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Is Europe Headed down the Primrose Path with Mandatory Mediation

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Is Europe Headed Down the Primrose Path with Mandatory Mediation?

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I. Introduction

Civil justice systems are having their share of troubles in Europe as costs and delays associated with courts and the litigation process have significantly impacted citizens' access to justice.[1] In Italy alone, there is a reported backlog of almost six million civil cases in the court system.[2] As a result of systemic problems in accessing justice, the alternative dispute resolution (ADR) movement has experienced a steadily growing presence in both civil and common law jurisdictions.[3]

Over the last two decades, the European Union (EU) has intentionally promoted mediation and other forms of ADR to advance access to justice goals, and it has done so with a high degree of intensity.[4] The European Union has funded mediation and ADR projects in both commercial[5] and public justice areas;[6] issued several consultation papers,[7] ADR directives,[8] and

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[1] *See generally* Annette Marfording, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, 23 U. NEW S. WALES L.J. 384 (2000) (book review). In Central and Eastern Europe, deficiencies in legal aid assistance have threatened to undermine the rule of law and democratic government. *See also* EUROPEAN FORUM ON ACCESS TO JUSTICE, ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE: FORUM REPORT (2002), *available at* http://pilnet.org/public-interest-law-resources/44-access-to-justice-in-central-and-eastern-europe-forum.html (referencing mediation on several occasions).

[2] *See* M. Henry Martuscello II, *The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration*, 24 N.Y. INT'L L. REV. 49, 49 (2011) (noting the backlog of cases in Italy to be 5 million in 2011, which is expected to grow to 6.5 million by 2012).

[3] *See id.* at 51.

[4] *See infra* notes 5-11 and accompanying text.

[5] *See, e.g.*, Giuseppe De Palo & Linda Constabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 304 (2006) (discussing the European Commission's 2001 pilot project to promote international commercial arbitration and mediation in the southern Mediterranean countries).

[6] *See generally* Laura Davis, *The EU and Advancing Justice Issues in Mediation*, (June 2010), *available at* http://www.initiativeforpeacebuilding.eu/pdf/JusticeOct.pdf (noting increased involvement by the EU in promoting justice and human rights).

[7] Most recently, the European Commission Directorate-General for Health and Consumers announced a public consultation paper on the use of ADR as a means to

resolutions;[9] conducted public consultations on the use of ADR and online dispute resolution (ODR);[10] and promulgated a code of conduct for mediators.[11] Of all the ADR processes, mediation, in particular,[12] is at the forefront of EU discussions about access to

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resolve disputes related to commercial transactions and practices in the European Union. The primary issue considered is consumer-to-business disputes. *See* Directorate-General for Health and Consumers of the European Commission, *Consultation Paper on the Use of Alternative Dispute Resolution as a Means to Resolve Disputes Related to Commercial Transactions and Practices in the European Union*, COM (2011), *available at* http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/does/adr_consultation_papaper_18012011_en.pdf.

[8] *See, e.g.*, *Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation No. 2006/2004 and Directive 2009/22/EC*, COM (2011) 793 final (Nov. 29, 2011), *available at* http://ec.europa.eu/consumers/redress_cons/docs/directive_adr_en.pdf (calling for upholding the quality principles of impartiality, transparency, effectiveness, and fairness in ADR).

[9] *See, e.g.*, Report on Alternative Dispute Resolution in Civil, Commercial and Family Matters, EUR. PARL. DOC. 2011/2117(INI) (2011), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0343+0+DOC+PDF.VO//EN.

[10] *See, e.g.*, *Public Consultation on the Use of Alternative Dispute Resolution (ADR) as a Means to Resolve Disputes Related to Commercial Transactions and Practices in the EU*, COM (2011), *available at* http://ec.europa.eu/consumers/redress_cons/Feedback_Statement_Final.pdf.

[11] *See* European Code of Conduct for Mediators, *available at* http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

[12] *See, e.g.*, Christophe Ayela & Dany Khayat, *Panorama of Mediation and Arbitration in France*, ASPATORE, Jan. 2011, 2011 WL 190722 (discussing the use of mediation in France); Dr. Pablo Cortes, *Can I Afford Not To Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues*, 35 RUTGERS COMPUTER & TECH. L.J. 1, 1 (2008) (stating that "[m]ediation is the fastest growing dispute resolution method"); Giuseppe De Palo & Mary B. Trevor, *Greece: Mediation 'Ante Portas'*, 29 ALT. TO THE HIGH COST OF LITIG., Feb. 15, 2011, at 19 [hereinafter De Palo & Trevor, *Greece*] (analyzing Greece's mediation laws); Giuseppe De Palo et al., *Mediation in Italy: The Legislative Debate and the Future*, 6 ADR BULL., no. 3, July 1, 2003 (discussing Italy's mediation laws); Francesca De Paolis, *Italy Responds to the EU Mediation Directive and Confronts Court Backlog: The New Civil Courts Mandatory Mediation Law*, 4 N.Y. DIS. RESOL. LAW., no. 1, Spring 2011, at 41-43 (discussing Italy's mediation laws); Martuscello II, *supra* note 2, at 53 (discussing the growth of mediation in Italy); Bert Niemeijer & Machteld Pel, *Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, 110 PENN ST. L. REV. 345, 346 (2005-2006) (discussing the implementation of mediation pilot schemes in the Netherlands). According to one author, mediation has "penetrated wide and deep into

justice and efficient dispute resolution.[13] The main attractions of mediation, consisting of the core values of self-determination and party participation,[14] led policymakers to determine that mediation would produce mutually agreeable results for parties, and that the end-game would be high compliance with mediated agreements.[15]

The shift toward mediation suggests that, in many respects, mediation is capturing the "access to justice" movement. Mediation's prominence as an access to justice vehicle in the European Union was enhanced by a Mediation Directive[16] issued in 2008 by the European Parliament and the Council.[17] The Directive required Member States to implement structures to support mediation of cross-border commercial disputes in the European Union by May 2011.[18] The payoffs promised were social and economic benefits and a new legal culture based on "friendship, reasoned conversation and compromise."[19] The recitals in the Directive emphasize the speed, cost, and efficiency of mediation.[20]

Europe's experience with mediation parallels that of the United States in many respects. In the United States, expenses and

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the structures of the European Union." Rhys Clift, *The Phenomenon of Mediation: Judicial Perspectives and an Eye on the Future*, 15 J. INT'L MAR. L. 508, 514 (2009).

13 *See Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*, COM (2004) 718 final (Oct. 22, 2004).

14 *See* Jacqueline Nolan-Haley, *Mediation, the "New Arbitration"*, 17 HARV. NEGOT. L. REV. (forthcoming 2012) [hereinafter Nolan-Haley, *Mediation, the "New Arbitration"*].

15 *See* Resolution of September 13, 2011 on the Implementation of the Directive on Mediation in the Members States, Its Impact on Mediation and Its Takeup by the Courts, EUR. PARL. DOC. P7_TA(2011)0361, ¶ 17 [hereinafter Resolution of September 13, 2011], *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0361.

16 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, ¶ 2, 2008 O.J. (L 136) 3 [hereinafter Mediation Directive].

17 *Id.*

18 Denmark was excluded from the Mediation Directive. *Id.* ¶ 30.

19 Sylwester Pieckowski, *How the New Polish Civil Mediation Law Compares with the Proposed EU Directive on Mediation*, 61 DISP. RESOL. J. 67, 68 (2006) [hereinafter Pieckowski, *The New Polish Civil Mediation Law*].

