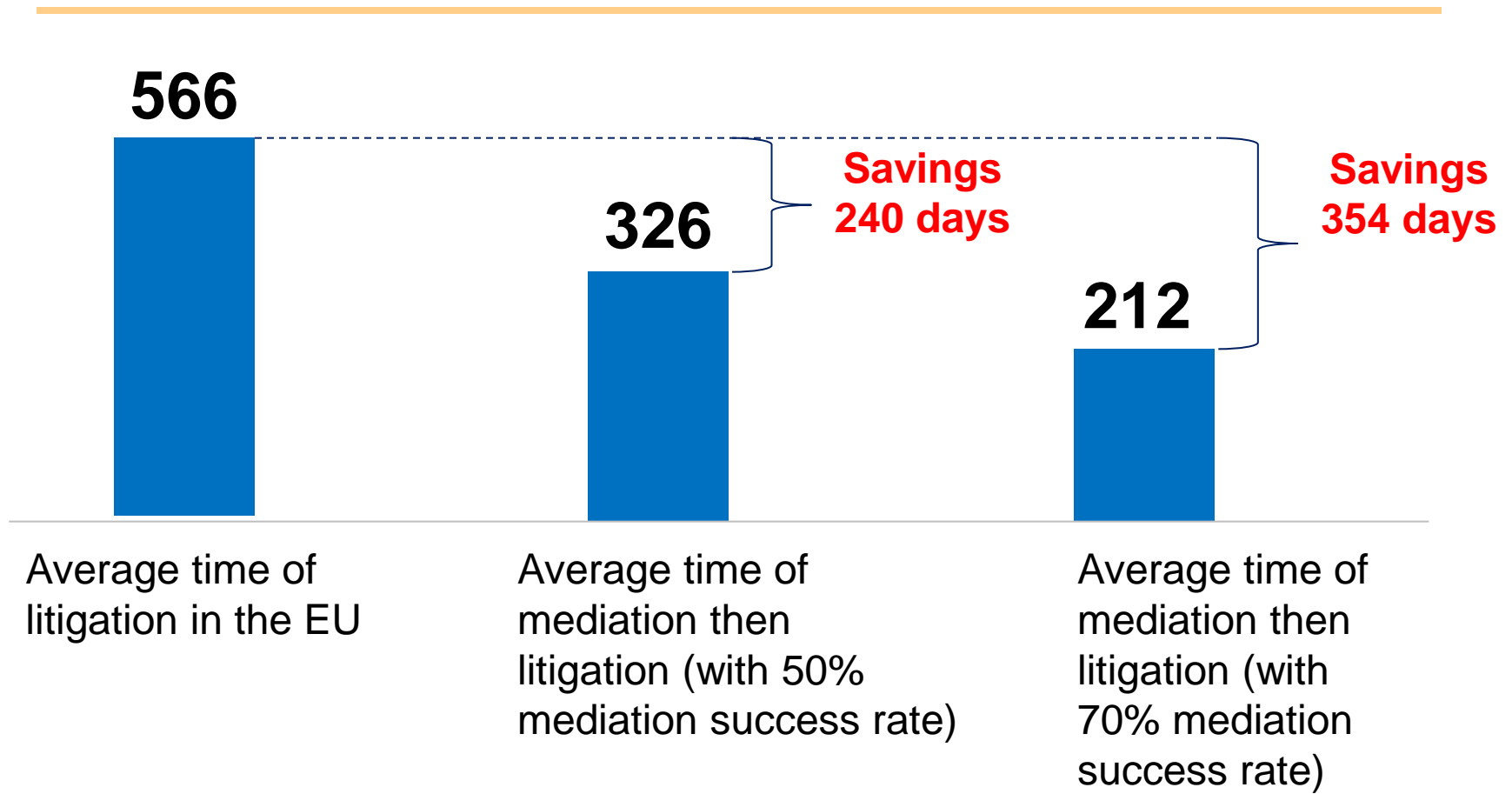
Estimated Annual Number of Mediations in the EU



