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From Promise To Practice: Resolving The Mediation Paradox In Europe

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Commentary

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Abstract

This article explores the enduring underuse of mediation in civil and commercial disputes across the European Union (EU) and U.K., a phenomenon known as the "mediation paradox." Despite decades of policy support and legal frameworks such as the EU Mediation Directive, mediation remains a marginal method of dispute resolution. Drawing on historical context, a detailed analysis of a recent expert survey covering 25 EU member states, and regression analysis, the article reveals that indirect promotion of mediation is insufficient. Instead, it highlights that judicial incentives, courts' *ex officio* powers, economic benefits and mandatory models are the only institutional features significantly associated with increased mediation use. This presents a new paradox: Although mediation is praised for its voluntariness, it flourishes only when mandated. The article concludes by recommending stronger, evidence-based legal strategies to make mediation a more central feature of European justice systems.

Introduction

The effectiveness of mediation in civil and commercial disputes is a well-established fact, supported by extensive research, practice and international policy frameworks. Yet, despite its numerous advantages—such as faster resolution times, reduced legal costs and more amicable settlements—mediation continues to be dramatically underutilized in most jurisdictions around the world. This curious and persistent underuse is widely recognized within the EU as the "paradox of mediation."[1] As a result, both disputing parties and national justice systems are deprived of the substantial advantages that mediation can offer.

EU Mediation Policy Goal: Balancing Mediation and Litigation

Article 1 of Directive 2008/52/EC of the European Parliament and Council (commonly referred to as the Mediation Directive) lays out a dual objective: to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation.[2] Going further, it seeks to establish a balanced relationship between mediation and judicial proceedings, thus integrating mediation more systematically into the broader justice landscape. However, the directive notably refrains from defining what such a balance should quantitatively entail. This omission introduces ambiguity,

making it difficult to assess the success or failure of the directive's implementation across the EU.

Moving Mediation From Potential to Practice: What Should Be Measured?

This naturally raises the question: What exactly constitutes a "balanced relationship" between mediation and litigation? Without a universally accepted agreement on the numerical expression of this balance, it is difficult to expect that the objective of the directive will be achieved. Scholars De Palo and D'Urso (2016) have sought to address this issue by proposing a specific ratio—namely, one mediation for every two court proceedings.[3] However, they stress that the mere quantity of mediation procedures is not sufficient. Equally crucial is the quality and effectiveness of these mediations, particularly their success rates.

A 50% success rate is often cited as a desirable benchmark, especially because professional mediators frequently achieve outcomes well above this threshold—sometimes exceeding 70%. According to De Palo and D'Urso, realizing the full promise of mediation entails not only increasing its frequency, but also ensuring that a meaningful portion of mediations conclude with a settlement. Without such success rates, mediation risks becoming a procedural hurdle rather than a truly effective alternative.[4]

Earlier studies offer further insight into the efficiencies of mediation. Research conducted in 2011 indicated that a success rate as low as 19% could still result in time savings for judicial systems, while a 24% rate could yield cost savings.[5] These figures illustrate that even modest gains in the success rate of mediation can produce tangible benefits, underscoring the importance of tracking both quantity and quality.

Has the Envisioned Balance Been Achieved?

To assess the Mediation Directive's real-world impact, a major study was undertaken in 2014.[6] The findings were sobering: Mediation in civil and commercial disputes was found to be employed in fewer than 1% of cases across EU member states. This gap between aspiration and reality underscored the enduring nature of the mediation paradox. Despite its promotion, mediation remained a peripheral process rather than a mainstream one. The study ultimately recommended that member states be obligated to achieve the Directive's original goal of a more balanced relationship between litigation and mediation.

Among the few bright spots was Italy, whose model of mandatory mediation showed promising results. Italy's experience provided empirical evidence that mandating mediation can significantly increase usage rates, thereby nudging the system closer to the Directive's envisioned balance. Inspired by Italy's success, countries such as Greece (since 2019) and Spain (from 2025) have either implemented or begun to explore their own versions of mandatory mediation for civil and commercial cases. Although they are no longer EU members, it is notable that England and Wales have also recently introduced different forms of mandatory mediation in an effort to expedite its use.

