European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Alternative Dispute Resolution and the Judicial Domain

ENCJ Report 2016-2017

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Table of Content

Executive Summary 4

Part I 5

1. Brief introduction 6

2. Methodology of work and activities of the Project Team 6

3. Goals and Boundaries of the Project 7

4. A discussion of previous approaches to ADR 8

5. Analysis of answers to the questionnaire 17

6. Presentation of the findings of the Project Team 20

Part II 25

Part III ..... **Error! Bookmark not defined.**

Questionnaire and table of answers

Executive Summary

The Project Team on the "**Dispute Resolution/Judicial Domain**" by the European Network of Councils for the Judiciary (ENCJ) was initiated in September 2016 as a result of the ENCJ Work plan 2016/2017 approved by the General Assembly held in Warsaw (Poland) in June 2016.

The Project Team comprised representatives of sixteen Members of the ENCJ (Belgium, Bulgaria, Denmark, England and Wales, France, Hungary, Ireland, Italy, Lithuania, Northern Ireland, Poland, Romania, Scotland, Slovakia, Slovenia, Spain), as well as representatives from two observer countries (Finland, Norway). The Project Team was co-chaired and co-coordinated by Mr Alessio Zaccaria (Consiglio Superiore della Magistratura , Italy) and Mr Marko Novak (Sodni svet, Slovenia). For the purpose of drawing up the current report, the Project Team held three meetings (in Rome, Bratislava and Ljubljana) and an additional meeting of coordinators and representatives of England and Wales and Scotland in Brussels.

The idea for the Project results from the fact that there are a number of ongoing changes to the ways in which civil, family and even some administrative disputes and criminal cases are being resolved across the EU. The increasing caseload of traditional courts, rising costs of litigation, time delays, desire for confidentiality and the desire of parties to have greater control over the selection of the individual or individuals who will decide their dispute, contributed to the fact that many countries have started to consider alternative dispute resolution techniques (ADR). All of these developments call into question how the European dispute resolution scene is changing, and whether the changes are desirable. Moreover, they raise the issue whether the basic article 6 ECHR (right of the citizen to a fair trial) in such cases is respected.

The foregoing led the ENCJ to identify in its Work Plan 2016/2017 the need for a project to consider if these changes are desirable, having regard to g the needs of society and especially the role and position of the judiciary, from the perspective of the right to a fair, timely and efficient trial.

The Project Team focused on the relationship and mutual interaction between court proceedings and ADR proceedings, conducted in the context of judicial proceedings in civil law cases. The work of the Project Team was not easy since the dimensions of the ADR (in the context of judicial proceedings) are still relatively unknown to the judiciaries in EU, although different ADR techniques are present in all participating countries. All countries provide for mediation through their judicial systems (attached to or dependant on official judicial mechanisms). The majority also provide negotiation and conciliation. However the vast majority of countries have a very low percentage (under 5 %) of ADR within judicial proceedings and do not monitor or study and analyse ADR in a systematic and comprehensive way.

Despite this the Project Team has managed to define some of the most significant and obvious benefits and potential risks of ADR procedures for the judicial domain and the right to a fair, timely and efficient trial, and consequently adopted recommendations and minimum standards.
The main conclusion of the Project Team is, that ADR can promote social harmony and at the same time consolidate the position of the judiciary, in the sense that judicial proceedings in modern societies should

be the last resort for dispute resolution. The Project team concluded that ADR should be adopted and promoted not just as a social value but as a legal one as well. It should be made available to the parties to civil proceedings at the earliest possible stage in the dispute in all appropriate cases. On the other hand ADR may limit the access to a fair trial, so Court related ADR procedures should be regulated by legislation to an extent that would provide the most basic procedural safeguards. Member States should also monitor and analyse ADR, in order to be able to recognize the advantages and disadvantages of ADR and to legislate accordingly, and to enable those involved in ADR to adopt the best practice and procedure.

