Expanding the Use of Mediation in Europe: from Promotion to Protection

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As the cradle of European judicial culture, ancient Greece and Rome were well known for shaping the way disputes were solved, to the extent that even many of our courthouses resemble Greco-Roman temples. Nevertheless, we must not forget that what were known as the Greek *Areopagus* and Roman *Tribunals* existed alongside other, more private, procedures. In Ancient Greece, mediation was deeply rooted in political thought. Solon, often portrayed as the creator of Athenian democracy, is depicted by both Plutarch and Aristotle as a mediator as well as a legislator.[1] Already, the Greeks understood two of the main advantages of mediation: it provides a speedy resolution to a dispute, and allows litigants to maintain friendly relations in the future.[2] If the two litigants agreed to reconcile, they swore an oath to abide by the terms on which they had agreed. The practice of mediation in solving disputes may be linked to Greek philosophy, which encouraged individuals to think about their relationships with others and control their passions. Plato, for example, advises that when a dispute arises between two persons, they should first consult their neighbours and friends, who know the problem and the litigants better; if an agreement cannot be reached, only then can they go to court.[3]

Various forms of Alternative Dispute Resolution (ADR) also coexisted in Roman law. In the Law of the Twelve Tables, one of the earliest Roman legal texts, certain kinds of disputes, such as those over division of land property[4], were solved by arbitration. Later, in the first century BC, Cicero explains that the *arbiter*'s role is to mediate the matters in litigation.[5] The Latin noun *mediator* is derived from the adjective *medius*, which means 'in between' or 'central'. In that sense, the mediator is an intercessor, a person coming between two adversaries to bring them back together. Though sources are sometimes difficult to interpret, modern studies show that it is clear that Roman law offered many ways to settle disputes without going to court, methods that combined private initiative with a slight oversight on behalf of the Roman state.[6] This alternative between private initiative and state justice is still a key aspect in the process of ADR development today, as will be discussed in this paper.

[1] R. M. Manley Tannis, 'Greek Arbitration: Homer to Classical Athens' (1998) (LLM thesis on file at Queen's University, Kingston) available at https://www.academia.edu/12071132/Greek_Arbitration_Homer_to_Classical_Athens), at 43.
[2] E. Harris and A. Magnetto, 'Arbitration, Greek', in T. Whitmarsh (ed.), Oxford Classical Dictionary (2020).
[3] Plato, Laws, book VI, 766-767.
[4] Milotic, 'Roman Arbitration: Concepts and Terminology', 26 *Croatian Arbitration Yearbook* (2019) 87, at 99. See also: L. Bablitz, 'Roman Courts and Private Arbitration', in P. J. du Plessis, C. Ando and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (2016) 234.
[5] *Ibid*. at 90.
[6] *Ibid*. at 97.

Besides classical antiquity, ADR has arisen in other cultures. Eastern culture developed another form of social regulation where the application of the law was only secondary. Seeking reconciliation through mediation techniques was the main way to maintain social peace. Such a difference with western culture is partly due to the religious and philosophical influences that Confucianism, Buddhism and Taoism have had on social relationships.[7] The individual is also less self-centred, as the established social order has a greater impact on citizens.

While ADR is deeply rooted in European thought, it has been put to one side with the development of state justice. The Council of Europe became interested in ADR in the eighties, and elaborated the basic principles of family mediation in a 1998 recommendation.[8] For this purpose, the Council analysed the use of family mediation in several countries to study its potential. It appeared that it improves communication between family members even in times of conflict and emotional unrest, reduces conflict to reach agreements, decreases the cost and time usually spent on judicial divorces, and maintains a relationship between parents and children who are the most at risk in these procedures.

On that basis, the Council recommended the development of family mediation in member states, and set out principles to be respected. Mediation should exist on a voluntary basis, and should be conducted by qualified and impartial mediators who do not have the power to impose a decision. States should ensure confidentiality of exchanges during mediation, and the enforcement of agreements. They should also organize the relationship between mediation and state justice, so that mediation can be autonomous. Finally, the Council advised that international family mediation should be developed, to which these principles are applicable.

The United Nations also developed these extra-judicial procedures by supporting them in every national system and by creating the United Nations Peacemaker in 2006.[9] Likewise, the European Union decided at the Tampere Council in October 1999 to study the advantages of ADR and the ways to promote it.[10]

The European Commission published a Green Paper on 19th April 2002 on ADR in civil and commercial law.[11] The Green Paper served three objectives: to learn about practices of ADR, to establish fundamental principles to ensure the same level of safety in ADR as in state

[7] R. David, C. Jauffret-Spinosi and M. Goré, *Les grands systèmes de droit contemporains* (12th ed., 2016), at 430.
[8] Council of Europe, Recommendation No. R (98) 1 of the committee of ministers to member states on family mediation of 21 January 1998.
[9] United Nations peacemaker, available at https://peacemaker.un.org/about-peacemaker.
[10] Poillot-Peruzzetto, 'Médiation', 1 *Répertoire de droit européen* (*RDDE)* (2018) at 5.
[11] Commission Green Paper of 19 April 2002 on ADR in civil and commercial law, COM/2002/0196.

justice, and to inform the general public about the norms in effect.[12] The Commission observed a growing interest in these extra-judicial procedures: they improved access to justice and many member states had already passed legislation to allow and implement them. Therefore, the development of ADR, and especially mediation, became a political priority for the European Union.[13]

Within the Green Paper, the European Commission noted that various forms of ADR coexisted depending on the judicial system and specific procedures. Firstly, some are 'in the context of judicial proceedings', meaning 'conducted by the court or entrusted by the court to a third party', while others are conventional, only depending on an agreement between the parties. In this conventional ADR category, the Commission distinguishes between procedures where the third party helps to find an agreement, and those where they have the power to propose or impose a solution. Having made these observations, the European Union decided to pass a Directive on ADR.

