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The End of Laissez-faire in Civil and Commercial Mediation in the European Union

1.01 The recent mediation legislation in the European Union (EU) constitutes only one part of a much larger global movement. For decades, mediation and other methods of alternative dispute resolution (ADR) for civil and commercial disputes have been the topic of discourse in many nations, both within the EU and beyond.[1]

1.02 The EU's increasing focus on mediation and other methods of ADR has followed upon years of increasing concern about court costs, court congestion, and other obstacles to cross-border dispute resolution. Throughout this time, the use of alternatives to litigating civil and commercial disputes remained almost entirely voluntary and subject to only limited legislative encouragement in the EU member states. Consequently, at least in part, very few litigants used mediation to resolve these disputes.

1.03 The October 1999 European Council of Tampere[2] foreshadowed a significant effort to change this laissez-faire approach[3] when it 'called for alternative, extrajudicial procedures

[1] ADR methods in fields other than civil and commercial disputes, such as family and employment law, have been practised and legislated upon for much longer. This book focuses on mediation in civil and commercial disputes.

[2] This Council has also been noted by European Commission Vice-President Viviane Reding in her Foreword. For a more detailed account of the Directive's history, please see Arnold Ingen-Housz, *ADR in Business: Practice and Issues across Countries and Cultures, Vol II* (Kluwer International 2011), specifically John M Bosnak, Chapter 29: 'The European Mediation Directive: More Questions Than Answers'.

[3] While detailed discussion is beyond the scope of this book and this introduction, no policy-oriented discussion can ignore the fundamental questions of whether and to what extent government sponsored pro-ADR policies are desirable, and to what extent such policies impact fundamental notions of the right to trial. As will be addressed in more detail below in this introduction, however, both the approach of the EU and the

[for dispute resolution] to be created by the Member States'.[4] The efforts that followed took nearly a decade and resulted in the adoption 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'.[5] While the Directive expressly applied only to cross-border disputes, its Recital 8 provided that 'nothing should prevent Member States from applying [its] provisions also to internal mediation processes'.

1.04 In addition to refraining from imposing domestic mediation processes, the Directive also refrained from requiring that member states mandate or otherwise encourage the use of mediation. Instead, it provided in Article 5(2) 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.

In fact, according to Recital 5 of the Directive, '[t]he objective of securing better access to justice . . . should encompass access to judicial as well as extrajudicial dispute resolution methods'. Ultimately, the Directive identified its goal as 'ensuring a balanced relationship between mediation and judicial proceedings',[6] but it did not suggest what that balance might be.

Mediation in the EU Member States Today: A Variegated Landscape Still in the Making

1.05 With the Directive's adoption, 26 EU member states[7] faced the challenge of implementing its provisions within three years, by the deadline of 21 May 2011. This book reveals the results, thus far, of the response to that challenge: each chapter, written by one or more local practitioners chosen for their expertise, covers what has happened in one member state. These narratives contain a wealth of practical information about the often rocky course of the Directive's implementation. To accompany their narratives, the local experts have also provided translations of the key domestic statutes currently governing mediation in their country. This material can be found in an annexed table, along with a chart that makes the 27 member states' mediation systems easier to compare.[8]

editors' proposal here are grounded in the principle of achieving a balance, as appropriate for each member state, between the use of mediation and the use of litigation.

[4] This description of the Council's call comes from the Directive, Recital 2. For a brief overview of the developments in the EU leading to the adoption of the Directive, see the EU's website at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/628&format=HTML&aged=0&language=EN&guiLanguage=en> last accessed 21 April 2012.

[5] For the Directive's full text, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> last accessed 21 April 2012.

[6] Directive, Art 1(1).

[7] Denmark is not bound by the Directive, as acknowledged in Recital 30. In order to provide a comprehensive view of current mediation developments in the EU, however, this book includes a chapter explaining Danish mediation laws and how they compare to the Directive's provisions.

[8] This access to information about local processes will also, the editors hope, allow the users of dispute resolution services to find common processes amongst member states more readily and aid them in their ADR activities—that is, when designing clauses, when they are faced with disputes, and when they are adapting their case assessment processes, working with in-house staffs, and coordinating with outside counsel in their practice management efforts.