The minimum standards that were identified as necessary for Court related ADR in civil proceedings are***:***

1. The basic procedural safeguards in Court related ADR in civil proceedings should provide,

    - the right to an equal position/equality of arms;
    - that the solution reached within the ADR proceeding is truly the reflection of real and true will of the participants;
    - protection from disclosure of data revealed in ADR in further judicial proceeding;
    - the principle of confidentiality.

2. In order to support the above mentioned procedural safeguards:

    - Only those with training accredited by an appropriate professional body should be allowed to lead an ADR procedure.
    - Appropriate training should be available to all judges to recognise the advantages and risks together with the potential need for ADR procedure.

3. A judge who has led an ADR procedure should not play the role of judge in the following trial, unless in accordance with the domestic law, both parties express the wish to continue to proceed with the same judge and the judge considers the circumstances of the case are such that it would be appropriate for him/her to do so, taking in to account the need for objective independence and impartiality.

4. Parties should be adequately informed with regard to the rules and procedures of ADR.

5. Following the completion of an ADR procedure the settlement may, if approved by a Court, be formally enforced.

6. Parties should have the opportunity once the ADR is finalised*,* of reopening the case, but only in exceptional circumstances defined by domestic law.

Part I

1. Brief introduction

A high quality, effective and efficient justice system is a prerequisite for every democratic society. The increasing caseload of traditional courts, rising costs of litigation, time delays, preference for confidentiality and the desire of parties to have greater control over the selection of the individual or individuals who will decide their dispute, has encouraged many countries to consider alternative dispute solutions (hereinafter also referred to as ADR).

Therefore there is a need to look at the general developments in this field and to consider if these changes are desirable, taking into account the needs of society and the judicial domain, from the perspective of the right to a fair, timely and efficient trial.

2. Methodology of work and activities of the Project Team

The Project Team started its work with the analysis of the working of ADR in the European space and then the Team, through discussion, identified the objectives of its work.

The work than proceeded with collecting relevant information on present functioning and existing regulation of ADR in European countries, by means of a questionnaire, addressed to the Councils for the Judiciary, represented in the Project Team, and to other ENCJ Members and Observers.

The group has also followed the work of the joint project of European Law Institute (ELI) and European Network of Councils for the Judiciary (ENCJ) - The project on the relationship between court-based dispute resolution and alternative dispute resolution, regarding especially the risks thrown up the very many different types of available ADR.

At the same time, the group noted and analysed the Study of European Parliament, Directorate general for internal policies, on implementation of Mediation directive in EU member states.[1]

The Project Team then analysed and discussed all information, collected as mentioned above, during three meetings in Rome, Bratislava and Ljubljana.

[1] Study of European Parliament, Directorate general for internal policies, on implementation of Mediation directive in EU member states

3. Goals and Boundaries of the Project

On the basis of the analysis of the working of ADR in the European space and the discussion at the Kick-off meeting in Rome, the group focused its attention on the working of ADR within or ordered by a Court in civil proceedings. Therefore the Report doesn't consider ADR schemes which are not part of court proceedings or not ordered by a Court.

3.1 Particular goals of the working group were:

1. To examine what impact Court related ADR procedures have on judicial domain.
2. To examine the relationship of Court related ADR procedures and the right to access to justice and the right to trial without undue delay.
3. To examine whether Court related ADR procedures should be legally regulated to protect the position of parties.
4. To examine the possibility or appropriateness of judges' participation in various Court related ADR procedures, save for arbitration.
5. To examine whether it should be a duty of judges and the courts to encourage parties to alternatively resolve their disputes.

3.2 Boundaries of the project were:

1. The Report does not provide detailed analysis of the national systems of ADR.
2. The Report does not evaluate compliance of national judicial systems with the recommendations, proposed by the Project Team.
3. Arbitration was excluded from the scope of the project research, as legal theory and European judicial policies do no longer list arbitration as a concept of ADR[2], as by its character it is closer to judicial proceedings than ADR.

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[2] Green paper on alternative dispute resolution in civil and commercial law, Item 2, Chapter 1.1.