The European Parliament and European Council based the Directive on Article 81 of the Treaty on the Functioning of the European Union, which states that measures should be taken to develop 'alternative methods of dispute settlement'.[14] The Directive itself was published on 21st May 2008, with a transposition period expiring in 2011. Its goal was to create harmonized legislation for ADR on cross-border litigation, and to entice member states into developing it through their own national laws.

The definition of mediation given by the Directive shows the intent of embracing every application possible. Mediation is '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'.[15] It may be initiated by the parties, or ordered by law or a judge. Moreover, the Directive gives a definition of the mediator, who is the central character in mediation. The mediator is the third party who is commissioned to conduct the mediation process 'in an effective, impartial and competent way', whatever their denomination, profession, and the way in which they have been appointed.[16]

[12] S. Guinchard (ed.), *Droit et pratique de la procédure civile* (2021), at 437.
[13] Commission Green Paper, *supra* note 11.
[14] Consolidated version of the Treaty on the Functioning of the European Union OJ 2012/C 326/1, Article 81.
[15] Commission Directive 2008/52/CE, OJ 2008 L136/3.
[16] *Ibid.*

The 2008 Directive almost exclusively entices, promotes and facilitates mediation. As mediation is a sensitive matter that deals with legal procedures depending on the states, the text is a flexible framework.

Nevertheless, mediation is still not used as much as the European institutions would have wished. A 2017 resolution on the implementation of the mediation Directive showed that many member states did not have a 'mediation culture'. [17] Therefore, the resolution encouraged them to further develop ADR so that it would become an effective way of solving disputes.

When developing mediation, the European institutions should not overlook the fact that it can threaten fair trial principles. The potential of mediation is great, as underlined by the various sources already mentioned: parties can reach satisfactory private settlements without having to face the difficulties raised by court proceedings. Nonetheless, the risk of privatization of justice is real and must not be underestimated.

Member states and European institutions have to ensure that the principle of a fair trial and the rule of law are respected, even if a dispute is solved by a private agreement following mediation. Therefore, developing mediation is all about finding the right balance between private agreements and state control. This will be the main concern addressed in this paper.

Today in Europe, the advantages of mediation are widely recognized and states have implemented this procedure in their law, with many variations. However, the use of mediation can pose some difficulties and it should be underlined that the rights of litigants must be taken care of. Thus, it is essential to further the development of mediation, facilitate broader use of this procedure, and ensure its growing quality.

I. Mediation in Europe : a Matter of Balance

A. Private Agreement for Smoother Dispute Resolutions

1. A Way to Elaborate more Satisfactory Resolutions

Mediation has various psychological and sociological benefits, as emphasized by the 2008 EU Directive. In a word, it is about how litigants feel and their mental state before and

[17] EP 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 (the 'Mediation Directive'), OJ 2018/C 337/01.

after the process of dispute resolution. Nowadays, it is well documented that mediation allows the improvement of communication between opponents, reduces animosity and is a way to produce amicable settlements, which provide continuity of personal or commercial contacts between former litigators. This aspect is especially crucial in family disputes, given the fact that they arise in a context of distressing emotions that exacerbate them. In addition, one must bear in mind that a legal issue brought to court often represents only a portion of the problems existing between two parties. By helping people sit around a table and talk about their problems in a peaceful manner, mediation can solve disputes on a wider and more profound scale. Psychological and neurobiological studies show that mediation has a real impact on helping people overcome feelings (such as anger, shame and sadness) or cognitive bias that may prevent them from reaching a settlement with the other party on their own.[18]

Moreover, acceptance of the decision is often facilitated as mediation provides a win-win settlement that is more likely to be honoured, and will cause fewer enforcement problems. It is also a matter of public satisfaction. A study carried out in Germany showed that, in cases of parental authority disputes, 89% of parents having settled through mediation ended up satisfied, whereas they were only 40% happy after a court decision. The same study found that mediation settlements in family matters bring solutions that are more durable and create fewer fights afterwards.[19] Mediation, in this sense, allows litigants to feel respected and have an influence on the decision making process.[20] As the English Court of Appeal stated in a ruling, 'it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live', a result which, often, cannot be reached by the judge.[21] This satisfaction factor should not be neglected by state authorities, at a time when institutions are heavily criticized and a lack of public confidence is on the increase.