Moreover, it is important to note that mandatory mediation has become a trend in the EU for family disputes. Recent research shows that in most EU member states, either certain forms of mandatory mediation in family matters have already been implemented, or there is active public discourse regarding their potential introduction.[7]

To assess the ongoing evolution of mediation practices, a 2024 expert survey was conducted by the Dialogue Through Conflict Foundation in partnership with professionals from all EU member states and U.K. jurisdictions.[8] The survey involved more than 2,000 experts and revealed that nearly 78% of respondents disagreed with the assertion that a balanced relationship between mediation and litigation exists in their jurisdiction, as stipulated by Article 1 of the Mediation Directive. Furthermore, 63% reported that the supply of mediation services far exceeds demand—another stark illustration of mediation's unfulfilled potential. Notably, respondents overwhelmingly favored mandatory mediation-related measures as the most effective way to stimulate demand and bring mediation closer to parity with litigation.

Clarifying the Meaning of Mandatory Mediation

The concept of mandatory mediation often raises questions and concerns, but in its modern form, it is a flexible and nuanced mechanism. At its core, mandatory mediation aims to familiarize parties with the process or to initiate it, without compelling them to reach a settlement. Across the EU, various models have emerged, tailored to each jurisdiction's legal traditions and societal context.

Under contemporary frameworks, parties typically retain essential procedural rights: They may withdraw from mediation at any time, are not forced to agree to a settlement and can still proceed to court if mediation proves unproductive. These models are carefully designed to maintain proportionality and to safeguard the constitutional right to judicial protection. The presence of such safeguards ensures that mandatory mediation does not become coercive or punitive but remains consistent with democratic values and access to justice.

Mandatory Mediation: Globally Backed, Locally Attacked

The legitimacy of mandatory mediation has been consistently upheld at the international level. Both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have confirmed that mandatory mediation is compatible with the right to access the courts, provided certain conditions are met.

The ECtHR has consistently upheld that while the right of access to a court is fundamental, it is not absolute and may be subject to legitimate and proportion ate restrictions. In *Ashingdane v. the United Kingdom*, the court clarified that such restrictions must pursue a legitimate aim and maintain a reasonable proportionality between the means used and the objective sought, without undermining the essence of the right.[9] This principle was further developed in cases such as *Momcilović v. Croatia*, where the ECtHR accepted the legitimacy of requiring a pretrial settlement attempt, provided it promoted judicial efficiency and caused only minimal delay.[10] However, in *Popadić v. Serbia*, the court criticized the excessive length of mandatory mediation, stressing that mandatory mediation must not cause undue delay in court proceedings.[11] It may be concluded that mandatory mediation is not in conflict with a right to access to a court as long as it serves a legitimate aim—typically the efficient administration of justice and the promotion of amicable settlements—and meets proportionality standards.

Two main judgments of the CJEU have served to establish a clear list of criteria under which national mandatory mediation models can be considered not only effective in increasing the uptake of mediation, but also compatible with the fundamental right to effective judicial protection. In the Alassini case (2010), it was held that mandatory extra-judicial settlement procedures should 1) not result in a decision that is binding on the parties unless the parties agree; 2) not cost a substantial delay for the purposes of bringing legal proceedings; 3) suspend the period for the time-barring of claims; 4) not give rise to costs—or give rise to very low costs—for the parties; 5) ensure that electronic means are not the only by which the settlement procedure may be accessed; and 6) ensure that interim measures are possible in exceptional cases where the urgency of the situation so requires.[12] In the Menini case (2017), the CJEU added two additional points of criteria specific for consumers' disputes: 1) Consumers cannot be obliged to be represented by a lawyer in the ADR process; and 2) national rules cannot unduly restrict a consumer's ability to withdraw from the mediation.[13] It should be highlighted that those criteria may be equally relevant to other types of disputes as well. In summary, according to the CJEU case law, mandatory mediation may be applied in national legal systems if the adopted national models are following established criteria, ensuring that mediation is not excessively burdensome and that appropriate exit routes are available to the parties.