4. A discussion of previous approaches to ADR

4.1 Presentation of ADR[3]

4.1.1 Concept

Alternative dispute resolution includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to a compromise, short of litigation. It is a collective term for the ways (other than by litigation) that parties can resolve disputes, with (or without) the help of a third party.

The concept of ADR is based on the hypothesis that disputing parties wish to achieve the best result by resolving disputes themselves. The essence of ADR procedures is voluntary access by the parties to a process with a neutral third party (e. g. mediator etc.), who conducts the proceedings, and ensures confidentiality.

The major goal of all ADR processes should therefore be the same as litigation, i.e. conflict resolution. The important distinction is that ADR focuses on the interests of the parties rather than their legal rights, and in this way the goal is to resolve the dispute so that the full interests of each party are satisfied.

4.1.2 Significance

ADR as a means of improving the speed of dispute resolution and enhancing access to Courts

Complexity and technical obscurity of the legislation may make access to justice for citizens more difficult. Societies have, therefore, started to identify alternative dispute solutions and ADR has gained widespread acceptance among both the general public and the legal profession in recent years.

There has also been discussion about taking a systems approach regarding ADR, in order to offer different options to people who are in conflict. More States have begun experimenting with ADR programs, with some programs being voluntary and others mandatory.

ADR as a legal and social value

Some legal cultures (e.g. Japan and China) have traditionally looked to alternatives rather than the law as a decisive mechanism for dispute resolution in society. In those countries, the priority is to find a solution which suits both parties and preserves social harmony. This is in conformity with the basic idea of ADR and

[3] Legal Information Institute: https://www.law.cornell.edu/wex/alternative_dispute_resolution
European Commission, http://ec.europa.eu/consumers/solving_consumer_disputes/non_judicial_redress/adr-odr/index_en.htm
Mediacija v teoriji in praksi, veliki priročnik o mediaciji, Društvo mediatorjev Slovenije, Ljubljana 2011.
Green paper on alternative dispute resolution in civil and commercial law, Item 2, Chapter 1.1..

has special value as one of the political priorities recognized by the European Commission: “*It is worth highlighting the role of ADRs as a means of achieving social harmony.”*[4]

ADR to support high standards of behaviour in markets

ADR can also serve as a part of the quality management system, reinforcing and encouraging appropriate behaviour by participants in business transactions and promoting consumer empowerment.[5]

4.1.3 Some previously identified possible advantages of ADR

- ADR is usually less formal, less expensive, and less time-consuming than a trial.
- ADR may be more suitable for multi-party disputes.
- The process is generally confidential and less stressful than traditional court proceedings.
- In ADR processes parties play an important role in resolving their own disputes. This often results in creative solutions, longer-lasting outcomes, greater satisfaction and improved relationships.
- ADR should enable a more complete resolution of disputes, whereas in judicial proceedings, parties are bound by specific claims. ADR may resolve disputes more thoroughly in that it seeks to identify and address the cause unlike traditional judicial systems of democratic states governed by the rule of law which only deal with the symptoms. This has the potential to achieve more long-term and stable solutions.

4.1.4 Some previously identified possible risks of ADR

- The power of large corporations and utilities to force consumers into a disadvantageous dispute resolution procedure.
- The imposition of settlements without consumers having access to legal advice.
- The imposition of solutions by unidentified online decision-makers.
- The absence of appeals in private arbitration processes.
- The growth of private dispute resolution procedures without article 6 ECHR protections for the weaker party.
- The abrogation of independent judicial determinations and court procedures.

4.1.5 Types of ADR

ADR consists of two historical types:

- methods for resolving disputes outside the official judicial mechanism (out of court procedures);
- informal methods attached to or dependant on official judicial mechanisms (ADRs in the context of

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4 Green paper on alternative dispute resolution in civil and commercial law, , Item 10, Chapter 1.2.

5 Alternative Dispute Resolution for Consumer Cases: Are Divergences an Obstacle to Effective Access to Justice, International Public Administration Review, Volume XII, Number 4, December 2014.

judicial proceedings - conducted by courts or entrusted by the court to a third party).