20 *See id.*

delays associated with litigation, citizen alienation and dissatisfaction with the justice system, and the pervasive notion that there must be a better way to manage civil justice[21] led to the large-scale adoption of mediation programs. Continued enthusiasm for mediation led to its institutionalization in state and federal courts and ultimately to it becoming mandatory.[22]

Mandatory mediation is moving at a slower speed in Europe. A significant stumbling block to its growth has been policy debates over the meaning of the access to justice provisions of Article 6 of the European Convention on Human Rights (ECHR).[23] Critics question whether compulsory mediation is a legitimate process in light of these provisions.[24] The debate was energized in 2004 by the English Court of Appeal's decision in *Halsey v. Milton Keynes General NHS Trust and Steel*,[25] which held that compulsory mediation violated Article 6 of the ECHR.[26] Supporters of compulsory mediation regimes continue to disagree.[27]

At this juncture, based on the United States' experience with mandatory mediation,[28] it is useful to inquire whether Europe should be heading in the direction of compulsory mediation regimes or whether it should be more cautious about following what could end up to be a primrose path to justice. The central ideology of mediation is voluntariness.[29] Tampering with this principle could wreak havoc with real access to justice.

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21 *See generally* Chief Justice Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (discussing the general dissatisfaction with litigation and arbitration as an improvement on the current system).

22 *See infra* Part IV.C.

23 Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] ("[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

24 *See, e.g.*, Halsey v. Milton Keynes Gen. Hosp., [2004] EWCA (Civ) 576, [2004] W.L.R. 3002, [13] (Eng.).

25 *Id.*

26 *Id.*

27 *See infra* text accompanying note 137.

28 *See infra* Part IV.C (discussing mandatory mediation in the United States as a forecast for Europe).

29 *See infra* Part IV.C.

II. Access to Justice and Mediation

A. In General

The idea of access to justice encompasses multiple meanings, all focused on empowering individuals to exercise their rights in the civil justice system. Under customary international law, access to justice refers generally to an individual's right to seek a remedy before an impartial court of law or tribunal.[30] Access to justice has been a longstanding priority for European states.[31] Along with the right to life, the duty to respect human rights, the prohibition against torture, slavery, and forced labor, and the right to liberty and security, the right to a fair trial through access to justice is a major part of the architecture of the ECHR.[32]

The idea of access to justice is also part of a worldwide law reform movement described more than thirty-two years ago by Cappelletti and Garth in their international study of access to justice.[33] These authors identified what they labeled as three "waves" of reform: (1) making legal aid accessible to the poor; (2) developing procedural devices that would allow a single lawsuit to resolve multiple claims; and (3) promoting systemic reform of the legal system through ADR.[34] Today, ADR is a strong wave of reform in the United States[35] and throughout the world.

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30 *See* Francesco Francioni, *The Rights of Access to Justice under Customary International Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 1-5 (Francesco Francioni ed., 2007).

31 *See generally* Jacqueline Nolan-Haley, *Evolving Paths to Justice: Asserting the EU Directive on Mediation*, Proceedings of the Sixth Annual Conference on International Arbitration and Mediation (forthcoming 2012) [hereinafter Nolan-Haley, *Evolving Paths to Justice*].

32 *See* ECHR, *supra* note 23.

33 Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report*, *in* 1 ACCESS TO JUSTICE (Mauro Cappelletti & Bryant Garth eds., 1978).

34 *See id.* at 54-84; *see also* Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice-Movement*, 56 MOD. L. REV. 282 (1993).

35 *See "Mediation Provides Meaningful Access to Justice," Says ABA President Robinson*, ABANOW.ORG (Oct. 17, 2011), http://www.abanow.org/2011/10/mediation-provides-meaningful-access-to-justice-says-aba-president-robinson/ (noting the ABA's efforts to publicize the role of mediation through "ABA Mediation Week").

Much of Europe's embrace of mediation has been under the banner of the third ADR wave,[36] as the European Parliament has included within the concept of access to justice "access to adequate dispute resolution processes for individuals and businesses."[37] In this sense, mediation and other ADR processes are part of a network of access to justice systems.[38] It is assumed that mediation will provide what EU Commissioner of Justice, Viviane Reding, calls "alternative and additional access to justice in everyday life."[39] Article I of the Mediation Directive makes the assumption explicit:

> The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.[40]

B. The Mediation Landscape in Europe

The contemporary European mediation movement began in the late 1980s. The movement followed in the wake of the modern U.S. ADR movement that began with the Pound Conference in 1976[41] and expanded to Australia, Canada, and New Zealand in the 1980s.[42] The appeal of mediation included cost advantages

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36 It should be noted that some scholars have questioned the quality of justice achieved through ADR processes. *See* Francioni, *supra* note 30, at 5.

37 *See* Resolution of September 13, 2011, *supra* note 15, at A.

38 *See* William Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47, 50 (distinguishing between the topics of access to justice and access to justice systems and considering them both as coefficient approaches to conflict resolution); *see also* ACCESS TO JUSTICE REVIEW NORTHERN IRELAND: THE REPORT 4 (Aug. 2011) (referring to the goal of producing "*effective and affordable* access to justice and legal aid *systems* which help resolve disputes at the earliest possible stage consistent with sustaining the quality of justice." (second emphasis added)).

39 Press Release, Eur. Comm'n, Eur. Comm'n Calls for Saving Time and Money in Cross-Border Legal Disputes Through Mediation para. 2 (Aug. 20, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1060&type=HTML.

40 Mediation Directive, *supra* note 16, art. 1.

41 *See* American Bar Association, *Report of the Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 178-82 (1976).

42 *See* NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL

over litigation and arbitration, informality and flexibility, and the traditional promise of greater autonomy in decision-making.[43] A variety of models developed throughout Europe, including court-annexed programs,[44] sector-specific programs such as labor and family, and more comprehensive practice in civil and commercial cases. While there are diverse forms of regulation and variances in common law and civil law jurisdictions,[45] the core value of self-determination remains a constant theme.[46]

When the Directive was issued in 2008, several European countries already had mediation regulations in place. Poland, for example, was the first state in Eastern Europe to enact legislation on mediation in civil and commercial cases.[47] England undertook an extensive process of civil justice reform that resulted in mediation becoming part of the court apparatus.[48] In addition, mediation schemes for consumer rights were common throughout EU states.[49]

In the private sector, several provider organizations in continental Europe have encouraged mediation since the 1990s.[50]

PERSPECTIVES 53 (Kluwer Law International 2009).

43 *Id.*

44 *See, e.g.*, Niemeijer et al., *supra* note 12, at 346 (discussing the Netherlands' court-annexed mediation program).

45 *See* Nadja Alexander, *Mediation and the Art of Regulation*, 8 QUEENSLAND U. TECH. L. & JUST. J. 1, 17-21 (2008) (discussing sector-specific mediation legislation).

46 *See* European Code of Conduct for Mediators, *supra* note 11, § 2.

47 *See generally* Pieckowski, *The New Polish Civil Mediation Law*, *supra* note 19, at 66; Sylwester Pieckowski, *Using Mediation in Poland to Resolve Civil Disputes: A Short Assessment of Mediation Usage from 2005-2008*, 64 DISP. RESOL. J. 83 (Nov. 2009-Jan. 2010) [hereinafter Pieckowski, *Using Mediation in Poland*] (describing Poland's mediation usage and indicating that Poland's law is much broader than the Mediation Directive, which is limited to cross-border commercial disputes).

48 *See* Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1258-61 (2009) [hereinafter Nolan-Haley, *Mediation Exceptionality*] (discussing the case law following the Woolf Reforms).