Nonetheless, constitutional courts in some EU member states have struck down national mandatory mediation laws—not because of the concept itself, but due to the way those laws were implemented. In Italy (2012)[14], Romania (2014[15], 2018[16]) and Bulgaria (2024)[17], courts ruled that specific features of the legislative models infringed upon constitutional guarantees. The rulings focused on issues such as the lack of adequate procedural safeguards, overly restrictive preconditions to litigation and insufficient clarity in how voluntary participation was preserved. These decisions should be seen not as rejections of mandatory mediation per se, but as calls for more refined and balanced legislative approaches.

Examples of National Institutional Mechanisms to Grow Mediation

Recent years have seen a range of institutional measures implemented across European states to propagate use of mediation. Such approaches include rendering mediation as a mandatory step in civil court procedures mainly through legislative means but also in some cases via court-led initiatives, as well as wielding financial "sticks" or dangling financial "carrots" to encourage mediation use. The clear trend in many European states has been the greater embedding of mediation in formal litigation processes through such means. In the following section, we provide a snapshot of pertinent developments from a few jurisdictions.

England and Wales

For England and Wales, the seeds of institutional measures to grow mediation were initially planted via the Civil Procedure Rules 1998 (CPR)[18]. Bedevilled as the system was by cost, delay and complexity, these reforms sought to transform the existing civil court process into a more streamlined and "managed" procedure. Central to the CPR was the new "overriding objective," by dint of which the court system was re- quired to deal with cases "justly and at proportionate cost" (CPR 1.1). This led to a range of court rules that encouraged settlement through mediation.

One of the most significant methods of court encouragement, which first saw light in *Dunnett v. Railtrack* (2002), was penalizing parties in costs for "unreasonable refusals to mediate." This case involved an appeal made against a failed compensation claim against Railtrack.[19] Although the appellant subsequently lost the appeal, the Court of Appeal did not award Railtrack its costs because it had failed to follow a judicial recommendation to attempt to resolve the dispute by mediation. The broad guidelines governing the circumstances in which a party may be deemed to have unreasonably refused to mediate were subsequently formulated authoritatively in *Halsley v. Milton Keynes* (2004). [20]The court set out a range of factors to be considered, including (1) the nature of the dispute; (2) the merits of the case; (3) whether previous attempts had been made to settle the claim; (4) whether the costs of ADR would be disproportionately high; (5) whether an ADR process would delay the proceedings; (6) the prospects of success of such a process; and (7) whether the court had encouraged the use of ADR. This costs penalties regime has been the subject of much inconsistency in its application, however, and has been subject to significant critique from commentators.[21]

Despite decades of robust encouragement, mandatory mediation was formally eschewed in England and Wales. The recent Court of Appeal case of *Churchill v Merthyr Tydfil Borough Council* (2023) held, however, that the English courts could, in appropriate circumstances, require parties to attempt ADR, including mediation.[22] Although the court did not lay down fixed principles for determining when courts could compel parties to mediate, it did (at para 61) reference criteria against which to judge this question, including the form of ADR being considered; availability of legal advice and representation; urgency of the case, delay caused by ADR and impact on any limitation periods; costs of ADR; prospect of success; balance of power between the parties; reasons for parties not wanting to mediate; and the sanctions to be imposed for noncompliance. In the aftermath of the *Churchill* case, court rules were recently amended to make specific provision for civil courts to "order" parties to "engage" in mediation in certain circumstances.[23] Subsequent cases have seen the court order parties to mediate in the face of their opposition (*DKH Retail Ltd v City Football Group Ltd* (2024)).[24] There remains some uncertainty around the extent that the new powers will be used in a consistent manner.[25]

Mediation developments have also recently become established in small claims cases (for claims under £10,000) where a free telephone mediation service manned by Ministry of Justice staff is offered to litigants. Since April 2024, parties seeking access to small claims courts have been "automatically referred" to this service and hence must attempt mediation prior to seeking adjudication (Practice Direction 51ZE).[26] Recent anecdotal evidence suggests that in the first year of the mandatory service, there were approximately 64,000 referrals to mediation, 43,000 mediations took place and 16,000 cases settled.