Estimated Annual Number of Mediations in the EU



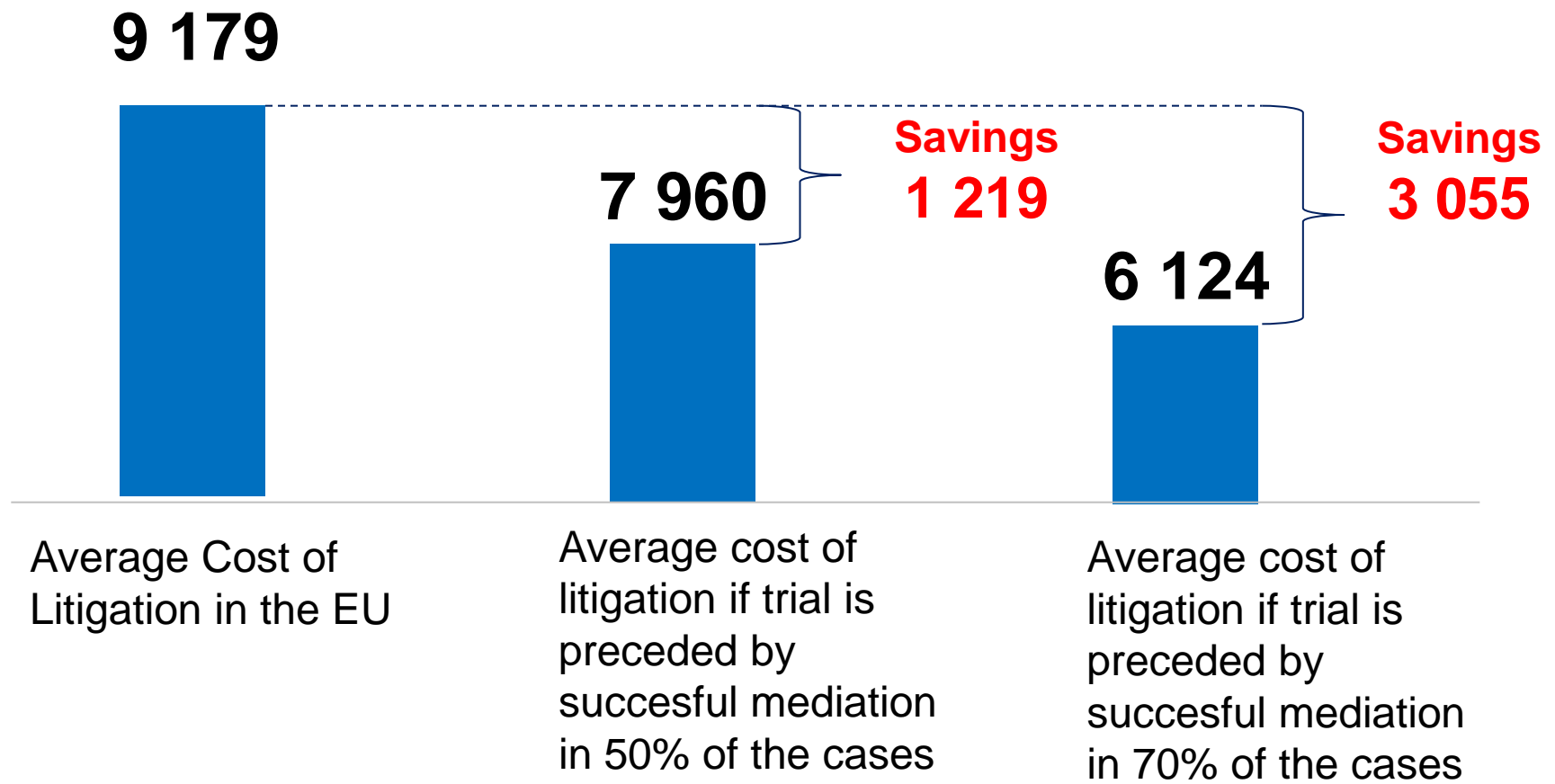
Average Time of a Dispute in Days



«Waiting Time» Saved in Years

Aprox. nr. of civil and commercial litigious cases at 1st instance courts (Cepej 2012)	Saved time with mediation preceding each case (50% of success rate)	Saved «waiting time» in days	Saved «waiting time» in years (conservative estimate)
13 000 000 x	240 =	3 120 000 000	8 547 945