49 European consumers' access to justice problems show mediation's appeal to consumers. *See* Daniele Cutolo & Mark Alexander Shalaby, *Mandatory Mediation and the Right to Court Proceedings*, 4 DISP. RESOL. INT'L. 131, 135 (2010) (noting the "high cost of legal consultation and representation and the long delays before a case is judged" and the "barriers of a psychological order due to the formality and complexity of court procedures, particularly in the case of cross-border disputes.").

50 *See, e.g.*, David J. A. Cairns, *Mediating International Commercial Disputes: Differences in U.S. and European Approaches*, 60 DISP. RESOL. J. 62, 86 (2005)

Traditional arbitration providers in Europe added mediation to their list of services.[51] In 1996, the U.S.-based CPR Institute for Dispute Resolution[52] published Model European Mediation Procedures; in 2001, the International Chamber of Commerce, a leading provider of arbitration services, issued ADR rules that made mediation the default choice of dispute resolution process.[53]

III. The EU Directive on Mediation

A. Historical Foundations

The EU's endorsement of mediation in civil and commercial disputes in the Directive evolved over several years through a series of projects.[54] First, in 1993, a Green Paper regarding consumer access to justice and settlement of consumer disputes promoted mediation.[55] The Vienna Action Plan of 1998[56] established mediation as a priority with an emphasis on family conflicts.[57] In 1999, the Tampere Meeting of the European Council called for the development of alternative procedures in civil and commercial disputes.[58] During this period from 1998

(discussing The Centre de Mediation et d'Arbitrage de Paris and the Netherlands Mediation Institute, which were established in 1995).

51 *See* Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111 (2002).

52 The name of this organization has been changed to the International Institute for Conflict Prevention and Resolution. *See International Institute for Conflict Prevention and Resolution*, CPR, http://www.cpradr.org (last visited Apr. 2, 2012).

53 *See* Int'l Chamber of Commerce, *ADR Rules of the Int'l Chamber of Commerce*, at preamble and art. 5(2), *available at* http://www.iccwbo.org/court/adr/id4452/index.html.

54 ALEXANDER, *supra* note 42, at 73.

55 *Commission Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*, at 52, COM (1993) 576 final (Nov. 16, 1993).

56 The Action Plan was requested by the Heads of State and Government at the Cardiff European Council in June 1998. Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security, and Justice, 1999 O.J. (C 19) 23.1, pt. 1.

57 *Id.* pt. 2.

58 European Commission for the Efficiency of Justice, *Better Implementation of Mediation in the Member States of the Council of Europe*, at 6-7, *available at* http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf [hereinafter

through 2002, the Committee of Ministers of the Council of Europe adopted several recommendations to promote mediation for family issues,[59] penal matters,[60] litigation between administrative and private parties, and in civil cases.[61] Also during this period, a Working Group on Mediation began to study the impact of these recommendations and to suggest specific measures for facilitating their implementation.[62]

In 2002, the European Commission issued a Green Paper identifying ADR as a "political priority" for all EU institutions.[63] The purpose of the Paper was to inform the public about the use of ADR as a means of increasing access to justice in cross-border disputes.[64] The Commission then consulted with Member States and interested parties about possible means to promote the use of mediation.[65] A draft mediation recommendation was issued shortly thereafter.[66] Building on its four prior recommendations for mediation, the draft urged the governments of Member States to "facilitate mediation in civil matters whenever appropriate."[67] The EU Parliament responded in 2004 by issuing a draft directive on mediation in civil and commercial matters.[68]

That same year, a European Code of Conduct for Mediators was developed by the European Commission and a group of

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Better Implementation of Mediation]; *see also* Nolan-Haley, *Evolving Paths to Justice*, *supra* note 31.

59 *Better Implementation of Mediation*, *supra* note 58, at 6-7 (discussing Recommendation No. R (98)1, which was adopted on Jan. 21, 1998).

60 *Id.* at 24-27 (discussing Recommendation No. R (99)19, which was adopted on Sept. 15, 1999).

61 *Id.* at 11-14 (discussing Recommendation No. R (2002)10, which was adopted on Sept. 18, 2001).

62 *Id.* at 15.

63 *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, at 5, COM (2002) 196 final (Apr. 19, 2002).

64 *Id.*

65 *Id.*

66 COUNCIL OF EUR. COMM. OF MINISTERS, *Recommendation Rec(2002)10 of the Committee of Ministers to Member States on Mediation in Civil Matters*, at §A (Sept. 18, 2002).

67 *Id.*

68 *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*, COM (2004) 718 final (Oct. 22, 2004).

stakeholders, and was then issued.[69] The Code set out a number of principles, many of which reflected provisions of the Model Standards of Conduct for Mediators,[70] although they differ in several respects.[71] Topics in the Code cover competence and appointment of mediators, independence and impartiality of mediators, the mediation agreement, fairness of the process, and informed consent.[72] The Code also covers important mediator practice areas such as fees and advertising, and it demonstrates not only a commitment to using mediation but to practicing it with high standards of professional integrity.[73]

B. Provisions of the Mediation Directive

1. Directives in General

Directives are one of the most common types of legislative acts in the European Union.[74] They are issued, in part, to harmonize the entrance of new Member States into the Union.[75] Based on the principles of subsidiarity and proportionality, directives allow Member States a great deal of flexibility in implementation.[76] Article 249 of the Treaty of Rome, the document that authorizes the issuance of directives, provides that "[a] Directive shall be binding, as to the result to be achieved,

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69 *See* European Code of Conduct for Mediators, *supra* note 11.

70 American Arbitration Association, A.B.A. Section of Dispute Resolution & Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf.

71 *See generally* Randall Kiser & Nicole Ginder, *Differences Between U.S. and European Mediator Standards*, 4 N.Y. DISP. RESOL. LAW. 56 (Fall 2011) (explaining the major differences between the provisions).

72 *See* European Code of Conduct for Mediators, *supra* note 11.

73 *Id.*

74 RALPH FOLSON ET. AL., EUROPEAN UNION LAW AFTER MAASTRICHT: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET 5 (Ralph H. Folsom et. al. eds., 1996). Directives are considered secondary sources of law; treaties are considered primary sources of law. EUROPEAN UNION LAW 2 (5th ed., Routledge-Cavendish 2006).

75 Katherine Krause, *European Union Directives and Poland: A Case Study*, 27 U. PA. J. INT'L ECON. L. 155, 161 (2006).

76 *See* Mediation Directive, *supra* note 16, ¶ 28.

upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[77] Thus, directives on mediation leave Member States free to fashion their own mediation schemes.

2. The Mediation Directive

The Mediation Directive adopted by the EU Parliament in 2008 was more limited in scope than the recommendations from the Green Paper and the draft directive of 2004. The Mediation Directive applied only to cross-border commercial disputes,[78] not to all civil and commercial disputes. Given the growing interest in mediation as a means of providing greater access to justice, the Directive provides a common set of rules for mediation practice in the European Union.[79] Responding to the complexity of different national laws, languages, and cultures, the Directive sets out six major provisions to encourage the use of cross-border commercial mediation throughout the Member States of the European Union. These provisions include (1) a definition of mediation,[80] (2) comments about mediation quality,[81] (3) information about when mediation should occur,[82] (4) an article about enforceability of mediation agreements,[83] (5) a statement about confidentiality,[84] and (6) recommendations for limitation periods.[85] Member States were required to implement its terms and amend inconsistent regulations by May 2011.[86] Member States were also required to provide information relating to courts that are competent to make mediated agreements enforceable.[87] By May 2016 the Commission must also submit a report on the development of

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77 Treaty Establishing the European Economic Community art. 249, Mar. 25, 1957, 298 U.N.T.S. 11.

78 *See* Mediation Directive, *supra* note 16, ¶ 8.

79 *See id.* ¶ 10.

80 *See id.* art. 3.