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1.06 The narratives and statutory translations have a value that goes beyond the practical: they reveal the variations in the response to the Directive. As one example, a number of states have opted to apply the Directive solely for cross-border disputes, thereby instituting a dual regulatory regime, while others have applied the Directive provisions, to a varying degree, to domestic disputes.

1.07 But an even greater range of responses, and some fundamental questions, have resulted from the states' efforts to achieve the delicate balance between the use of mediation and the use of litigation sought by the Directive. Proposals for, or questions about, the use of incentives, sanctions, and mandates have been part of difficult conversations in many countries.

1.08 Current legislative results demonstrate, however, that the EU's tradition of a voluntary approach to mediation so far remains deeply ingrained at both the practitioner and government level. Only one country has mandated participation in mediation as a prerequisite to litigation in a fairly broadly defined range of disputes,[9] whereas another has tried it for disputes below a certain monetary value, but then withdrew;[10] one country is testing mandatory mediation in certain subject areas;[11] a number of countries have instead mandated attendance at informational meetings about mediation;[12] and others have established financial incentives rather than mandates to encourage participation in mediation.[13] As the editors write this introduction, legislation concerning the Directive is inching its way through the law-making process in several member states. Implementation is by no means complete, even in states that have transposed the Directive.

In the Middle of International Mediation Theory and Practice Developments

1.09 In this book, the editors continue their examination of the international trend to lead more people to embrace mediation. They have focused especially on government initiative, such as that reflected in the Directive's promotion of mediation to 'secur[e] better access to justice'[14] and 'to establish [the EU as] an area of freedom, security and justice'.[15] The Directive is not, however, the first instance of an EU initiative in this field. Even before its adoption for the 27 state, 4 million km, nearly 500 million[16] inhabitant EU,[17] the European Commission

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[9] In Italy, mediation is a condition precedent to trial in a number of civil and commercial areas.

[10] In the United Kingdom, the Ministry of Justice has proposed making mediation mandatory for disputes of various monetary values, but so far the proposals have not been adopted.

[11] The French Government issued a decree which authorized certain first instance tribunals in family matters, as a test approach, to issue injunctions to meet with a mediator and participate in mediation. This test will last until the end of 2013, at which time its results will be assessed.

[12] France, Slovenia, and Luxembourg have chosen to require attendance at mediation information sessions for certain types of cases. The Czech Republic Mediation Act proposal provides that if parties do not participate in an introductory mediation information session, they may be ineligible to receive an award for costs in a later trial. The Irish Draft Mediation Bill requires solicitors and barristers to inform disputing parties about the possibility of using mediation, and allows a court considering the award of costs to take into account a party's unjustified or unreasonable refusal to consider using mediation or attend a mediation information session.

[13] For example, Poland, Romania, and Bulgaria have implemented a full or partial refund of court filing fees.

[14] Directive, Recital 5.

[15] Ibid.

[16] See <http://ec.europa.eu/enlargement/candidate-countries/index_en.htm> last accessed 27 April 2012.

[17] See <http://europa.eu/about-eu/facts-figures/living/index_en.htm> last accessed 18 April 2012.

sought to promote the use of mediation and other ADR mechanisms for cross-border disputes with, and between, the countries on the southern shore of the Mediterranean.

1.10 In 2003, as it worked on its vision of the Directive, the Commission called for proposals for a project to promote the use of arbitration and mediation within the area of its strategic economic partner in the Mediterranean, at that time known as the 'MEDA' region.[18] Its call resulted in the selection of a consortium of firms led by ADR Center.[19] This consortium developed a multifaceted approach that included disseminating information about ADR to legal and business professionals within the region, providing training in the use of ADR techniques, and giving technical assistance to local institutions.[20]

1.11 The three-year-long MEDA project led to a book[21] by the editors of this volume, who are on the faculty at the Dispute Resolution Institute (DRI) of Hamline University School of Law in St Paul, Minnesota—an institution that, since its inception in 1991, has been at the forefront of the international development of alternative means of dispute resolution.[22]

1.12 In the years that followed, international donor institutions including the World Bank, the International Finance Corporation (IFC), and the Inter-American Development Bank decided to fund several ADR technical assistance projects in the developing world. These projects all sought to promote the use of mediation and arbitration in both domestic and cross-border disputes. Once again, ADR Center was chosen to implement these projects; to do so, it put together and directed multinational teams of experts stationed in Africa, Asia, and the Caribbean.[23]

1.13 In addition to the growing scope of their collaboration in technical assistance and scholarly[24] projects, one of the editors gained dramatically increased exposure to the daily practice of international dispute settlement upon becoming a member of the Board of Directors of JAMS International.[25]

[18] In 2003, the MEDA region included Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, Turkey, and the West Bank and Gaza Strip.