Germany

The origins of efforts to promote mediation in Germany derive largely from the Mediation Act, which came into force on July 21, 2012.[27] It served principally to implement the EU Mediation Directive of 2008 (EU Directive). Its preliminary sections define "mediator" and "mediation" (Section 1) and describe the mediation procedure and the role of the mediator (Sections 2 and 3).

Certain provisions of the Code of Civil Procedure (ZPO)[28] also address mediation and particularly its relationship with court proceedings. Under Section 278a(1), the court can directly propose mediation or other out-of-court conflict resolution procedures to the parties, but it is not obligated to do so. Judicial attitudes toward mediation are mixed, so the likelihood of a referral varies, in part, according to the identity of the presiding judge. While some level of judicial encouragement of mediation still exists, a proposed provision of the Mediation Act that would have required participation in mediation as a prerequisite to filing a claim in court was not enacted. No provision in Germany currently requires disputing parties in the

civil or commercial context to mediate, nor are parties required to attend mediation information sessions or attorneys required to inform clients about mediation as an alternative to court proceedings.

According to Section 253(1), any statement of civil claim *should* contain information as to whether its filing was preceded by an attempt at mediation or another process for out-of-court dispute resolution, as well as a statement as to whether there are any reasons to prevent such a process. It seems that the choice of the "should" rather than "must" in the relevant provision has led to less-than-fulsome compliance with this provision.

Nonetheless, as a further drive toward facilitating mediation, Section 278 a II ZPO provides: "If the parties decide to conduct mediation or another out-of-court conflict resolution procedure, the court shall order the proceedings to be suspended."[29] Under Section 203 of the German Civil Code (BGB), mediation is treated as a negotiation that suspends the running of the statute of limitations.[30]

Lithuania

Civil mediation in Lithuania is governed by the Mediation Law (2008; latest edition, 2024)[31], the Code of Civil Procedure (CCP 2022)[32] and other national and international regulations, including applicable EU standards. This framework shapes the processes and principles of mediation, the qualification and development of mediators, institutional roles and the responsibilities of mediators. Court mediation is regulated by the CCP and by rules adopted by the Council of Judges (2018).[33]

The only civil disputes subject to mandatory mediation, however, are family disputes (since 2020). In all other civil cases, mediation is voluntary. Furthermore, there are no provisions outside of family matters requiring disputing parties to attend preliminary mediation information sessions in the pre-litigation stage of dispute resolution.

Judicial mediation was established in the Lithuanian courts in 2005, when a pilot project for court mediation, inspired by the Quebec City courts in Canada, was launched.[34] The project evolved into a countrywide court mediation institute, and by 2014, court mediation was applied in all Lithuanian courts, governed by rules enabling judges to be court mediators. [35]Judicial mediation is voluntary; thus, since 2019, the court retains the discretion to refer parties to a mandatory court mediation process in any case in which it is believed there is a good prospect of resolution. As an additional incentive to use mediation, a party will have to pay only 75% of the ordinary stamp duty if they can provide the court with written evidence of a good faith attempt to resolve the dispute through mediation.

Although relatively small in volume, court mediation use is on the rise, with a solid 21% annual growth in 2024.[36] As an additional measure, the Code of Civil Procedure 2002 requires presiding judges, once familiar with a case, to propose that the parties reach mutual agreement (conciliation) and to offer the parties the opportunity to try court mediation. As noted above, if peaceful settlement appears highly likely, the judge may mandate court mediation use. The number of referrals annually to court mediation has increased during this decade, from 516 in 2020 to 945 in 2024 (including family disputes).[37] Still, these numbers constitute less than 1% of litigated civil and commercial cases annually.

Austria

Starting in the early 2000s, the Austrian legislature developed legislation to promote mediation use. There is now a range of measures in the Austrian courts that compel or encourage participation in mediation. Since 2013, in proceedings to determine the best interests of a child in custody or personal contact matters, judges have been authorized to compel parties to participate in an initial meeting about mediation. Other legislative provisions in particular types of disputes include mandatory mediation aspects. For example, the Genetic Engineering Law[38] and the Neighborhood Law[39] include mandates that parties attempt to reach agreements either before a conciliation board or in mediation. The Apprenticeship Law[40] simi- larly mandates mediation for the termination of an apprentice relationship. In other specialized laws, mediation plays a significant role, as with the Disability Equality Package[41], which provides for mediation as an optional but state-supported means of conflict resolution.