81 *See id.* art. 4.

82 *See id.* art. 5.

83 *See* Mediation Directive, *supra* note 16, art. 6.

84 *See id.* art. 7.

85 *See id.* art. 8.

86 Other Articles include provisions regarding information for the general public, information on competent courts and authorities, and a review. *See id.* arts. 9-11.

87 *See id.* art. 12.

mediation and the impact of the Directive.[88]

Three years after the issuance of the Directive, there have been varied compliance responses by Member States. Some have adopted a minimalist approach to mediation regulation;[89] others have offered incentives for mediation,[90] while others, such as Italy, have gone beyond the Directive's mandate and have made mediation a compulsory feature in their justice system.[91]

A significant feature of the Directive is its voluntary nature. The decision to mediate must be based on a voluntary agreement between parties to a cross-border dispute,[92] and the actual mediation process must be voluntary and based on party self-determination.[93] Despite its voluntary nature, judges may inform parties about mediation whenever "appropriate,"[94] and Member States are still free to enact national legislation making mediation mandatory.[95]

i. Mediation Defined

The Directive adopts the dominant account of mediation by defining it as a voluntary process in which a third party assists two or more disputing parties to reach a settlement.[96] This is a functional definition focused on settlement as the end of mediation and is representative of the more legal definitions used in the United States.[97] Other understandings of mediation are directed

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88 The report is to be submitted to the European Parliament, the Council, and the European Economic and Social Committee. *See* Mediation Directive, *supra* note 16, art. 11.

89 *See infra* note 120 (discussing Belgium).

90 *See* Resolution of September 13, 2011, *supra* note 15.

91 *See infra* text accompanying notes 158-72.

92 *See* Mediation Directive, *supra* note 16, ¶10.

93 *See id.* ¶13.

94 *See id.* ¶13 (stating that "the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate").

95 *See id.* ¶14 ("Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system.").

96 *See id.* art. 3. Mediation conducted by a judge who is not involved in the judicial proceeding related to the dispute is also included in this definition. *Id.*

97 *See, e.g.*, UNIF. MEDIATION ACT § 2 (amended 2003), 7A U.L.A. 105 (Supp. 2006) (defining mediation as "a process in which a mediator facilitates communication

more toward its decision-making and transformative aspects. [98]

ii. Quality of Mediation

Article 4 of the Mediation Directive addresses methods of ensuring the quality of mediation. Member States are required to develop effective quality control mechanisms, including codes of conduct and mediation training.[99] In this regard, the Directive requires that "mediation is conducted in an effective, impartial and competent way" and that mediators know about the existence of the European Code of Conduct for Mediators.[100]

iii. Referral to Mediation

Article 5 reinforces the understanding of mediation as a voluntary process. It is unclear, however, the extent to which gentle coercion by the courts may occur. Courts are permitted to extend an invitation to parties to participate in mediation or to attend an information session on the use of mediation when "appropriate."[101] As noted earlier, the Directive has no effect on national legislation requiring mandatory mediation.[102] A Member State may make mediation compulsory and impose sanctions on parties who refuse to mediate.[103]

iv. Enforceability of Mediated Agreements

Article 6 requires that Member States offer mechanisms to provide for the enforceability of the agreement reached in mediation, either by a court or "other competent authority."[104] In

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and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute").

98 *See, e.g.*, LAURENCE J. BOULLE ET AL., MEDIATION SKILLS AND TECHNIQUES 1 (LexisNexis 2008) (stating that mediation is a decision-making process); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 9 (Jossey-Bass 2005) (examining four different stories fostered by the mediation process: the "Satisfaction Story of the field, the Social Justice Story, the Oppression Story, and the Transformation Story").

99 *See* Mediation Directive, *supra* note 16, art. 4.

100 *See id.* ¶17.

101 *See id.* art. 5.

102 *See id.* art. 5(2).

103 *See id.*

104 *See* Mediation Directive, *supra* note 16, art. 6. All Member States have

theory, both parties to the mediation must consent to making the written agreement enforceable.[105] However, some Member States, such as Italy, permit enforceability of the written agreement by request of one of the parties without the explicit consent of the others.[106]

v. Confidentiality

Article 7(1) provides that mediators can refuse to testify in judicial proceedings or arbitrations regarding any information arising out of or in connection with mediation processes unless the parties agree, overriding considerations of public policy arise, or the disclosure is necessary in order to implement or enforce a concluded agreement.[107]

Confidentiality provisions prevent mediators and people involved in the administration of mediation services from disclosing evidence in civil judicial proceedings.[108] This privilege does not extend, however, to parties or other participants in mediation. In this regard, the Directive provides far less protection than that available in the United States through the Uniform Mediation Act and other statutes that permit mediators and parties to assert a privilege.[109]

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complied with this provision. *See* e-mail from Lena Zdraholov, Eur. Comm'n to author (on file with author). It should be noted that the Mediation Directive does not address the enforceability of contractual provisions to mediate future disputes.

105 *See* Mediation Directive, *supra* note 16, art. 6.

106 *See generally* Elena D'Alessandro, *Enforcing Agreements Resulting From Mediation Within the European Judicial Area: A Comparative Overview from an Italian Perspective* (Working Paper, Oct. 1, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950988 (discussing Art. 12 of Italy's Legislative decree No. 28/2010).

107 *See* A. K. C. Koo, *Confidentiality of Mediation Communications* 30 Civ. Just. Q. 192, 199 (2011). Koo also notes that Mr. Justice Briggs has relied on the confidentiality provision of the Directive to argue for a mediation privilege in the English civil justice system. *See id.*

108 *See generally* Klaus Reichert, *Confidentiality in International Mediation*, 59 DISP. RESOL. J. 60 (Jan. 2005) (discussing the similarity of approaches to confidentiality in the UNCITRAL Model Law on International Commercial Conciliation of 2002 and the EU Directive).

109 *See* UNIF. MEDIATION ACT, *supra* note 97, § 5.

vi. Limitation and Prescription Periods

Article 8 requires that Member States preserve a party's rights to formal judicial proceedings or arbitration. States are required to ensure that parties who choose mediation are not subsequently prevented from initiating judicial proceedings or arbitration in relation to the same dispute by the expiration of limitation or prescription periods.[110]

C. Compliance with the Directive

Much of the European Union's rhetoric encouraging compliance with the Directive echoes access to justice language. A press release on the EU website in August 2010 by Vice-President Viviane Reding, EU Commissioner for Justice, is typical.[111] The press release calls for Member States to implement the Directive because its provisions:

> [P]romote an alternative and additional access to justice in everyday life. Justice systems empower people to claim their rights. Effective access to justice is protected under the EU Charter of Fundamental Rights. Citizens and businesses should not be cut off from their rights simply because it is hard for them to use the justice system.[112]

The press release also cited a June 2010 EU-funded study, which found that utilizing mediation provided substantial, practical economic advantages.[113]

Most Member States have complied with the Article 6 notification regarding courts that are competent to enforce

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110 *See* Mediation Directive, *supra* note 16, art. 8.

111 Press Release, Eur. Comm'n, Eur. Commission Calls for Saving Time and Money in Cross-Border Legal Disputes Through Mediation (Aug. 20, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1060&type=HTML.