[19] Established in 1998 and headquartered in Rome, Italy, ADR Center is currently the largest private mediation organization in Europe. The company has 17 offices throughout Italy and manages in excess of 3,000 mediations per year. See <http://www.adrcenter.com> last accessed 18 April 2012.

[20] Giuseppe De Palo, one of the editors of this handbook, was the director of the MEDA project, which was comprised of a team of over 50 experts from 18 countries.

[21] For more details about the MEDA project, see the Introduction to the book: Giuseppe De Palo and Mary B Trevor, *Arbitration and Mediation in the Southern Mediterranean Countries* (Kluwer 2007).

[22] For more information about the Dispute Resolution Institute, see the Institute's website at: <http://law.hamline.edu/disputeresolution> last accessed 21 April 2012. In the 2013 *America's Best Graduate Schools: U.S. News and World Report* ranking of law schools, Hamline University School of Law was ranked third in the United States in the field of Dispute Resolution; <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/dispute-resolution-rankings> last accessed 24 April 2012.

[23] For more information about all of these projects, whose aggregate value is in excess of €8 million, see <http://www.adrcenter.com/international/cms> last accessed 26 April 2012.

[24] The editors' continuing commitment to evolution in conflict resolution management led in 2009 to the ongoing monthly 'Worldly Perspectives' column in *Alternatives to the High Cost of Litigation* newsletter, co-published by CPR: International Institute for Conflict Prevention & Resolution in New York City, and Jossey-Bass, a San Francisco unit of John & Wiley & Sons. For more information, see <http://www.cpradr.org> or <http://www.altnewsletter.com> last accessed 18 April 2012.

[25] JAMS International is a subsidiary of US-based JAMS LLC, the world's largest provider of mediation and arbitration services; JAMS LLC was established in 1979 (see <http://www.jamsadr.com>). A number of JAMS International panellists are authors of the country chapters in this book (see <http://www.jamsinternational.com>).

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1.14 The EU's focus on developing ADR for cross-border dispute resolution, meanwhile, had been turning increasingly toward the EU itself. In particular, under the Specific Programme 'Civil Justice' 2007–13,[26] the EU started funding a major initiative entitled 'Lawyers in ADR' in 2008. 'Lawyers in ADR' encompasses three different projects designed to remove impediments to mediation for EU lawyers; set common standards for mediation advocacy, especially for cross-border cases; and facilitate cooperation and sharing of ADR know-how among lawyers in the member states.[27]

Will the Directive Bring About More Mediated Cases?

1.15 The substantial amount and variety of the editors' ADR experiences, spanning the last 20 years or so, have naturally contributed to shaping their understanding of the field of mediation. But these experiences have also led them to confront an increasingly global question: why is mediation not used much more widely, when its many advantages are apparent, technical assistance projects to promote it have long been offered,[28] and its legislative support is burgeoning?

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[26] The Specific Programme 'Civil Justice' 2007–13, established by the European Parliament and the Council (Decision No 1149/2007/EC), aims to promote judicial cooperation among the 27 EU member states. Activities funded under the Programme are meant to:

> contribute to the creation of a single European area of justice in civil matters based on mutual recognition and mutual confidence;
> encourage the elimination of obstacles to the proper functioning of cross-border civil proceedings in the member states;
> improve the daily life of individuals and businesses by enabling them to assert their rights throughout the EU, notably by fostering access to justice; and
> improve the contacts, exchange of information, and networking between judicial and administrative authorities and the legal profession.