ADR includes informal tribunals, informal mediation processes, formal tribunals and formal mediation processes:

- the classic tribunal form of ADR is arbitration (both binding and advisory or non-binding);
- the classic form of mediation is referral for mediation before a court appointed mediator or mediation panel;
- classic informal methods include social processes, referrals to non-formal authorities (such as a respected member of a trade or social group) and intercession.

The major differences between formal and informal processes are (a) dependency on a court procedure and (b) the possession or lack of a formal structure for the application of the procedure.

Alternative dispute resolution (ADR) includes the following typical forms:

- **negotiation** - participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution;
- **conciliation** - is a less formal form of ADR. This process does not require an existence of any prior agreement. A party can request the other party to appoint a conciliator. If a party rejects an offer to conciliate, there can be no conciliation;
- **mediation** - there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does not impose a resolution on the parties;
- **collaborative law** - in collaborative law or collaborative divorce, each party has a lawyer who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the lawyers (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system;
- **arbitration** - participation is normally voluntary, and there is a third party who, as a private adjudicator imposes a resolution. Legal theory and European judicial policies no longer list arbitration as a concept of ADR[6], as its character is closer to judicial proceedings than ADR.

Beyond the basic types of ADRs there are also other different forms, such as:

- **case evaluation** - a non-binding process in which the parties present the facts and the issues to a neutral case evaluator who advises them on the strengths and weaknesses of their respective positions and assesses how the dispute is likely to be decided by a jury or other adjudicator;

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[6] Green paper on alternative dispute resolution in civil and commercial law, Item 2, Chapter 1.1.

- **early neutral evaluation** - a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation by the expert can assist the parties in assessing their case and may influence them towards a settlement;
- **family group conference** - a meeting between members of a family and members of their extended related group. At this meeting (or meetings) the family becomes involved in learning skills for interaction and in making a plan to seek to avoid the abuse or other ill-treatment between its members;
- **ombuds** - third party selected by an institution – for example a university, hospital, corporation or government agency – to deal with complaints by employees, clients or constituents.

ADR can be also conducted online.

4.1.6 EU legislation on alternative and online dispute resolution

ADR is the EU´s political priority[7], repeatedly declared by the European Union institutions and promoted together with ODR. The legal framework for consumer alternative and online dispute resolution is established primarily by the following acts:

1. Treaty on the Functioning of the European Union[8] from the implementation of the Lisbon Treaty especially mentions the development of ADR (Item g of Art. 81.2)

2. Green Paper on alternative dispute resolution in civil and commercial law, drafted and presented by the Commission in 2002

3. The Directive on certain aspects of mediation in civil and commercial matters[9]

4. The Directive on consumer ADR (ADR Directive)[10]

The ADR Directive ensures that consumers have access to ADR for resolving their contractual disputes with traders. Access to ADR is ensured irrespective of the product or service they purchased save for disputes regarding health and higher education. It applies whether the product or service was purchased online or offline or whether the trader is established in the consumer's Member State or in another one. This Directive also established binding quality requirements for dispute resolution bodies offering ADR procedure to consumers.

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[7] Green paper on alternative dispute resolution in civil and commercial law, Chapter 1.3.
[8] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union
[9] 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
[10] DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

5. The Regulation on consumer ODR (ODR Regulation)[11]

The ODR platform is a web-based platform developed by the European Commission. Its objective is to help consumers and traders resolve their contractual disputes about online purchases of goods and services out-of-court at a low cost in a simple and fast way. It allows consumers to submit their disputes online in any of the 23 official languages of the European Union. The ODR platform transmits the disputes only to the quality dispute resolution bodies communicated by Member States. Member States have to establish a national contact point to provide assistance to users of the ODR platform. The list of these national contact points is available on the ODR platform. The ODR platform is accessible to consumers and traders since 15 February 2016.

6. The Commission Implementing Regulation on consumer ODR[12]

7. European Code of Conduct for Mediators[13]

Additional to this legislative framework for consumer ADR regulation, there are also a number of EU directives (in terms of EU sectorial legislation), which contain provisions on ADR schemes for consumer disputes, such as the Directive on credit agreements for consumers and the Directive on electronic commerce.