112 *Id.*

113 *Id.* The survey data report showed that, based on an average claim for €200,000, where mediation is not used, there will be between 331 and 446 days of wasted time, with resulting additional costs of between €12,471 to €13,738 per case. *See* ADR CTR. SPA, THE COST OF NON ADR – SURVEYING AND SHOWING THE ACTUAL COSTS OF INTRA-COMMUNITY COMMERCIAL LITIGATION, *available at* http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf.

mediated agreements.[114] In July 2011, infringement proceedings were initiated by the European Commission against Member States that failed to meet the May 21, 2011, implementation deadline.[115] At present, only four Member States have failed to adopt national measures to implement the Directive.[116]

In several countries, the Directive created opportunities for significant civil justice reform. On November, 16, 2010, the Republic of Ireland's Law Reform Commission responded by issuing a 230 page report entitled "Alternative Dispute Resolution: Mediation and Conciliation."[117] The report approved new procedures for mediation in a variety of contexts and proposed legislation on mediation and conciliation.[118] Following the Republic of Ireland's lead, Northern Ireland issued an Access to Justice Review Progress Report that acknowledged the advantages of the Irish report.[119] However, in other countries, such as Belgium, the Directive has not had any significant impact on creating new incentives for mediation.[120]

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114 *See* e-mail from Lenka Zdrahalova, Eur. Comm'n, to author (May 4, 2011) (on file with author).

115 Press Release, Eur. Comm'n, Eur. Commission Takes Action to Ease Access to Justice in Cross-Border Legal Disputes (July 22, 2011), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/919&type=HTML (reporting that the following countries had received "letters of formal notice" from the European Commission: the Czech Republic, Spain, France, Cyprus, Luxembourg, the Netherlands, Finland, Slovakia, and the United Kingdom).

116 These are Cyprus, Czech Republic, Spain, and the Netherlands. E-mail from Jérôme Carriat, Directorate General Justice, Eur. Comm'n, to author (Feb. 2, 2012) (on file with author).

117 LAW REFORM COMM'N, REPORT: ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND CONCILIATION, (LRC 98, 2010) (Ir.), *available at* http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf.

118 *Id.* at 188.

119 *See* ACCESS TO JUSTICE REVIEW NORTHERN IRELAND, THE PROGRESS REPORT §4.16 (Mar. 2011), *available at* http://www.courtsni.gov.uk/SiteCollectionDocuments/Northern%20Ireland%20Courts%20Gallery/A2J/p_A2J_Review_Progress_Report_March2011.pdf.

120 *See* Giuseppe De Palo & Mary B. Trevor, International Institute for Conflict Prevention & Resolution, *Mediation in Belgium: Forward Steps, but the Court System's Efficiency Keeps ADR Demand Low*, 29 ALT. TO THE HIGH COST OF LITIG., no. 9, Oct. 2011, at 175 [hereinafter De Palo & Trevor, *Mediation in Belgium*] (noting that there is little incentive to mediate in Belgium because the litigation system is efficient).

D. Effect of the Directive on Mediation Activity in Europe

The Directive has generated an increased interest by mediation provider organizations in mediation training, development of ethical standards, and credentialing of neutrals.[121] In short, the "business" of mediation has increased substantially. In January 2011, JAMS, one of the major U.S. ADR provider organizations, created an international component with headquarters in New York and London and additional locations in Milan, Brussels, Geneva, and Rome.[122] The organization's website specifically alludes to the Directive: "The need for more effective mediation and arbitration services has risen due to recent initiatives, including the European Union's Mediation Directive, within member countries fostering increased use of dispute resolution outside the courts."[123] On the ethics front, the International Mediation Institute (IMI) has issued a wide range of training protocols and standards.[124]

IV. From Encouragement to Compulsion: Mandatory Mediation in Europe

With the issuance of the Green Paper, the European Code of Conduct for Mediators, the draft directive on mediation, and multiple mediation conferences,[125] mediation has become more than what the Directive labeled "a way to simplify and improve

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121 *See European Commission Supports Programme to Boost Standard of Mediation*, CTR. FOR EFFECTIVE DISPUTE RESOLUTION (Sept. 5, 2011), *available at* http://www.cedr.com/news/?376 (referring to the business of training mediators in Europe).

122 *See JAMS Arbitration, Mediation, and ADR Services*, JAMS INT'L, www.jamsinternational.com (last visited Apr. 2, 2012).

123 *Id.*

124 *See Mediation*, INT'L MEDIATION INST., http://imimediation.org/ (last visited Apr. 2, 2012). The IMI is a non-profit charitable institution, registered in the Hague, the Netherlands and operating globally. *Id.*

125 In addition to many conferences held between Europeans, dialogue with other countries has begun. A good example of this is the October 2008 meeting at the Peace Palace at the Hague in the Netherlands with mediation groups from around the world discussing major issues that affect the dispute resolution community. *See* Nancy A. Walsh, *Foreward to* Rebecca Golbert, *An Anthropologist's Approach to Mediation*, 11 CARDOZO J. CONFLICT RESOL. 81, 81-82 (2009) (describing groups that attended and the overall purpose of the meeting).

access to justice."[126] Mediation is, rather, a process that many policymakers think should be compulsory.[127] Under the Directive, Member States are free to enact national legislation making mediation mandatory.[128] The following sections discuss recent developments in mandatory mediation in both common law and civil law jurisdictions.

A. Common Law Jurisdiction: England's Experience with Mandatory Mediation

Over the last ten years, a major policy debate has emerged over the merits of compulsory mediation regimes, specifically whether the regimes violate the access to justice provisions of Article 6 of the ECHR. The debate was energized in England, where mandatory mediation has been a highly contested issue since the case of *Dunnett v. Railtrack.*[129] *Dunnet* is the first English case where the court's enthusiasm for mediation was transformed into a more intense support for the process.[130] The *Dunnett* court held that successful parties who had refused to mediate, could be prevented from receiving costs that they would otherwise be awarded.[131]

In the wake of *Dunnett*, there was substantial commentary questioning the legitimacy of compulsory mediation.[132] Could courts require parties to participate in mediation?[133] If not, could they impose cost sanctions against successful litigants who had refused to mediate?[134] The conjoined cases of *Halsey v. Milton Keynes General NHS Trust* and *Steel v. Joy* answered these remaining questions.[135] In these conjoined cases, the Court of

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126 *See* Mediation Directive, *supra* note 16, ¶3.

127 *See, e.g.*, Nadja Alexander, *German Law Paves the Way for Mandatory Mediation*, 2 ADR BULL. 9, art. 2 (2000) (discussing Germany's adoption of legislation mandating court-connected mediation in some cases).

128 *See* Mediation Directive, *supra* note 16, ¶14.

129 *See* Dunnett v. Railtrack, [2002] EWCA (Civ) 303, [2002] W.L.R. 2434 (Eng.).

130 *See* Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1258.

131 *See id.*

132 *See id.* at 1259.

133 *See id.*

134 *See id.*

135 Halsey v. Milton Keynes Gen. Hosp., [2004] EWCA (Civ) 576, [2004] W.L.R. 3002 [9] (Eng.).

Appeal held that it should not require truly unwilling parties to mediate their cases because compulsory referral would violate a litigant's fundamental rights to have access to the courts and thereby violate Article 6 of the ECHR.[136] The court held that even if it had the power to require parties to engage in the mediation process, it would be difficult to identity situations in which the exercise of this power would be appropriate.[137]

By declining to impose a mandatory scheme, the court in *Halsey* took a pragmatic approach to mediation.[138] The court reasoned that compulsory referral "would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process."[139] Because of these potentially negative consequences of mandatory mediation, the court found that while compelling parties to engage in ADR would be unacceptable, it was the court's role to encourage mediation options.[140] Furthermore, this encouragement could be "robust."[141] Thus, the *Halsey* court held that parties, even successful ones, who unreasonably withhold consent to mediate, could be liable for costs.[142] Recognizing that this was a departure from the general rule on costs, the court explained:

> In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown . . . that the successful party acted unreasonably in refusing to agree to

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136 *Id.*

137 Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1259 (citing *Halsey*, [2004] EWCA (Civ) 576, [9]).