2. A Way to Obtain Procedural Gains

From a more procedural point of view, mediation has other benefits. In this case, the main advantage resides in cost gains, in both time and money. This can be measured by studies

[18] E. Bader, 'The Psychology and Neurobiology of Mediation', 17(2) *Cardozo Journal of Conflict Resolution* (2016) 363.
[19] R. Greger, *Mediation und Gerichtsverfahren in Sorge und Umgangsrechtskonflikten Pilotstudie zum Vergleich von Kosten und Folgekosten* (2010), at 116.
[20] European Commission for the Efficiency of Justice (CEPEJ), 'Mediation, report prepared at the request of the Delegation of Switzerland' (2003), available at: https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-mediation-repo/1680747d99.
[21] England and Wales Court of Appeal (Civil Division), *Dunnett v. Railtrack Plc* (2002), at para. 14.

examining the costs of Non-ADR. States are of course interested in reducing the length of trials, in order to reduce pressure on courts. A study carried out by the European Parliament shows that, given a theoretical success rate of 75% (i.e. mediation successfully settles the dispute in 75% of cases, while the other 25% go to court), as many as 330 days of procedure are saved in Belgium and 860 in Italy[22]. Of course, these are very high success rates, but the same study found that, starting from as low as a 9% success rate in Belgium, and even 4% in Italy, mediation saves time for the whole judicial system.[23] The figure is 19% for the EU.[24]

As for financial costs, these are also deeply affected by the use of mediation. Savings can be impressive. It has been calculated that, in the case for example of a commercial dispute worth 200 000 euros, not trying mediation before going to court can cost around 13 000 euros more.[25] Recent studies showed that the use of mediation could even have a dual positive effect for companies: on the one hand, they save money on one litigation, while on the other, this saved money allows them to pursue other cases, which might otherwise have been too expensive.[26]

These explanations show that mediation has numerous advantages for litigants, which is why the EU and the Council of Europe (CoE) have encouraged member states to introduce or promote such procedure in their laws. They do however need to set guidelines, as justice cannot be left as an entirely private matter.

B. State-controlled and Organized Procedure

1. A Necessary Regulation to Help Mediation Work Smoothly

Shortly after the French Revolution, Portalis, a well-known French juris consult, wrote in the introduction of the *Code Civil* that 'Justice is the first debt of sovereignty'.[27] This illustrates the idea that, traditionally in European legal culture, the state is responsible for organising and implementing justice. This is still the case with mediation, as when implementing it, states have to choose whether they want a free or a regulated market. While a

[22] EP Directorate-General for Internal Policies PE 453.180, 'Quantificating the cost of not using mediation' (2011) at 14.
[23] *Ibid*. at 15.
[24] *Ibid*. at 17.
[25] ADR Center, 'The Cost of Non-ADR. Surveying and Showing the Actual Costs of Intra-Community Commercial litigation' (2010) 53, available at https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/Survey-Data-Report.pdf.
[26] *Ibid*. at 25.
[27] J.-E.-M. Portalis, *Discours préliminaire du premier projet de Code civil* (1801).

free market without any restrictions can endanger rule of law principles, an excess of regulation can be an obstacle to the development of ADR.

The 2008 Directive underlines that 'member states should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective, quality control mechanisms concerning the provision of mediation services'.[28] What is essential is to ensure that mediation is conducted in an 'effective, impartial and competent way'.[29] In any case, particular attention should be paid to consumer protection so that a minimum of quality criteria is ensured. The Directive also suggests that mediators should be aware of the existence of the European code of conduct for mediators, written in 2004 with the assistance of the European Commission.

This has led to great diversity in market regulation concerning the role of the mediator. In fact, in the Netherlands, access to becoming a mediator is left to the private sector. The Dutch Mediation Institute (NMI) plays a central role, as mediators that wish to work in the Netherlands must be accredited by it.[30] Mediators have to be qualified to access the national register of mediators, and this process is quite challenging, as mediators have to go through a training process as well as pass a theoretical exam and a final assessment.[31] Therefore, even if there is no real state control, the Dutch system favours an effective control mechanism. Even if a state opts for a private system that ensures a control mechanism for access to the mediator profession, this does not mean that control will not be effective.

Moreover, some practical questions arise on subjects such as confidentiality. One scholar described it as the 'cornerstone' of mediation.[32] It is indeed crucial that litigants feel free to speak during the mediation process, in order to reach a compromise, without the fear of elements being used against them later in court, if mediation fails. Article 7 of the 2008 Directive specifies that member states have to ensure that mediators should not be compelled to give evidence during a court hearing related to information that has arisen during the mediation process. Nevertheless, this obligation may be limited if the parties agree that confidentiality can be bypassed in particular cases, such as the need to protect the best interests of children or prevent physical or psychological harm to a person. Disclosure of such information can also be granted when it is necessary to enforce the agreement.[33] The purpose

[28] Commission Directive 2008/52/CE, *supra note 15*, at para. 16.
[29] Commission Directive 2008/52/CE, *supra note 15*, at para. 17.
[30] Available at: https://e-justice.europa.eu/content_mediation_in_member_states-64-nl-en.do?member=1.
[31] *Ibid.*
[32] Kulm, 'Privatising Civil Justice and the Day in Court', in K. Hopt et F. Steffek (eds.), *Mediation Principles and Regulation in Comparative Perspective*, at 228.
[33] Commission Directive 2008/52/CE, *supra note 15*, Article 7.

of this obligation is to give the mediation process the trust it needs. In fact, parties might give information during a mediation process that they would not want publicized in court.