[27] As part of its work on these projects, which are ongoing, ADR Center has implemented a wide series of ADR-related activities such as training courses on civil and commercial mediation for lawyers throughout Europe; a video on cross-border mediation translated into 23 official EU languages; a survey on data gathered to quantify the costs of not using mediation; a website containing the results of these projects; and many other ADR tools. For additional information about the 'Lawyers in ADR' project, see <http://www.adrcenter.com/international/cms/?page_id=259> last accessed 26 April 2012. More recently, the EU decided to fund another project proposed by ADR Center, entitled 'Judges in ADR'. Its aims are to remove impediments to EU judges' ability to actively promote and use mediation and, in particular, to create a technical knowledge base for judicial referral to mediation in the EU. In particular, 'Judges in ADR' finances the following activities:

> research and analysis to calculate the costs and benefits associated with mediation;
> creation of a website with articles, rules, regulations, and an e-learning module to facilitate cooperation and sharing of know-how among judges from EU countries in the field of ADR; and
> training courses in mediation referral techniques for EU judges.

Additional information on this project is available at <http://www.adrcenter.com/civil-justice> last accessed 26 April 2012.

[28] Efforts by the international organizations that have financed programs such as the ones referred to above, and other similar ones, have not involved any specific target number for increasing the use of mediation. Instead, the assumption has been that trainees will buy into the process once a structure and understanding are provided. This approach has resulted in an extremely low 'return on investment' as far as the actual number of mediations being carried out once the money to finance ADR initiatives runs out. In short, and with apologies to W P Kinsella and the screenwriter of *Field of Dreams*, the world of ADR does not appear to be an Iowa cornfield where, 'If you build it, [they will] come'—mediations seem to require more reason than an attractive vision.

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1.16 Part of the answer, the editors have found, is that whether a country's dispute resolution system results in mediation use depends, more than any other factor, on whether the system has achieved an appropriate balance between the voluntary nature (as far as its outcomes are concerned) of the process, and the necessity of public incentives for litigants to actually engage in it.[29] So far, this balance simply has not been achieved in most countries worldwide, not just in the EU.[30]

1.17 At this stage of its implementation, the Directive has led to discussions and analysis of mediation and dispute resolution to a degree and depth never before encountered across the EU. Without the Directive, progress achieved so far in increasing regulation would likely never have happened. Still, it is critical not to shy away from analysing what the actual impact of this regulatory exercise has been, particularly now, when member states still struggle with transposition of the Directive and calls for legislation favouring a significantly higher resort to mediation continue to come from many sources.[31]

1.18 Indeed, the current combination of disappointing numbers for mediation use, varied approaches to the Directive's implementation, and a renewed impetus behind mediation legislation makes it imperative, in the editors' view, to 'take the bull by the horns' when envisioning how to move forward. While significant diversities in the EU member state mediation regimes are inevitable, and to a certain extent desirable, legislation with only limited impact on mediation use is neither inevitable nor obviously desirable.[32]

1.19 A recent EC-funded study has shown that tackling this issue is a particularly compelling government duty, and even more so during a time of economic downturn.[33] The study

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[29] Harvard Law Professor Frank E A Sander sees a clear distinction between coercion within the mediation process and coercion into mediation. Being told to attempt mediation differs from being forced to settle the dispute during mediation. The former 'coercion'—at issue here—only 'relates to requiring that parties *try to reach an agreement* to resolve their dispute'. D Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo J of Conflict Resolution* 479, 485–6, available online at: <http://cojcr.org/vol11no2/479-510.pdf> last accessed 27 April 2012.

[30] Recent statistics on mediation use in almost all member states confirm that even those countries that stepped forward early to transpose the Directive have seen little increase in the use of mediation.

[31] These sources include, most recently, the EU Parliament, in the form of two resolutions. See European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the member states, its impact on mediation and its take-up by the courts (2011/2026(INI)), available online at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN> last accessed 6 April 2012, and European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117(INI)), available online at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0449+0+DOC+XML+V0//EN> last accessed 6 April 2012. In addition, the Commission has released a proposal on Alternative and Online Dispute Resolution for business-to-consumer disputes, available online at: <http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm> last assessed 26 April 2012.