4.1.7 Council of Europe and United Nations

1. Recommendation no. r (98) 1 of the Committee of Ministers to member states on family mediation (Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies)[14]

2. Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters (Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies)[15]

3. Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (Adopted by the Committee of Ministers on 15 September 1999 at the

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[11] REGULATION (EU) No 524/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

[12] COMMISSION IMPLEMENTING REGULATION (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes.

[13] European Code of Conduct for Moderators

[14] Recommendation no. r (98) 1 of the Committee of Ministers to member states on family mediation

[15] Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters

679th meeting of the Ministers' Deputies)[16]

4. Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies)[17]

5. Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states on judges; independence, efficiency and responsibilities

   - (point 39: „Alternative dispute resolution mechanisms should be promoted.“)

6. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006[18]

7. UNCITRAL Model Law on International Commercial Conciliation (2002)[19]

4.1.8 European Court of Human Rights (ECtHR)

The ECtHR has already considered the relationship between ADR procedures and the right to a fair trial as guaranteed by Article 6 § 1.

In this respect the EctHR recognized the admissibility of the institution of arbitral adjudication in the sense of waiving the right to judicial protection.

> In the Contracting States' domestic legal systems a waiver of a person's right to have his or case heard by a court or tribunal is frequently encountered in civil matters, notably in the shape of arbitration clauses in contracts. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention (Deweer v. Belgium, § 49). Persons may waive their right to a court in favour of arbitration, provided that such waiver is permissible and is established freely and unequivocally (Suda v. the Czech Republic, §§ 48-49). In a democratic society too great an importance attaches to the right to a court for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. [20]

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16 Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters

17 Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties

18 UNCITRAL Model Law on International Commercial Arbitration

19 UNCITRAL Model Law on International Commercial Conciliation

20 Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial

The decision in Tabbane v. Switzerland concerned the resolution of a dispute by an international arbitration tribunal in Geneva with no right of appeal to the courts. The applicant, a Tunisian businessman domiciled in Tunisia, entered into a contract with a French company based in France. The contract included a clause requiring any disputes between the parties to be referred to arbitration. By entering into the contract the applicant expressly and freely waived any right to appeal to the ordinary courts against the decision of the arbitration tribunal in the event of a dispute.

The French company subsequently lodged a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris. In accordance with the ICC Rules, the applicant was able to appoint an arbitrator of his choice. That arbitrator then agreed with the other two arbitrators that the arbitration would take place in Geneva, with the result that Swiss law became applicable to the arbitration proceedings. The arbitration tribunal found against the applicant, who lodged an application for review with the Swiss Federal Court. The Federal Court refused to examine the arbitration award, considering that the parties had validly waived their right to appeal against any decision issued by the arbitration tribunal in accordance with the Federal Law on private international law.

The case concerned the right of access to a court for the purposes of Article 6 § 1 of the Convention in the context of international arbitration. The decision develops the case-law relating to voluntary waivers of the right to appeal against an arbitration award. The Court found that, having regard to the legitimate aim pursued and the applicant's contractual freedom, the restriction had not impaired the very essence of his right of access to a court.21

Furthermore, the ECtHR in the case of Momčilović vs. Croatia[22] considered that determining the exhaustion of a special procedure for potential settlement as a procedural prerequisite for submitting an action does not violate the right of access to a court.

[21] Tabbane v. Switzerland (dec.) - 41069/12; Decision 1.3.2016 [Section III]

[22] Momčilović vs. Croatia

4.2 Summary of the European Parliament's (EP) Study and analysis on implementation of the Mediation Directive in EU member states[23]

ADR is EU´s political priority, repeatedly declared by the European Union institutions.