A comparative study of European legislation shows that most states protect the principle of confidentiality to different extents and some of them have laid down disciplinary sanctions for professionals that overstep this principle.[34] For instance, Spanish legislation stipulates that in cases of breach of confidentiality, the person responsible for the breach may be considered liable for damages.[35] One of the only exceptions considered by the Spanish legislation is if there has been express approval given by the parties. This shows that some states have gone beyond what the 2008 Directive suggested, to ensure that the confidentiality of mediation proceedings might actually be an asset to convince parties to take part in an ADR procedure.

2. The Judge's Role in Regulating the Process

In some cases, ADR can take place even if an action has already been brought before a court, and the judge can play a central role in this process. A comparison of European legislation shows that during court proceedings, a judge can push the litigants towards ADR in different ways.[36] Litigants can be encouraged to take part in an information meeting on mediation, which is intended to explain to the parties that there could be another way to solve their problems. In some exceptional cases, the judge can decide that the parties should attend mediation.

In some legislation, the judge may become the central actor of an ADR and can even be the professional mediator. In the German legal system, the 2012 law that transposed the 2008 Directive has given courts the added possibility of sending the parties to a judge, the *Güterichter*, whose mission is to conciliate them.[37] This type of procedure takes place within the court. The conciliatory judge cannot make a decision regarding the dispute between the parties. His or her sole purpose is to find a favourable outcome for both parties and he or she can use any kind of ADR, including mediation.[38]

Granting effective mediation is also a primary aspect that a member state has to take into consideration. In fact, if the mediation process cannot benefit from a concrete outcome, parties will refuse to undergo such a process. The 2008 Directive expressly states that member

[34] Ferrand, 'L'offre de médiation en Europe : Morceaux choisis', 67 *Revue internationale de droit comparé* (2015) 45, at 67.
[35] EP Directorate-General for Internal Policies PE 493.042, '*Rebooting' the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU* (2014).
[36] Ferrand, *supra* note 34.
[37] *Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung* (Law to promote mediation and other out-of-court dispute resolution procedures), 21 of July 2012.
[38] Zivilprozessordnung (German code of civil procedure), at para. 278 and subparagraph 5.

states have to ensure that a written agreement resulting from mediation is enforceable. There should only be specific cases that can prevent such enforcement, such as an agreement being contrary to the law of the state.[39] Article 6 of the Directive specifies that a court or any other competent authority according to the state's legislation can grant enforceability. In any case, legislation must ensure that the content of a written agreement resulting from mediation is enforceable.

The Directive also underlines that an agreement resulting from mediation should be made enforceable in another member state in accordance with the national law prescriptions.[40] This is also in line with the application of the principle of mutual recognition of judgments in civil and commercial matters.[41] Most countries have implemented an enforcement mechanism for both out-of-court and judicial mediation by submitting the agreement to the approval of a judge, thus providing mediation proceedings with the legal value of a court's decision.[42]

Moreover, some states have implemented very strict regulation concerning ADR, making it almost mandatory. This is specifically the case in Italy where mediation has been developed constantly. Before the transposition of the Directive in 2010, the Italian legislator had already developed ADR in commercial and civil law areas as a way to limit litigation before the courts.[43] Article 5.1 of the 2010 legislation provides a list of the civil and commercial disputes for which mediation is mandatory.[44] Compulsory mediation has a broad range of application from inheritance matters to medical liability. In these fields of law, parties must initiate mediation proceedings before starting court proceedings. Otherwise, the judge will postpone proceedings until the mediation attempt has been completed.

Nevertheless, in a case of some urgency, parties can still have access to a judge, especially when they ask for provisional measures.[45] Mandatory mediation does not mean that the parties are forced to find an agreement: they only have to make an effort to try to settle. If they fail to do so, they can address their claims to a court. This has led to a significant rise in the number of mediation proceedings per year (almost 150 000 a year) and the success rate is

[39] Commission Directive 2008/52/CE, *supra note 15*, para. 19.
[40] Ibid. at para. 20.
[41] 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 2001 L012.
[42] CEPEJ, *European Handbook for Mediation Lawmaking* (2019), available at https://rm.coe.int/cepej-2019-9-en-handbook/1680951928.
[43] Bandini and Carrara, 'The transposition of the European Directive on mediation in civil and commercial matters in Italy', 2 *Cahiers de l'arbitrage* (2012) 347.
[44] *Decreto legislativo 4 marzo 2010, n. 28, Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali* (Law concerning mediation in civil and commercial disputes), (10G0050).
[45] *Ibid.* Article 5.3.

almost 50 percent when parties have decided that they would keep on trying mediation after their first meeting.[46] Italy has adopted an opt-out model of mediation where, if the parties agree to try mediation during the first meeting, they can immediately initiate proceedings.

While mediation exists in all member states nowadays, it has various kinds of frameworks and is used to different extents. Numerous specialists and institutions agree on the idea that efforts are required on a large scale to boost the use of ADR. However, further development of mediation necessarily questions our vision of justice as a whole, as this is a completely different way of rendering justice. Therefore, some problems need to be addressed.