[32] The slow adoption of mediation for dispute resolution might be attributed, in part, to the possibility that the EU is now passing through what is, essentially, an 'orientation period', during which the member states and parties must become accustomed to its use. This characterization, if accurate, would speak against the advisability of changing policies right away. But a number of newly passed policies in certain member states have long been in place in other countries, even outside of the EU, without producing significant results. These precedents, on balance, would seem to favour the approach of not waiting too long merely to confirm largely predictable, negative results.

[33] A survey titled 'The Cost of Non ADR—Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation' quantified the cost of not using mediation. The survey was implemented by ADR Center, in the context of the 'Lawyers in ADR' initiative, in collaboration with the European Company Lawyers Association (ECLA—Belgium) and the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME—Belgium). This study surveyed companies, lawyers, and legal researchers

unearthed a truth that everyone already knew, but in a way no one had appreciated before: mediation, if used extensively, can result in significant and rigorously measurable time and money savings. In a subsequent elaboration presented at the EU Parliament in May of 2011, the study showed that in the EU, even at a very low success rate (about 25 per cent), on average mediation would still save both time and costs.[34] Not surprisingly, this study was referenced in one of the two EU Parliament resolutions mentioned earlier[35] and is now often discussed in international mediation circles.[36]

No One Size Fits All, But …

1.20 In light of the ongoing discussions, it is significant that the sole member state that has seen any relevant increase in the use of mediation since transposition of the Directive appears to be Italy, where mediation is mandatory for a range of civil and commercial disputes.[37] Many member states have chosen to wait and see what happens in the judicial challenges that have resulted from the Italian requirement before considering implementing mandatory mediation themselves.[38] The Italian experience, though not without its difficulties,[39] certainly suggests that mandatory mediation, in appropriate cases, may be worth a much closer look for many countries.[40]

(representatives answering on behalf of their home country) in 26 EU member states, to ascertain the true cost of relying upon traditional adjudicative processes. For more details on this study, see <http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf> last accessed 26 April 2012.

[34] Specifically, if all cases in the EU were mediated before going to trial and mediation had a success rate of only about 25 per cent, there would still be a benefit in terms of time and cost saved. The study also found that when mediation is successful, European citizens can save over €7500 per dispute. For more details on this study, see <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40771> last accessed 26 April 2012.

[35] See 1.17 and accompanying footnote.

[36] At the time this manuscript was submitted, the European Commission had funded a new study, which includes arbitration, to gauge the existing ADR climate in business-to-business disputes among member states. A possible outcome may be a new EU Directive on ADR that would ensure that businesses have access to simple, effective, and rapid means of redress to resolve their dispute with another business. Such a Directive could complement both the 2008 Directive on cross-border mediation and the recent Commission proposals regarding business-to-consumer disputes. See <http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm> last accessed 26 April 2012.

[37] Although drastic, this regulatory change was not abrupt, but progressive, spanning years. Italian Decree 28/2010 was enacted in March 2010, but the rules making mediation mandatory in certain types of cases did not go into effect until March 2011, to allow some time for adjustment. In addition, for the areas anticipated to trigger the Decree most often (vehicle and boat accidents), the effective date was further postponed to March 2012. Interestingly, but also predictably, during the initial 12-month period when the new rules were in force without the requirement for parties to mediate, the total number of mediations remained very low. But at the time this manuscript was submitted, a little over a year after the mediation requirement became effective for some cases, the number of mediations in civil and commercial disputes had already climbed to over 13,000 per month. Before the law's implementation, it had been less than 4,000 per year. This number is expected to reach over 80,000 mediations per month (one million annually) as a result of mediation becoming mandatory for the additional types of civil cases in March 2012.

[38] Given the interest in the Italian model expressed by several member states and the interest in exchanging information on best practices in mediation among the member states, several high-level meetings between judges and lawyers of different EU member states have taken place in recent months or will take place in the near future. These meetings have taken place both in the context of EU-funded initiatives, such as those taking place under the aegis of the 'Judges in ADR' project, and independently, at the request of high-level government officials and lawmakers, who have convened in Rome and Milan to learn more about the situation in Italy.

[39] See Chapter 15 of this book for information about the experience in Italy. See also G De Palo and LR Keller, 'The Italian Mediation Explosion: Lessons in Realpolitik' (2012) 28 *Negotiation Journal* 181–199.