Average Cost of a Dispute in Euro



Direct Costs Saved in Euro

Aprox. nr. of civil and commercial litigious cases at 1st instance courts (Cepej 2012)	Saved costs with mediation preceding each case (50% of success rate)	Saved «direct costs» (conservative estimate)
13 000 000 x	1 219 =	15 847 000 000

Legislative Measures That Have Not Made Mediation Happen

- 1) Strong confidentiality protection
- 2) Judges pro-activity
- 3) Easy enforceability
- 4) Financial incentives
- 5) Lawyer duty to inform clients
- 6) Robust mediator accreditation systems

The Single Most Effective Legislative Measure

Mandatory mediation in certain cases

132

Mandatory mediation info sessions

110

Financial incentives to mediate

97

Require counsel to inform parties of mediation

72

Economic sanctions

54

Judges power to order mediation

51

Mandatory mediation with opt-out

45



The Single Most Effective Legislative Measure

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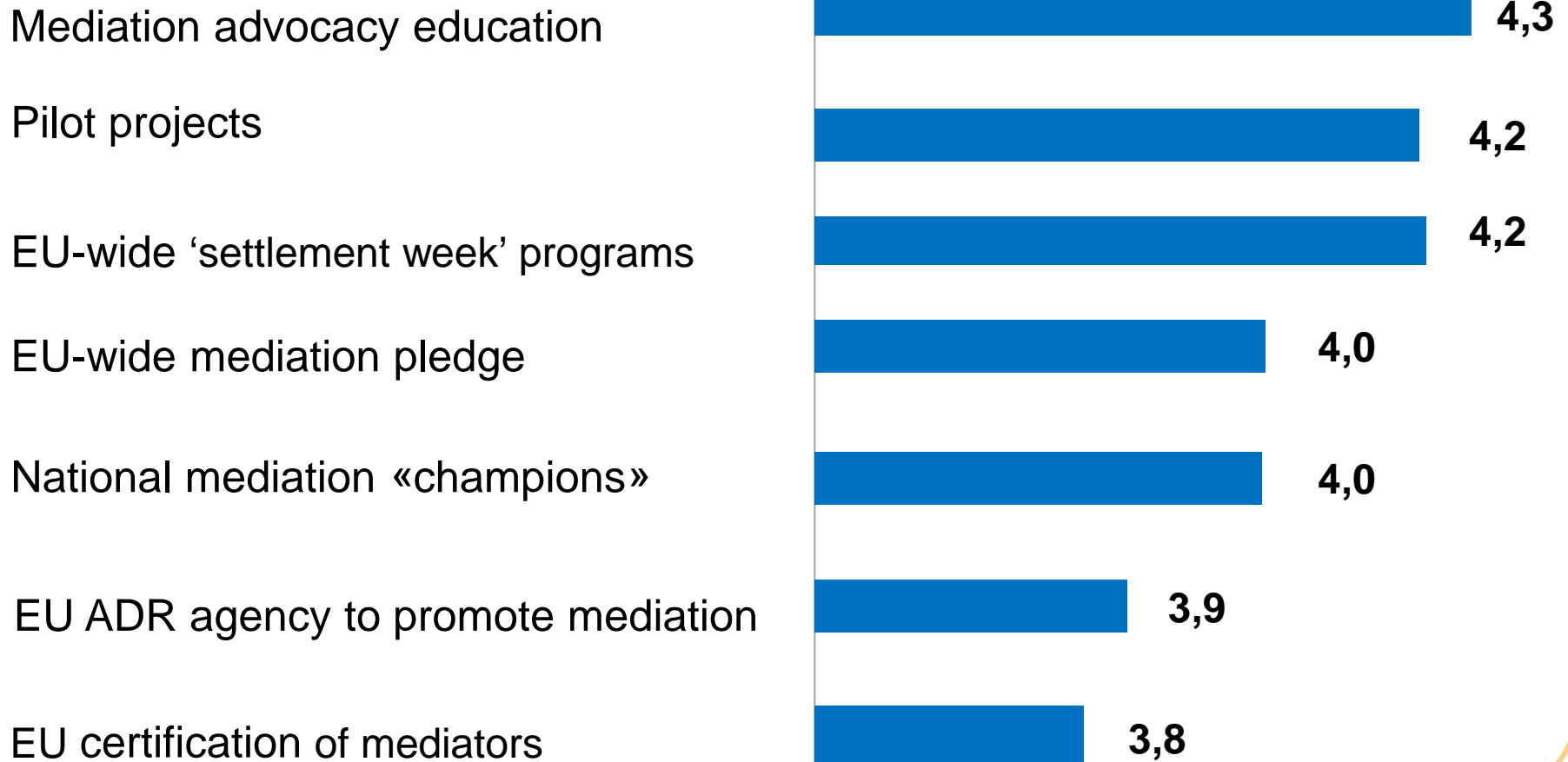
51