II. The Main Issues Involved in the Further Development of Mediation

A- Difficulties in Implementation and Risks of Deviation

1. Issues that can Lead to Mistrust from the Parties

One of the main difficulties in the implementation of mediation in the European Union is that the status of the mediator varies considerably depending on the state. The 2004 Code of Conduct is not binding, and the 2008 Directive does not impose its ratification as a condition to becoming a mediator. Since the Directive does not make training or certification mandatory for a mediator, litigants may feel unsure about the entire process. Article 4 of the Directive only says that member states should encourage 'the development of, and adherence to, voluntary codes of conduct by mediators'.[47] The states can also create organizations to regroup and train mediators, or to grant accreditation for professional mediators. The goal is to guarantee that mediation will be conducted with efficiency and competence. Nevertheless, there is no compulsory rule. Some states will not impose any criteria to be able to work as a mediator, whereas Germany requires mediators to be fully qualified lawyers or certified mediators.[48] This poses the question of how the person conducting mediation is supposed to be 'competent and trained', when there is no European legislation.

[46] CEPEJ, *supra 42.*
[47] Commission Directive 2008/52/CE, *supra* note 15.
[48] Commission Report COM(2019) 425 final, on the application of Directive 2013/11/EU of the European Parliament and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes of 25 September 2019.

Thus, the lack of a European framework poses a real difficulty: depending on the state where mediation takes place, the mediator might be professionally trained and certified, or have no background or qualifications in negotiation, which causes uncertainty for the parties. For mediation to work, it seems essential for mediators to be properly trained in dispute resolution techniques.[49]

The other main difficulty posed by cross-border ADR is the non-compliance with settlements, especially when they are non-binding.[50] The reluctance to execute the decision may be proof of the absence of a true ADR culture in some states. The 2008 Directive leaves the decision to member states on how the agreement reached can be made enforceable, either through a court or another authority.[51] Nevertheless, the need to go before a judge takes away some of the advantages of mediation. With the agreement, both parties should be satisfied and have endured fewer costs and delays. If one of them decides that the agreement is after all not satisfactory, they will be subjected to the inconveniences of state justice.

States can draw up some special procedures to make those agreements enforceable quickly, however this will not prevent all the difficulties linked to a case of cross-border agreement. Therefore, mediation appears to be less effective for citizens than it does for state justice, since the decisions of a judge are immediately enforceable. This issue might prevent ADR from developing as quickly as the European Union wishes: the public will not trust mediation if they do not feel that the settlement reached is truly respected.

2. The Risks of Mediation for the Judicial System

The main risk is the inequality of arms between the parties. An agreement can often be reached between two litigants of equal strength, economically and socially speaking. However, this may also be an opportunity for a powerful party to impose a so-called settlement on the weaker one. This risk is partially prevented by the 2008 Directive: the parties can enter mediation only for a dispute concerning rights and obligations at their disposal.[52] Therefore, fundamental rights should not be in danger in the case of an imbalance.

The disequilibrium between parties will have many repercussions on the mediation process itself. For instance, ADR can occur between an employer and an employee, who by

[49] B. S. Seigel, *Why mediation works… and why it doesn't* (2013), available at https://www.buchalter.com/wp-content/uploads/2013/09/Why-Mediation-Works.Seigel.pdf.
[50] EP Directorate-General for Internal Policies, PE464.424, 'Cross-Border Alternative Dispute Resolution in the EU' (2011).
[51] Commission Directive 2008/52/CE, *supra* note 15.
[52] *Ibid.*

definition are unequal.[53] Firstly, the employee might have fewer resources, so they will be interested in a quicker solution, even if this sometimes means making more concessions. Secondly, the employer may have more experience in mediation, and in dispute management in general, which will help them seize the advantage. Finally, the parties will have a different state of mind regarding the solution they seek: for the employer, the question will usually be financial, whereas for the employee, an apology or acknowledgment could reduce the compensation sought.

Without a judge to ensure equality of arms between the parties, the latter may enter mediation on unequal grounds, which will be prejudicial for the weaker party. The mediator can sometimes try to prevent the strongest party from abusing the imbalance, although the parties remain free to decide, which would not be the case at an actual trial.

On a wider scale, development of mediation may have an impact on the judicial reforms undertaken by a government. Indeed, ADR is supposed to provide better access to justice, lower the costs of a legal dispute, and accelerate its resolution. It should not prevent states from allowing more means for their judicial systems and further modernising their laws. The multiple rulings by the European Court of Human Rights on the grounds of excessive delays show that states still need to work on a reasonable timeframe; installing mandatory mediation cannot be a way out of structural reforms.

Promoting ADR is an objective of the European Union, although it should not be achieved while neglecting judicial proceedings. Therefore, mediation cannot become a last resort for the public, once state justice has lost public confidence because of high costs and ineffective procedures. ADR can also pose a threat to the fundamental processual principles, as they are private agreements and justice has inevitably less control over their content.

B- The Necessary Guarantee of Rule of Law Principles

1. Protecting the Right to a Fair Trial

Although mediation is widely encouraged by both European institutions and member states, we have seen that this procedure is not without risks for litigants. It is of the utmost importance that litigants choosing mediation are protected against any abuse of their rights. These rights to a fair trial are guaranteed by Article 6 of the European Convention on Human

[53] Gazal-Ayal and Perry, 'Imbalances of Power in ADR', 39 *Law and Social Inquiry (LSI)* (2014) 791, at 795.

Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union.[54] amongst others. As underlined in part one of this study, mediation in Europe today is all about the tension between private agreement and state control. Therefore, it is only logical that human rights issues, related for example to access to a court and equality of arms, vary depending on whether mediation is voluntary or mandatory.