[40] As noted above, in 1.8 and accompanying footnotes, mandatory mediation has been discussed extensively in other member states and is being tested in at least one of them.

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1.21 EU member states, though, do vary widely in terms of mediation practice and law; government and legal structures; and ethnic, political, and cultural traditions. Hence, imagining that the EU might impose, or even simply suggest, mandatory mediation across the member states would be a mistake. It would also be technically impossible under EU law. Nonetheless, limitations on its ability to impose certain requirements do not mean that the Directive cannot provide guidance—even strict guidance—to the member states about improving the effectiveness of their mediation regulations.

Knowing Where to Go: Introducing the Principle of a 'Balanced Relationship Target Number' Between Litigation and Mediation

1.22 Indeed, on closer inspection, the Directive does already provide the legal mandate to prompt more effective mediation policies and, perhaps, even to identify policies that, though technically compliant, can already be recognized as ineffective. This aspect of the Directive, found in its Article 1, has not so far received the attention it warrants. As noted at the beginning of this introduction, Article 1, albeit implicitly, seemed to call for the number of mediations to rise above the then-current level of usage by asking for a 'balanced relationship between mediation and judicial proceedings'. If the notion of balanced relationship, as seems only logical, includes the actual number of mediations and trials in a given country, today that balance is clearly absent in virtually all member states.[41]

1.23 The editors therefore propose the idea of a government commitment to a 'balanced relationship target number' between litigation and mediation. To accomplish this goal, the EU should determine, or perhaps better yet, request each member state to determine, a target figure. This figure would represent the minimum percentage of cases to be mediated in each country in order to arrive at an ideal 'balanced relationship' with the percentage of litigated cases.

1.24 The 'balanced relationship target number' should be determined on the basis of a common set of objective elements. These elements may include, in addition to general macro-economic indicators, figures relating to the current status of the administration of civil justice and to the mediation infrastructure of a given country.

1.25 With respect to the administration of civil justice, objective sources could include the average duration of civil trials as taken from ministerial sources; the widely available reports by the World Bank[42] and the European Commission for the Efficiency of Justice created within the Council of Europe;[43] data from the European Court of Human Rights on the amounts and frequency of financial sanctions imposed on states for delayed justice under

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[41] Furthermore, this lack of balance is particularly intolerable if, as noted above in 1.19, overall savings can be generated even with a low mediation success rate. In this light, the political decision not to promote mediation use more aggressively, at least to a certain extent or in certain cases, is highly questionable. More generally, not pursuing these savings can be seen as in conflict with the Directive's goal to 'secure better access to justice', Recital 5, and the member states' general duty to avoid imposing on their citizens unnecessary expenditures of time and money in civil litigation.

[42] See <http://www.doingbusiness.org> last accessed 18 April 2012.

[43] See <http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp> last accessed 18 April 2012.

Article 6 of the European Convention on Human Rights;[44] and any study measuring the economic impact of delayed judicial procedures.[45]

1.26 With respect to the mediation infrastructure of a given country, assessment should initially focus on, amongst other elements, the infrastructure's present scope and performance, both in number of mediated cases and users' appreciation; the costs of upgrading the infrastructure to the level at which it is capable of handling the desired amount of disputes; and the current mediation policies in place. These data, too, can come from multiple sources, such as the aforementioned 2012 study of ADR in business-to-business disputes.[46]

1.27 A 'balanced relationship target number' will establish a comprehensible and quantifiable way of ascertaining whether the Directive has been effectively implemented in a given member state. Certainly, in light of the acknowledged variations across the EU, each member state should be allowed to choose the appropriate tools for its own particular situation (such as mandatory mediation, mandatory information session attendance, financial incentives, and the like) to achieve its target number. But should the existing tools prove ineffective in determining or reaching that target, there will be a Directive obligation to step up the effectiveness of the tools deployed.[47]

1.28 'If you don't know where you are going, any road will get you there', says the Cheshire Cat in Lewis Carroll's Alice in Wonderland. At the moment, the member states are following

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[44] See <http://www.echr.coe.int/echr> last accessed 18 April 2012.