More broadly, under the Code of Civil Procedure[42] and the Act on Non-Contentious Proceedings[43], civil judges are authorized to refer matters for consensual resolution of their conflict, which can include mediation. To facilitate mediation, the Act on Non-Contentious Proceedings states that the court may suspend its proceedings for a maximum of six months for this purpose.

In addition, section 433 of the Austrian Code of Civil Procedure provides for a court-assisted settlement. Pursuant to this procedure, any party contemplating a legal action may apply to the district court in the district where the opponent lives for court assistance in attempting to settle the dispute.[44]

Methodology of the 2024 Expert Survey

To update and deepen the understanding of mediation's institutional framework, and elicit views on the steps taken in various jurisdictions to promote mediation, the 2024 expert survey was distributed electronically to over 2,000 mediation professionals across the EU and U.K. jurisdictions. Using a convenience sampling method based on professional networks, the survey captured responses from 25 member states that yielded at least 10 expert responses each. A total of 1,380 fully completed surveys were included in the final data set.

The research applied a standard logit regression model to explore the factors associated with higher mediation incidence. Specifically, the analysis aimed to determine whether particular institutional features—such as economic incentives, judicial referral powers and preliminary sessions—correlate with higher usage of mediation. The two dependent variables were binary indicators representing whether a jurisdiction recorded over 5,000 or over 10,000 mediations per year. To control for structural variation across countries, additional variables such as population size and GDP per capita were included.

Table 1: Institutional framework for mediation and the incidence of mediation

	Dependent variable			
	Dummy=1 if >5,000 mediations		Dummy=1 if >10,000 mediations	
Focal explanatory variables	AME	S.E.	AME	S.E.
Courts mention possible referral to mediation	0.006	(0.021)	0.027	(0.019)
Courts inform parties of benefits from mediation	-0.034	(0.035)	-0.028	(0.019)
Courts incentivized by law to refer to mediation	0.086***	(0.025)	0.056***	(0.015)
Courts have discretionary powers to refer to mediation	0.052***	(0.016)	0.013	(0.017)
Courts have ex officio powers to refer to mediation	0.071***	(0.026)	0.038**	(0.020)
Mediation confidentiality guaranteed in all cases	0.012	(0.021)	0.010	(0.022)
Mediated agreement enforced immediately	-0.030	(0.039)	0.018	(0.022)
Economic incentives for mediation exist	0.069**	(0.034)	0.057***	(0.019)
Preliminary mediation info. session required in most cases	0.016	(0.028)	0.023	(0.024)
Mediation mandatory for litigants in at least some cases	0.042	(0.032)	0.092***	(0.020)
Lawyers have a duty to inform parties about mediation	-0.039	(0.031)	-0.024	(0.019)
Online mediation used more often than in-person mediation	0.037	(0.027)	0.010	(0.023)
Online mediation regulated by law	-0.038	(0.028)	-0.030	(0.019)
Meditator accreditation based on statutory standards	-0.005	(0.031)	0.005	(0.022)
Requirements to become a mediator acceptable or strong	-0.008	(0.027)	-0.022	(0.015)
Respondent-level controls	Yes		Yes	
Country-level controls	Yes		Yes	
Pseudo R^2	0.146		0.178	
Observations	1,380		1,380	

Notes: The table reports logit estimates in the form of average marginal effects (AMEs). The unit of observation is an individual respondent (expert on mediation). The utilized sample includes 1,380 respondents from 25 EU countries. The dependent variable is a bi- nary indicator (dummy) equal to 1 if the respondent noted that, in their country/jurisdiction, the annual number of mediations exceeds 5,000 (model in first two columns) or 10,000 (model in last two columns), respectively. The mean value for dependent variable is 0.267 for the model in the first two columns and 0.147 for the model in the last two columns. All focal explanatory variables and binary indicators. Included (but not reported) respondent-level controls are respondent's educational background (law, economics or business administration, psychology or social work, other) and primary activity (mediator, judge, attorney, in-house counsel, academic, other). Included (but not reported) country-level controls are (logged) population size and GDP per capita for year 2022. Reported standard errors (S.E.) are robust and clustered at the country level. ***, ** and * respectively denote statistical significance at the 1%, 5% and 10% levels.