The right of access to a court is directly at stake here, since, by essence, mediation eludes court. How, then, can this right be safeguarded? Scholars argue that the European Court of Human Rights seems to have a pragmatic approach on this matter: the greater control parties have at each point in the dispute resolution process, the less heavily the state should regulate that process.[55] The Court of Strasbourg has already ruled that parties can waive their right to access to a court, given that this is a choice free from coercion or constraint.[56] While there is so far no decision from the Court about mediation, judgments in arbitration cases have applied these principles.[57] For L. McGregor, this could suggest that the Court 'is unlikely to overly regulate voluntary engagement with ADR'.[58] Freedom of choice is, obviously, the fundamental human right.

A huge issue remains concerning the lack of definition of the notion 'coercion or constraint'. This is especially problematic in adhesion contracts including a mediation clause, which are common nowadays, especially in consumer disputes. In such cases, consumers might not be aware that they waived their right of access to a court while buying a product. Furthermore, because of the small amounts often at stake, many consumers hesitate to bring their case to the court system, due to excessive costs and length of proceedings, thus having no real choice between the court system and ADR.[59] To deal with these situations, the EU has promoted the use of ADR and online procedures in consumer disputes.[60] Nevertheless, these

[54] ECHR, *Guide on Article 6 of the European Convention on Human Rights* (2020), available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf.
[55] McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR', 26/3 *European Journal of International Law* (2015) 607, at 617.
[56] ECtHR, *Poitrimol v. France*, Appl. no. 14032/88, Judgment of 23 November 1993. All ECtHR decisions are available at http://hudoc.echr.coe.int/.
[57] ECtHR, *Suda v. Czech Republic*, Appl. no. 1643/06, Judgment of 28 January 2010.
[58] McGregor, *supra* note 55, at 618.
[59] Kamphorst, 'The Right to a Fair Trial in Online Consumer Dispute Resolution', 8/5 *Journal of European Consumer and Market Law* (2019) 175.
[60] EP and Commission Directive 2013/11/EU *on alternative dispute resolution for consumer disputes* of 21 May 2013, OJ 2013 L 165/63 and EP and Council Regulation (EU) No 524/2013 *on alternative dispute resolution for consumer disputes* of 21 May 2013, OJ 2013 165/1.

kinds of tools are not yet widely known, or used.[61] In addition, they create other problems, especially in terms of equality of arms.[63]

Concerning mandatory mediation, its dangers have long since been underlined.[64] A stronger standard of scrutiny is to be expected to protect parties' rights of access to a court. Nevertheless, all kinds of mandatory mediation cannot be excluded, for the 'stick' is sometimes more useful than the 'carrot' when it comes to promoting mediation. The Court of Justice of the European Union had to examine an Italian law obliging a customer to go to mediation before bringing his claim to court. The Advocate General argued that these compulsory out-of-court dispute resolution provisions pursued 'legitimate objectives in the general interest'.[65] The Court ruled that mandatory mediation is not a breach of Article 6 ECHR if it meets certain criteria. [66] This decision was upheld in 2017, with the Court establishing no less than six criteria that need to be verified by the national judge to ensure that a law implementing compulsory mediation is compatible with the right of access to a court.[67] These rulings suggest that, in the Court's opinion, mandatory mediation is compatible with Article 6 ECHR if it does not imply excessive length or cost, and, above all if it can be overruled by an appeal to state justice.

2. Monitoring Mediators' Ethics

Another key aspect to consider is mediator ethics. Access to an independent and impartial tribunal is one of the cornerstones of the right to a fair trial.[68] A dispute resolution procedure such as mediation organized by the state should have some standards in order to ensure a fair decision by an independent and neutral third-person. Across Europe, the legislative framework for mediator status varies. It is sometimes quite comprehensive, such as in Austria for instance, where the list of mediators is kept by the federal Ministry of Justice.[69] Despite this comprehensive framework, mediators are not obliged to apply for registration. This means that

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[61] European Commission, *Consumer Conditions Scoreboard* (2017), at 66 and available at https://ec.europa.eu/info/sites/default/files/consumer-conditions-scoreboard-2017-edition_en.pdf.
[63] Kamphorst, 'The Right to a Fair Trial in Online Consumer Dispute Resolution', 8/5 *Journal of European Consumer and Market Law* (2019) 175, at section V.
[64] Hughes, 'Mandatory Mediation, Opportunity Subversion', 19 *Windsor Year Book of Access to Justice* (2001) 161.
[65] Joined Cases C-317/08 to C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* (EU:C:2010:146), Advocate General's conclusions at para. 45: 'legitimate objectives in the general interest (i.e: a quicker, less expensive method of dispute settlement which also lightened the burden on the court system and was likely to produce a more satisfactory long term solution to the dispute)'.
[66] Joined Cases C-317/08 to C-320/08, *supra* note 64, at para. 67.
[67] Case C-75/16, *Livio Menini, Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa* (EU:C:2017:457), at para. 61.
[68] ECHR, *supra* note 54, at 49.
[69] *Bundesgesetz über Mediation in Zivilrechtssachen* (Austrian Law on Mediation in Civil Cases), 6 of July 2003, BGBl (Austrian Official Journal) I 2003/29.

mediation can be conducted by non-registered mediators, who are not bound by the high standards mentioned. In such a case, the mediation process will be less protective, in terms of statute of limitations and confidentiality for example.[70] Other member states, such as the Netherlands, have not organized public accreditation of mediators, despite the high success of mediation in this country.