Mandatory mediation with opt-out

45

155

The Single Most Effective Non-Legislative Measure





The Two «Fs»

Fight



Flight



Legislative Measures to Solve the «EU Mediation Paradox»

- 1) Introduce “mitigated mandatory mediation” in Mediation Directive and other EU legal instruments on ADR (in force and being proposed), albeit on a temporary basis, as a trial.
- 2) Insist that the MS accept the “Balanced Relationship Target Number” theory (given the poor results of all other pro-mediation legislative measures, alone or combined, it should lead the MS to do the same as above)

The «Balanced Relationship Target Number» Theory

Art. 1 of the Mediation Directive

The objective ... 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.

Each MS must determine its own **BRTN** = minimum percentage of cases to be mediated to arrive at “**balanced relationship**” with that of litigated cases.

Each MS free to choose the appropriate policy tools to reach its **BRTN** (mandatory mediation, information sessions, financial incentives etc.)

Failure to set and reach **BRTN** = failure to comply with the Directive

**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

**Proposal of the ADR Committee of the Commercial Division Advisory Council
To Implement the Task Force Report's Proposal for a Pilot Mandatory Mediation
Program**

September 13, 2013

Section IV of the June 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century (the "Task Force Report") proposes two initiatives the Task Force concluded will aid parties in reaching early resolution of their business disputes: (1) a pilot mandatory mediation program; and (2) procedures to help identify limited discovery that will aid settlement discussions before comprehensive electronic discovery and depositions multiply the costs of dispute resolution. After consultation with the New York County Commercial Division Justices and the Administrative Judges for Civil Matters, New York County, and a few further

every fifth newly assigned case

effective adjudicative forum, the Task Force concluded, will help ensure that businesses in the increasingly competitive global economy will continue to view New York as a desirable place to conduct business and the Commercial Division as a forum that will facilitate the cost-effective resolution of their disputes. Moreover, the Task Force reasoned, reforms that help facilitate settlement and reduce discovery disputes will enable Commercial Division Justices to focus more of their resources on substantive legal and factual issues and the development of New York commercial and business law they are particularly suited to address.

Notwithstanding the above, and notwithstanding the evidence that mediation has been used successfully in the Commercial Division, because of both the inherent adversarial nature of the litigation and the broad disparity in the degree to which judges refer matters to mediation, the Task Force concluded that mediation is "substantially underutilized in New York." Accordingly, the Task Force proposed the implementation of a Pilot Mandatory Mediation Program, including procedures for early settlement-related discovery to facilitate mediation or other settlement efforts. The language of the Task Force proposal is as follows:

«The Emperor Has No Clothes!»



Stockholm, September 3, 1967



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