[45] By way of example, before leaving his post as the Governor of the Bank of Italy, Mario Draghi, now Governor of the European Central Bank, noted that the delays of the Italian justice system were estimated at one per cent of Italy's GDP. See <http://www.ilfattoquotidiano.it/2012/02/01/migliorare-giustizia-cambiare-nome-agli-uffici/188001> last accessed 18 April 2012.

[46] See 1.19 and accompanying footnote. The following country chapters are another valuable resource showing some of the individualized factors that need to be taken into particular account in a given member state to come up with the 'balanced relationship target number'.

[47] The notion of an EU-promoted balanced relationship between mediation and litigation, as proposed in this introduction, would thus be consistent with the EU law principle of subsidiarity. According to the European Parliament, '[t]he subsidiarity principle pursues two opposing aims. On the one hand, it allows the Community to act if a problem cannot be adequately settled by the Member States acting on their own. On the other, it seeks to uphold the authority of the Member States in those areas that cannot be dealt with more effectively by Community action. The purpose of including this principle in the European Treaties is to bring decision-making within the Community as close to the citizen as possible.' See <http://www.europarl.europa.eu/factsheets/1_2_2_en.htm> last accessed 18 April 2012. In addition to that between laws of different hierarchy, such as EU and domestic member states laws, the principle of subsidiarity might be useful in framing the relationship between litigation and mediation. Developed in the seventeenth century, the principle stresses the government duty to defer to private autonomy. In one of its more radical elaborations, attributable to John Locke, the principle denies the legitimacy of any government action where citizens can better accomplish the same goals by themselves. As applied to dispute resolution, the notion of subsidiarity might turn upside down the currently prevailing view of ADR processes as 'alternatives' to court proceedings. In fact, in this context, ADR and mediation, as private processes, would appear to be the first, natural avenue to redressing disputes, and state-managed procedures, such as trials, the last resort. Subsidiarity, therefore, at least at some level, may underlie the approach of those who prefer to speak of ADR as 'appropriate', as opposed to 'alternative', dispute resolution. This reflection upon the concept of subsidiarity in dispute management should dispel the mistaken conclusion that the call for a much higher number of mediations in the EU, which the notion of 'balanced relationship target number' today implies, is simply a political tool, employed during a time of economic crisis, to undercut the fundamental right of EU citizens to their 'day in court'. For a discussion of the principle of subsidiarity in the history of European law, see Antonio Padoa Schioppa, *Storia del diritto in Europa. Dal medioevo all' eta contemporanea* (Il Mulino 2007). On the topic of the ideal relationship between public and private dispute resolution processes within the court system, see the seminal piece by F Sander, 'Varieties of Dispute Processing' (1976) 70 *Federal Rules Decisions* 111.

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many roads. In the absence of a clear arrival point—such as something along the lines of the proposed 'balanced relationship target number'—both the Directive and all ADR legislation, whether EU or domestic, run the risk of not reaching the very goals they were designed to attain.

The EU as a Perfect Lab in Effective Mediation Policy-making

1.29 With the release of the Directive, the EU member states embarked on a challenging journey together. The increasing awareness of the cross-border mediation market and the heightened aspirations for increased growth that have already resulted from the Directive's implementation have created an urgent demand for reliable and current information. Attorneys, firms, businesses, and mediation service providers, both within and outside the EU, must take the Directive into account as part of their day-to-day work. EU businesses providing mediation training need an up-to-date resource for their teaching materials. More globally, educators and academics need a source to consult for comparative studies of mediation legislation across the EU member states. Finally, those who are looking ahead to continue to develop policy and rules, not only in the EU, need to be able to assess where the Directive's implementation now stands.

1.30 This need for reliable and current information underlay the editors' first motivation for this book: to describe the current state of mediation in the EU to the intended readers. But as their editing work and other vantage points revealed the Directive's limited impact in most member states, a second motivation emerged: to call for new approaches and tools capable of facilitating increased mediation use, especially while new legislation is in the making. We have proposed one such tool. Once properly elaborated and refined, this tool, along with others, might be put to work by governments around the world, with the goals of testing more effective mediation policies and ultimately contributing to the delivery of better access to justice for all. In this context, the EU—where multiple and diverse domestic rules play off against certain shared rules—might turn out to be just about the best possible testing environment for effective mediation policies.

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