Table 1 presents the estimation results in the form of average marginal effects (AMEs) and the corresponding standard errors (S.E.). For ease of interpretation, statistically significant AMEs are marked with asterisks. To understand the estimated effect sizes, note that the sample-wide mean likelihood of the response that the number of mediations in the respondent's jurisdiction exceeds 5,000 and 10,000, respectively, is
0.267 and 0.147.

Institutional Features and Mediation Rates: Key Findings

The statistical analysis yielded several robust findings regarding the relationship between institutional design and mediation prevalence:

- **Judicial initiatives are pivotal.** Legal provisions that incentivize courts to refer parties to mediation, or grant them *ex officio* authority to do so, are positively associated with increased mediation use. Specifically, such features increase the likelihood of jurisdictions surpassing the 5,000 and 10,000 mediation thresholds.
- **Economic incentives matter.** Providing financial advantages—such as the refunding of court fees or access to tax deductions—also proves effective. These incentives not only motivate litigants, but also signal institutional support for mediation.
- **Mandatory mediation delivers.** Jurisdictions that require mediation for certain case types are significantly more likely to achieve high mediation volumes. This approach appears to be the single most impactful institutional measure for driving up the use of mediation.

By contrast, more passive strategies—such as obligating lawyers to inform clients about mediation or ensuring mediation confidentiality—do not show statistically significant effects in promoting uptake. Likewise, online mediation frameworks, while modern and potentially useful, were not linked to higher case numbers in this study.

The Hidden Lesson: Effectiveness Requires More Than Awareness

The findings collectively point to a clear conclusion: Awareness alone is not enough. Informational measures, although well intentioned, do little to shift entrenched patterns of dispute resolution. For mediation to be meaningfully integrated into the justice system, more assertive institutional mechanisms are necessary. These include empowering courts, providing financial incentives and introducing procedural requirements that gently steer, or perhaps more robustly channel, parties toward attempting mediation.

This suggests a pivotal lesson for policymakers: Fostering a mediation culture requires more than rhetoric and symbolic measures. It demands concrete action, targeted design and a willingness to embrace hybrid models that blend voluntary principles with structural nudges.

A New Paradox of Mediation: Praised for Voluntariness, yet Grows Only When Mandated

In summary, while the EU's Mediation Directive was visionary in intent, its implementation has fallen short in practice. Despite clear institutional support and a robust legal framework, mediation remains underused in most member states. As the 2024 data confirm, real progress depends not on maintaining idealized notions of voluntariness, but on embracing pragmatic strategies that encourage meaningful participation.

This reveals a striking new paradox: Although mediation is most admired for its voluntary spirit, it tends to thrive only when participation is mandated or strongly incentivized. To bridge this gap, EU policymakers must confront the uncomfortable truth that the path to widespread adoption may require less persuasion and more prescription.

By recognizing this reality and tailoring national strategies accordingly, Europe can finally unlock the full promise of mediation—not just as an alternative to litigation, but as a cornerstone of modern, efficient and humane justice systems.

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41. Federal Disability Equality Act of 10 August 2005 (Federal Law Gazette I No. 82/2005; as amended, inter alia, BGBl. I No. 32/2018).

42. Genetic Engineering Act of January 1995, § 5 (Federal Law Gazette I No. 510/1994).

43. Act on Non-Contentious Proceedings of 12 December 2003, § 70(1) (Federal Law Gazette I No. 111/2003; as amended BGBl. I No. 38/2019)

44. Tetiana Tsuvina & Sascha Ferz, *The Recognition and Enforcement of Agreements Resulting from Mediation: Austrian and Ukrainian Perspectives*, 4(16) Access to Justice in Eastern Europe 32 (2022). ■

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