138 *Id.*

139 *Halsey*, [2004] EWCA (Civ) 576, [10].

140 *See* Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1259 (citing *Halsey*, [2004] EWCA (Civ) 576, [11]).

141 *Id.*

142 *Id.* (citing *Halsey*, [2004] EWCA (Civ) 576, [13]).

ADR.[143]

The court offered a non-exhaustive list of factors to determine if a party's refusal to participate in mediation was reasonable:

> (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.[144]

Thus, the court considered reasonableness a relevant factor in evaluating a party's refusal to mediate.[145] Commentators greeted *Halsey* with mixed reviews: some viewed it as a "sensible compromise,"[146] while others criticized the court's failure to mandate mediation, noting that several other jurisdictions supported compulsory dispute resolution processes.[147]

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143 *Halsey*, [2004] EWCA (Civ) 576, [13].

144 *Id.* at [16].

145 Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1260 (citing *Halsey*, [2004] EWCA (Civ) 576, [25]). The court's reasonableness rationale was clear:

> In our judgment, it would not be right to stigmatise [sic] as unreasonable a refusal by the successful party to agree to mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful.

Halsey, [2004] EWCA (Civ) 576, [28].

146 David Pliener, *At Last, Clarity for Mediation*, 154 NEW L.J. 878, 878 (2004).

147 *See* Sir Anthony Clarke, Master of the Rolls, the Second Civil Mediation Council National Conference, The Future of Civil Mediation Birmingham (May 8, 2008) (transcript available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf). In his talk, Sir Anthony Clarke noted that Belgium and Greece had successfully introduced compulsory dispute resolution schemes and Germany is permitted to require litigants to either engage in court-based or court-approved conciliation prior to beginning litigation. *Id.*; *see also* Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1260.

The court's decision in *Halsey* precipitated a series of litigated consent cases that extends far beyond the issue of participation in mediation.[148] *Halsey*'s costs scheme, which penalizes parties who are deemed to have unreasonably refused to mediate, has been extended to refusals to negotiate, delays in agreeing to mediate, taking unreasonable positions in mediation, and even to a party's unreasonable conduct in demanding an apology as a prerequisite to mediation.[149]

While still the exception, many courts have imposed costs for unreasonable refusals to negotiate or mediate.[150] However, more often courts have found parties' refusal to mediate not unreasonable.[151] While it is difficult to draw definitive conclusions from the cases decided "within the *Halsey* reasonableness framework," "a common rationale for refusing to impose costs has been reliance on the sixth *Halsey* factor: namely, whether mediation had a reasonable prospect of success."[152] It is somewhat unsettling that the reasonable prospect for success has become such a recurrent theme "because it is not clear what 'success' meant to the court."[153] Resolution of all pending issues? Some issues? A better understanding between the parties?

In the post-*Halsey* era, the debate over mandatory mediation continues in England. Critics such as Dame Hazel Genn are concerned with the exercise of covert power during the course of mediation and the influence of this power over settlement agreements.[154] Genn claims that mandatory mediation practices invite coercion.[155] This has not stopped England from introducing mandatory mediation for divorce cases.[156] However, after a

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148 Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1261.

149 *Id.* at 1261-62 (citations omitted).

150 *Id.* at 1262.

151 *Id.*

152 *Id.* at 1262-63.

153 Nolan-Haley, *Mediation Exceptionality*, *supra* note 48, at 1263.

154 HAZEL GENN, THE HAMLYN LECTURES 2008: JUDGING CIVIL JUSTICE 124 (Cambridge Univ. Press, 2010).

155 *See id.* at 123-25.

156 Ben Letham, *Family Law: Divorcing Couples Face Mandatory Mediation*, FINDLAW UK THE SOLICITOR BLOG (Feb. 23, 2011, 12:40 PM), http://blogs.findlaw.co.uk/solicitor/2011/02/family-law-divorcing-couples-face-mandatory-mediation.html.

review of civil litigation by Sir Rupert Jackson, mediation is still not mandatory.[157]

B. Civil Law Jurisdictions

1. The European Court of Justice Weighs In

More recently, the European Court of Justice has weighed in on the mandatory mediation debate in a case involving Italian consumer telecom disputes. In *Rosalba Alassini v. Telecom Italia SpA*,[158] the court held that the compulsory mediation scheme imposed by Italian law did not amount to a breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.[159] This case involved a preliminary ruling regarding provisions of the Universal Services Directive.[160] One of the procedural issues considered by the court was whether certain provisions of the Universal Service Directive requiring Member States to ensure transparent and simple procedures for dispute resolution were violated by an Italian law requiring an out of court dispute resolution procedure before the case would be

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157 LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 361 (Dec. 2009) (stating that "[i]n spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate"). However, it should be noted that the report does agree with *Halsey*'s rule that costs can be imposed upon parties who unreasonably refuse to mediate. *Id.*

158 Legge 31 luglio 1997, n. 249 (It.).

159 Joined Cases C-317/108 & C-320/08, Alassini v. Telecom Italia SpA, 2010 E.C.R. 134 (conditioning the rule on mandatory mediation on the following provisos: (a) the mandatory mediation procedures cannot result in a binding decision; (b) cannot cause substantial delay in bringing proceedings; (c) cannot suspend any time-bar period; and (d) cannot give rise to more than minimal costs); *accord* Steven Friel & Christian Toms, *The EU Mediation Directive-Legal and Political Support for ADR in Europe*, 2 BLOOMBERG L. REP. – ALTERNATIVE DISP. RESOL. 1, 2 (2011), *available at* http://www.brownrudnick.com/uploads/117/doc/Brown_Rudnick_Litigation_European_Mediation_Directive_Friel_Toms_1-20110.pdf (noting also that the Italian laws on ADR already complied with other EU Directives that aim to strike a balance between encouraging mediation and access to judicial proceedings); *see also* Tomaso Galletto & Richard L. Mattiaccio, *Mediation in Italy: A Bridge Too Far?*, 66 DISP. RESOL. J. 78, 86 (2011) (explaining that the Joined Cases decision held that the compulsory mediation does not violate EU principles "if the compulsory scheme meets certain conditions and it is intended to be more effective than a purely voluntary scheme in reducing docket congestion").

160 Joined Cases C-317/108 to C-320/08, Alassini v. Telecom Italia SpA, 2010 E.C.R. 134, ¶ 68; *see also* Council Directive 2002/22, 2002 O.J. (L 108) 51 (EU).

allowed to proceed to court.[161] The court opined that none of the Directive's provisions limited the power of Member States to establish mandatory out of court procedures to settle consumers' telecom disputes with providers.[162] Critics were concerned that the court simply assumed mediation to be a beneficial process without examining any empirical evidence.[163]

2. *Experience in Member States*

Three years after the *Alassini* ruling, Italy adopted a mediation regime that extended far beyond the Directive's mandate and incorporated mediation into domestic law as well as cross-border disputes.[164] Effective March 20, 2011, mediation became a condition precedent for litigation involving an extensive range of civil and commercial disputes in Italy.[165] The new law is a robust, if not coercive, form of compulsory mediation that has all the markings of an arbitration process. [166] It operates in the following

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161 Joined Cases C-317/108 & C-320/08, Alassini v. Telecom Italia SpA, 2010 E.C.R. 134, ¶ 68.

162 *Id.*

163 Jim Davies & Erika Szyszczak, *ADR: Effective Protection of Consumer Rights?*, 35 EUR. L. REV. 695, 705 (2010) ("What is significant in the Opinion of the Advocate General and the judgment of the Court . . . is the acceptance of the advantages of mediation over 'rushing into court' without analyzing any empirical evidence."). *See also* Cutolo & Shalabe, *Mandatory Mediation and the Right to Court Proceedings*, 1 DISP. RESOL. INT'L 131, 137 (2010) (summarizing the rationale for developing a pro-mediation position).