These two examples show the considerable differences in mediator status amongst member states, and sometimes even between two mediators in one state. On the one hand, one might ask if equality of treatment and access to fair and impartial dispute resolution can be guaranteed for all European citizens in this context. On the other hand, too much scrutiny is not a solution, as mediation remains a private initiative, and a free market. In a 2017 case, the CJEU ruled that Greek mediation law had imposed overly restrictive conditions on accessing the profession of mediator, and especially, that by 'subjecting the recognition of accreditation of mediators obtained in other EU member states to further conditions, it went beyond EU law'.[71] These explanations reveal the difficulty of harmonizing the legal and professional status of mediators.

Further development of mediation challenges the main aspects of the traditional and essential principles of state justice. The EU and its member states will have to take this issue into account when giving a new impulse to these alternative proceedings.

III. Bringing Mediation to the Next Level: Ideas and Proposals

A- Suggestions to Increase the Use of Mediation

1. Promote Clear and Accessible Information on Mediation

A common problem is that parties are generally unaware of ADR, and it is already too late when they get a grasp of it.[72] States should deliver minimum online information as to which forms of ADR are available and which associations and bodies effectively implement those processes. The European Law Institute (ELI) considers that clear and comprehensive information should be given to parties. More specifically, they should be aware of the identity of the dispute resolution provider, the costs expected and the length of proceedings, what

[70] Rechberger, 'Mediation in Austria', 32 *Ritsumeikan Law Review* (2015) 61, at 64.
[71] Case C-729/2017, *European Commission v Hellenic Republic* (EU:C:2019:534).
[72] Ferrand *supra* note 34, at 53.

mediation consists of and the consequences of engaging in such a process. Developing mandatory information could favour the use of mediation and an on-site information point in the courts could also be a valuable asset.[73]

Member states have adopted various schemes for ADR. Therefore, it is quite hard for a European citizen to determine which appropriate ADR applies to his or her situation. Regarding cross-border disputes, the establishing of a 'single entry point' is an option.[74] This would mean that each consumer would have a unique intermediary who would be able to determine which procedure would be most suitable in dealing with the legal issue and would be able to inform the consumer which type of ADR is recommended for the specific situation.

2. Promote Awareness amongst Legal Professionals

It is crucial that judges are properly trained. They should receive all the information needed to implement ADR, both at the beginning of their professional training and throughout their career. A form of non-optional training for judges on mediation is essential to change the approach towards the resolution of disputes.[75]

The European Commission for the Efficiency of Justice (CEPEJ) has developed a 'mediation development toolkit' whose aim is to give practical tips on how to organize mediation teaching for judges.[76] The CEPEJ's toolkit underlines the essential elements that a judge should know concerning mediation. During an initial awareness programme, a judge's attention should be drawn to appreciating the differences between the various types of ADR. They also have to be able to determine which cases are suitable for mediation, to send parties to attend a mediation information session organized by professional mediators and to facilitate the transition from court proceedings to mediation proceedings.

Moreover, lawyers could also be made aware of mediation procedures and the benefits for their clients. In most member states, while lawyers are often the first professionals consulted by a litigant, they are not under the obligation to inform their clients that mediation is possible

[73] *Ibid*. at 83.
[74]EP Directorate-General for Internal Policies PE464.424, 'Cross-Border Alternative Dispute Resolution in the European Union' (2011).
[75] CEPEJ, *Road Map of the CEPEJ-GT-MED* (2018), available at https://rm.coe.int/road-map-for-mediation-based-on-the-cepej-gt-med-report-on-the-impact-/16808c3fd5.

[76] CEPEJ, *Mediation awareness programme for judges: ensuring the efficiency of the Judicial Referral to mediation* (2019) available at https://rm.coe.int/cepej-2019-18-en-mediation-awareness-programme-for-judges/168099330b.

and in their best interests[77]. The opposite solution would be preferable and the Dutch example should be considered, as in the Netherlands the Code of Conduct for lawyers states 'the advocate should keep in mind that an amicable solution is often preferable to a lawsuit.'[78]

3. Find the Right Balance between Incentive and Penalty Measures

Most European states have implemented mediation on a voluntary basis whereas others have introduced mandatory mediation. A mandatory system could be counterproductive as mediation is a process based on the free will of litigants and on their empowerment concerning judicial issues.[79] The risk is that mediation would become a simple formality that parties will undergo without even considering the mere possibility of finding a solution using such a process. In some states, there can be pecuniary sanctions when litigants do not cooperate and try to find an alternative resolution to their dispute.[80] Such sanctions against unreasonable refusals of mediation are also promoted by Ali/Unidroit principles of transnational civil procedure.[81] They can either consist of fines or sentences that will distribute procedural costs; the general goal is to push litigants to act in good faith when trying to solve their issues with the help of a mediator.[82]