164 Martuscello II, *supra* note 2, at 51 (discussing the Italian government's enactment of statutes promoting mediation as an alternative to court proceedings over the last twenty years). *See also* Vanessa O'Connell, *Mandatory Mediation in Italy? Mamma Mia!*, WALL STREET J. L. BLOG (Mar. 14, 2011, 6:02 PM), http://blogs.wsj.com/law/2011/03/14/mandatory-mediation-in-italy-not-if-the-lawyers-have-any-say/ (discussing Italian lawyers' plans to strike over Italy's mediation law).

165 De Paolis, *supra* note 12, at 42. The new mediation law addresses three types of mediation: voluntary mediation; judicial mediation proposed by the judge to parties in a dispute; and compulsory mediation of certain categories of disputes, including "any litigation in relation to insurance, banking and financial agreements as well as other matters such as joint ownership, property rights, division of assets, leases in general, gratuitous loans, compensation for damages due to car accidents, medical liability or defamation." *Id. See also* Galletto & Mattiaccio, *supra* note 159, at 82-83 (explaining that mediation became law through the passage of Law 69).

166 *See* Galletto & Mattiaccio, *supra* note 159, at 83-87. Decree No. 28 implements the new mediation law. *Id.* There is currently a case pending before Italy's Constitutional Court that questions whether Parliament, in issuing Decree No. 28,

manner: if parties go to court without attempting to mediate, the law requires that the court stay the proceedings for not longer than four months so that mediation can be attempted.[167] In situations where no agreement is reached, the mediator may offer a settlement proposal if the parties request it and if the mediator considers it appropriate after warning the parties of the possible legal consequences.[168] While the parties are free to accept or reject the mediator's proposal, rejecting the proposal could trigger cost consequences.[169] To the extent that the court's subsequent judgment "completely corresponds" with the mediator's proposal, the court may award costs against the party who declined to accept the mediator's proposal.[170] As critics have observed, confidentiality is obviously compromised when this occurs.[171] Whether Italy's adoption of mandatory mediation was a decision made on the merits, or prompted by the Mediation Directive, or was a decision based on the volume of cases that weigh down the Italian justice system, is unclear. However, with its backlog of 5.4 million civil cases, the Italian justice system was clearly in need of reform.[172]

Some Member States have employed financial incentives, rather than compulsory regulations, to encourage mediation. For example, in Bulgaria, if parties are successful in resolving a dispute in mediation, they are entitled to a refund of 50% of the state fee that they paid to file the case in court.[173] Romania provides an even greater incentive to parties, who receive "full

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empowered the government to establish mandatory mediation. *Id.*

167 *Id.* at 82.

168 *Id.* at 84.

169 *Id.*

170 De Paolis, *supra* note 12, at 42.

171 *See generally* Galletto & Mattiaccio, *supra* note 159 (discussing the controversial aspects of the mediation law, including concerns about confidentiality).

172 *See id.* at 80 (noting that "nearly six million pending civil cases in a nation of 60.7 million people would appear to make a compelling case for mediation"); *accord* Martuscello II, *supra* note 2, at 49-50 (discussing the costly and inefficient nature of the overburdened Italian civil justice system); *see also* THE WORLD BANK & INT'L FIN. CORP., DOING BUSINESS 2011: MAKING A DIFFERENCE FOR ENTREPRENEURS 15 (2011), http://www.doingbusiness.org/reports/global-reports/doing-business-2011/ (noting that Italy has implemented judicial regulatory reforms that may produce positive long-term results).

173 Resolution of September 13, 2011, *supra* note 15, ¶ 6.

reimbursement of the court fee if [they] settle a pending legal dispute through mediation."[174]

To a lesser extent, other EU countries have also surpassed the requirements of the Directive by imposing various forms of mandatory mediation or offering proposals for such regulations.[175] Additional countries may follow in response to low interest levels in mediation. In Poland, which enacted a comprehensive mediation law in 2005 that applied to both domestic and cross-border disputes,[176] low mediation usage has already led to calls for greater initiatives by judges, policymakers, and lawyers to support mediation.[177]

C. *What Europe Can Expect with Mandatory Mediation Regimes*

Before EU Member States consider adopting more aggressive approaches to mediation as a possible remedy for its low usage, they should take note of other countries' experiences with compulsory regimes, particularly the United States. One of the major mediation debates in the United States for over twenty-five years has been whether mediation, which is essentially a voluntary process, should be made compulsory.[178] Proponents of mandatory regimes have argued that diversion to mediation is a sensible

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[174] *Id.* This incentive followed in the wake of Romanian mediation legislation enacted in 2006 as part of a major law reform initiative. *See also* Law No. 192/2006, May 22, 2006 (Rom.): A report on mediation in family matters laments the absence of official statistics on the "use of mediation in family law matters." Mediation in Family Matters: The Experience in Romania, EUR. PARL. DOC. PE 453.187, 4 (2011) (noting that in 2010, only 258 cases were resolved by mediation). There is also insufficient promotion of mediation to the public at large. *Id.* at 8.

[175] For example, Greek law does not require consent for enforcement of mediation agreements. *See* De Palo & Trevor, *Greece*, *supra* note 12, at 20. On the other hand, Northern Ireland is exploring whether those receiving legal aid in particular cases should be required to consider ADR options. *See* ACCESS TO JUSTICE REVIEW NORTHERN IRELAND: THE REPORT, *supra* note 38, at 66.

[176] *See generally* Pieckowski, *The New Polish Civil Mediation Law*, *supra* note 19, at 67-68 (discussing the law in detail).

[177] Pieckowski, *Using Mediation in Poland*, *supra* note 47, at 86.

[178] The debate has also reached Europe. At least one scholar has suggested that court-referred ADR may only be effective as an alternative to court proceedings when it is made compulsory in some form. *See* Nadja Alexander, *Global Trends in Mediation: Riding the Third Wave*, *in* GLOBAL TRENDS IN MEDIATION 1, 25 (Nadja Alexander ed., Kluwar Law International 2d ed., 2006).

move, particularly when considering the desirability of reducing the dockets of overcrowded courts.[179] To honor the understanding of mediation as a voluntary process, proponents have adopted Professor Frank Sander's theory that there is a difference between requiring parties to enter into a mediation process, a permissible practice, and requiring them to reach an agreement in mediation, an impermissible form of coercion.[180] Another justification proponents have invoked in developing compulsory regimes is the need to remedy the low usage problem caused by unfavorable views of mediation, which are shared by potential users.[181] Some clients and lawyers have perceived of mediation as a sign of weakness, while other critics have viewed it as a form of "second class justice."[182]

In an effort to promote and legitimize mandatory mediation, the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (SPIDR) issued a report in 1990 stating that "[m]andatory participation in non-binding dispute resolution processes often is appropriate."[183] Federal legislation soon followed. The Civil Justice Reform Act of 1990[184] and its progeny in the states made mandatory mediation part of the ADR landscape, and courts upheld its legitimacy.[185] After mediation was implemented as a cure for the inefficiencies of the justice system, mandatory mediation programs were adopted in numerous contexts, particularly for custody and divorce disputes.[186] Some studies reported that parties remained satisfied

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179 *See, e.g.*, Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997).

180 *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 490 (1985).

181 *See* Wissler, *supra* note 179, at 565.

182 *See id.* at 571-76.