Some member states have developed innovative solutions to promote mediation. Financial 'carrots', such as tax credits, could also be implemented.[83] Litigants can also benefit from refunds of state fees paid in pending court cases. This means that, even if they start by going to court, parties have every advantage in settling their dispute through mediation while the case is pending. Nevertheless, studies show that even though incentives seem to have some effect on the use of mediation, 'they do not appear to have produced, where they have long been in existence, significant results'.[84] In addition, incentives and sanctions should not prevent the parties from accessing the judicial system. [85]

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[77] EP Directorate-General for Internal Policies, *supra* note 35, at 135.
[78] *Nederlandse orde van advocaten* (Netherland Order of advocates), *Code of Conduct 2018*, rule n°5, at 10, available at: https://regelgeving.advocatenorde.nl/content/code-conduct-2018.
[79] V. Lasserre, La promotion et l'encadrement des modes amiables de règlement des différends (2021), available at: https://www.cours-appel.justice.fr/sites/default/files/2021-03/Rapport%20Promotion%20et%20encadrement%20des%20MARD%205%20mars%202021_0.pdf
[80] Ferrand *supra* note 34, at 79.
[81] Ali/Unidroit principles of transnational civil procedure, *Principle 24* (2006) available at https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles
[82] CEPEJ, *supra* note 42.
[83] For example in Bulgaria: see De Palo and Trevor, 'Bulgaria's Major Mediation Steps Include Cash Back on State Filing Fees', 28/8 Alternative to High Costs of Litigation: Worldly Perspectives (2010) 155, at 156.
[84] EP Directorate-General for Internal Policies, *supra* note 35, at 132.
[85] EP Resolution of 12 September 2017, *supra* note 17, at Article 5(2).

B- Suggestions to Improve the Quality and Effectiveness of Mediation

1. *Promote Appropriate Standards for Professionals*

The question of developing a licensing system deserves consideration as this would guarantee the quality of an ADR process and ensure that essential principles of mediation, such as confidentiality, are respected.[86] For instance, Italy faced difficulty when mandatory mediation was implemented. There was a sudden increase in mediation professionals and associations that led to concerns regarding the quality and reliability of so-called mediation professionals.[87] Therefore, the expansion of ADR should take into consideration the development of general ethical and professional standards on a European level.[88]

2. *Fully Embed Mediation within the Judicial System*

Judges are essential in helping to build trust towards mediation procedures so that the parties will attend those procedures with a constructive attitude. The three best practices underlined by the ELI are: 'encouraging ADR, upholding standards in ADR and preserving access to justice'.[89]

When considering the promoting aspect, the ELI underlines that judges should always keep basic principles in mind. ADR should be considered as a complementary system and be integrated as such into the state justice system. Before and during litigation, judges should make parties and legal professionals aware of the possibility of using ADR and the positive prospects of such a procedure before and during litigation. They should determine whether it is appropriate to do so by taking into consideration the financial capabilities of the parties and factors related to the nature of the dispute, as well as the relationships between the parties. It is only natural that courts should disregard ADR processes in the context of violence.

The CEPEJ toolkit also emphasizes the necessity for member state judicial authorities to appoint a judge in each court who would be responsible for mediation. This judge would also be in charge of keeping up with the objective of raising awareness concerning mediation with

[86] EP Directorate-General for Internal Policies PE 462.490, 'Why is mediation not used more often as a means of alternative dispute resolution?' (2012).
[87] G. Santacroce, *Il ruolo della mediazione nel sistema giudiziario italiano* (2014), available at https://www.giustizia.it/giustizia/protected/980521/0/def/ref/NOL979449/.
[88] CEPEJ, *supra* note 42, at 46.

[89] European Law Institute (ELI), *The relationship between formal and informal justice: the courts and alternative dispute resolution* (2018) available at https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%2018/ELI-_ENCJ_ADR_Statement.pdf.

his or her colleagues and developing training programmes. This judge should be trained in mediation techniques to be able to organize and pilot projects in his or her own court[90]. The specialization of judges in every court could also allow them to detect the legal cases that seem eligible for mediation. Judges could then start an ADR process with the consent of the parties, appoint an ADR professional or at least send the parties to an information meeting on ADR[91]. The development of a 'mediation bureau' in every court should be considered as a valid option.

Moreover, states should implement a specific department within their central authorities, whose objective would be to work on mediation to create local correspondents that would have particular knowledge of ADR[92]. It is of the utmost importance that European institutions have direct interlocutors to which they can refer when developing policies on ADR.

In conclusion, ADR has convinced the European Union and some member states of its effectiveness in finding satisfactory and binding private agreements. Parties reach a more peaceful settlement with the same legal strength as a judicial ruling, without having to endure the inconvenience of state justice. However, we can see that there is a pattern in evolution towards more state control, suggesting that a totally free market, where competition is the only rule, neither guarantees qualitative and fair dispute resolution, nor fits Europeans standards[93]. Pondering the need to develop ADR in the future is inevitably intertwined with the development of online disputes[94]. In such a context, online mediation could be based on a mathematical analysis carried out by an algorithm, which inevitably addresses questions of a fair trial. Yet another challenge for European institutions and future judges!

[90] CEPEJ, *supra* note 75.
[91] V. Lasserre, *supra* note 78.
[92] CEPEJ, *supra* note 74.
[93] Ferrand *supra* note 34.
[94] P. Cortés, *Online dispute resolution for consumers in the European Union* (2010).