183 SPIDR, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts, Report 1, reprinted in* STEPHEN P. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 402-03 (5th ed., 2007). In 2001 SPIDR joined two other organizations to form the Association for Conflict Resolution (ACR).

184 28 U.S.C. § 471-82 (2006).

185 *See, e.g.*, *In re* Atlantic Pipe Corp., 304 F.3d 136, 147 (1st Cir. 2002) (holding that the court has the inherent power to order parties to engage in mandatory mediation).

186 Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV.

with mediation, even when their participation was required.[187]

Today in the United States, there is a substantial amount of literature that criticizes mandatory mediation programs with their frequent requirements of good faith participation.[188] While mandatory mediation programs were adopted in large measure for efficiency reasons, experience has demonstrated that in some respects these programs have been false economies. Given the number of parties returning to court to challenge the validity of agreements made in mediation, the efficiency rationale has lost some of its luster.[189] Paradoxically, while mediation has been offered as a means of access to justice, some scholars have argued that it has become a barrier to accessing justice[190] and that it should be phased out.[191] Other critiques include claims that mediation has outlived its usefulness, is antidemocratic,[192] has reduced the number of trials, has lacked the substantive and procedural protections of court,[193] and can be "destructive to many women and some men" in the divorce context.[194]

Apart from these policy and process critiques, mandatory mediation programs also implicate ethical issues. When forced to engage in mediation, some lawyers push back by using the

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335, 337 (1999).

187 *See, e.g.*, Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23 (1993) (summarizing the results of several studies on mediation).

188 *See, e.g.*, SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE I § 9 (2d ed., 2011) (citing articles critical of mandatory mediation and good faith participation requirements).

189 *See* James R. Coben & Peter M. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 73-89 (2006).

190 *See, e.g.*, Tracy Walters McCormack et al., *Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators, and Lawyers*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 150, 159 (2011) (portraying "mandatory mediation as one more obstacle before an audience with 'the great and powerful Oz'").

191 *See, e.g.*, Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142 (2004) (suggesting that the court's authority to require parties to mediate should expire within two to three years after a mandatory program begins).

192 *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 29-33.

193 *See* Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277, 277 (2007).

194 Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991).

mediation process as a free discovery tool[195] or by simply going through meaningless motions.[196] Confidentiality may also be compromised, particularly when rules requiring good faith bargaining allow the mediator to report on what happens during mediation.[197] Good faith bargaining requirements can also pressure parties to settle.[198] Some parties who are referred to mediation may fear that if they do not settle, there will not be a favorable outcome from the judge.

V. The Challenges Ahead

As the European Union moves forward with further experimentation and implementation of the Directive, policymakers should be aware of some of the challenges posed by establishing mandatory mediation regimes in Member States. First, there is a definitional concern with the blurred boundaries between the concepts of "mediation" and "conciliation," terms that are often used interchangeably in Europe. The definition of mediation in the United Nations Commission on International Trade Law (UNCITRAL) Model Conciliation Act explicitly equates conciliation with "mediation or an expression of similar import."[199] However, there are cultural differences in the

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195 Julie Macfarlane, *Cultural Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 257.

196 Some states have attempted to prevent this behavior through good faith participation statutes. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 78 (2002).

197 *See, e.g.*, *In re* A. T. Reynolds & Sons, Inc., 452 B.R. 374, 383 (S.D.N.Y. 2011) (rejecting the bankruptcy court's forceful ruling in favor of requiring meaningful participation in mandatory mediation as an infringement upon confidentiality, and instead holding that "confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation").

198 Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 304 (1992).

199 G.A. Res. 57/18, art. 1(3), U.N. Doc. A/RES/57/18 (Jan. 24, 2003). Article 1 (3) specifically provides:

> For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to the contractual or other legal relationship. The conciliator does

interpretation of these processes that need to be taken into account. Some scholars equate conciliation with an evaluative type of mediation, while others have taken the opposite view and label conciliation as a brand of facilitative mediation.[200] Given different understandings in the meaning of mediation among Member States, the problem of blurred boundaries needs to be addressed.

Related to this definitional problem is the challenge of understanding the potential consequences of mandatory, as opposed to voluntary, mediation. The Directive simply encourages lawyers to inform their clients of the possibility of mediation.[201] However, lawyers must be cautious in their description of mediation, which may differ depending upon whether mediation is a voluntary or mandatory undertaking. In countries with a mandatory regime, such as Italy, where mediators are permitted to offer potentially binding evaluations,[202] a lawyer's advice might be considerably different than in a Member State where mediation is completely voluntary.

Finally, the ethical concerns that arise in mediation are generally heightened in mandatory mediation regimes. Ethical concerns become more complicated in cross-border settings, where formal and informal cultural practices among parties and lawyers may differ.[203] The concept of mediator neutrality,

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not have authority to impose upon the parties a solution to the dispute.

200 *See, e.g.*, Daniele Cutolo & Mark A. Shalaby, *Mandatory Mediation and the Right to Court Proceedings*, 4 DISP. RESOL. INT'L 131 (2010) (using the term "conciliation" to describe mediation procedures); *see also* Srdan Simac, *Mediation: Attorneys and Conciliation*, 13 CROAT. ARB. Y.B. 269, 283 (2006) (defining conciliation as "a specific method of mediation in which the parties settle their dispute under the guidance and assistance of an independent third party—a conciliator").

201 Mediation Directive, *supra* note 16, ¶25. Unlike several U.S. states which impose an obligation on lawyers to advise clients about alternatives to litigation, the Directive limits advice to the mediation process. *See* Kristin L. Fortin, *Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 626, n.268 (2009) (listing Massachusetts, Missouri, Oregon, Pennsylvania, Michigan, and Virginia as states imposing such an obligation).

202 *See generally* De Paolis, *supra* note 12, at 42-43 (discussing the mediation in Italy).

203 For a discussion of similar issues arising in international arbitration, *see* Carrie Menkel-Meadow, *Are Cross Cultural Ethical Standards Possible or Desirable in International Arbitration?*, SOCIAL SCIENCE RESEARCH NETWORK (2008), *available at*

appropriate mediation advocacy, and identifying mediator conflicts of interest may have varied meanings in the Member States. Protecting confidentiality may also pose challenges, as some countries, such as Sweden, have adopted the limited confidentiality protection of the Directive,[204] while others, such as Italy, have taken a more "rigorous approach."[205] The EU Parliament has already observed that a more comprehensive approach to confidentiality is needed.[206]

VI. Conclusion

This Article has described how mediation has captured the contemporary access to justice movement in Europe. As Europe embraces mediation with gusto, policymakers should be cautious in their expectations and should not view mediation as a panacea for the ills of civil justice systems. If access to justice includes access to ADR systems, in particular mediation, then it is critical to keep in mind the values that made mediation attractive in the first place. Mediation's core values of self-determination and party participation have been its distinguishing characteristics, and those that differentiate it from the arbitration process.[207] The pull towards compulsory mediation regimes, particularly when coupled with the practice of mediator evaluation, could leave mediation looking very much like arbitration, with parties asking whether they have been unwittingly led down the primrose path to justice.[208] Mediation regimes are only as good as the values they embody; thus, party self-determination needs to remain the controlling principle of mediation.

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130922.

204 *See generally* Dan Engstrom & Cornel Marian, *Striking the Hard Bargain: The Implementation of the EU Mediation Directive in Sweden*, MEDIATION NEWSL. (Int'l Bar Ass'n Legal Practice Div., London, U.K.), Sept. 2011, at 22-24 (discussing mediation in Sweden).

205 Resolution of September 13, 2011, *supra* note 15, ¶ 1.

206 *Id.*

207 Nolan-Haley, *Mediation: The "New Arbitration," supra* note 14.

208 *Id.*