Results of the EP Study show:

- that most States guarantee a high degree of confidentiality of the entire mediation process;
- that courts of most Member States are not very proactive in referring individual cases to mediation;
- that the majority of Member States have mediator accreditation systems;
- a large majority of Member States whose average respondents indicated the lowest number of annual mediations have no economic incentives for parties to participate in mediation;
- in the majority of Member States, respondents indicated that litigants are not required to attend preliminary mediation informational sessions;
- the majority of Member States also reported that there is no mandate for parties to use mediation;

The possible legislative measures that could have a positive effect on mediation and were positively viewed, according to the Study, are:

- the idea of requiring counsel (attorneys) to inform parties of mediation;
- mandatory mediation information sessions before litigation proceedings;
- mandatory mediation with the ability for parties to opt-out;
- making mediation mandatory for the 'stronger' party:
- granting judges the power to order litigants to mediation;
- implementing incentives for parties who choose to mediate in order to encourage the use of mediation.

The measures that did not gain substantive support:

- requiring judges to explain why they did not refer a case to mediation;
- assessment of the productivity of judges based in part on the number of cases referred to mediation;
- imposing sanctions for parties' refusal to attend mandatory mediation proceedings;
- requiring a third-party review of the mediation settlement, focusing on violations of law, public policy or unconscionable stipulations;
- mandatory legal assistance for mediation.

The main conclusions of the Study are:

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[23] European Parliament's Study and analysis on implementation of the Mediation Directive in EU member states

- Mediation saves parties a significant amount in both time and cost when compared to the time and cost of litigation.
- Although the answers tend to suggest that existing legislation promotes the use of mediation, the realisation of the Mediation Directive is disappointing as despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1 % of the cases in the EU. This study, which solicited the views of up to 816 experts from all over Europe, shows that this disappointing performance results from weak promediation policies, whether legislative or promotional, in almost all of the 28 Member States.
- While Article 5 of the Directive allowed Member States to introduce mandatory mediation elements, including sanctions, the EU tradition of a voluntary approach to mediation has largely prevailed at the legislative level. To the contrary the assessment of which measures generate mediations show that a mandatory element is necessary. Where these features exist in the law, mediations occur. The Study shows that introducing a 'mitigated' form of mandatory mediation (at least in certain categories of cases) may be the only way to make mediation eventually happens in the EU.
- Amongst the possible pro-mediation legislative measures as those which may have the greatest impact on the use of mediation are therefore mandates for preliminary mediation informational sessions (compulsory attendance at information sessions) and mandates for mediation (mandatory mediation with the ability to opt-out if litigants do not intend to continue with the process).

4.3 Summary of the ELI-ENCJ Joint Project

The Joint Project Group constituted by the European Law Institute (ELI) and the European Network of Councils for the Judiciary (ENCJ) was established to consider the concerns that have arisen in Europe as a result of the exponential growth of numerous different forms of alternative dispute resolution ("ADR"). The work will presumably be completed by the end of 2017.

The project looks towards three main prospective outputs:

(1) A statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes. This will include guidelines as to the preliminaries and procedures that should be adopted in considering ADR and in referring cases to ADR processes, and how risks of injustice can be reduced or eliminated.

(2) A statement of European best practice in relation to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges. This will include guidelines as to the preliminaries and procedures that should be adopted in considering and referring cases which are the subject of an ADR process to a court, and how risks of injustice can be reduced or eliminated.

(3) Recommendations as to the best European models that can be developed and applied for coherent access to DRPs in respect of different types of dispute, and towards which Member States may wish to progress.

The Group prepared recently a Position paper (final draft: 28 November 2016), which focuses on the interface between court-based dispute resolutions processes (“DRPs”) and ADR processes and which aims to draw attention to the potential problems that the project group has already identified.

In particular, the following risks linked to ADR have been highlighted in the Position Paper:

A. The risk that persons will be denied an independent judicial determination

B. The risk that persons will settle their claims without having first had access to independent legal advice

C. The risk that decision-makers or those conducting ADR processes are inadequately qualified

D. The risk that individual parties have an inadequate understanding of the available methods of dispute resolution

E. Risks of decision-making by an unidentified online or other decision-maker

F. The risk that mediation or other ADR options are under-used, because of their voluntary nature and an absence of quality assurance

G. The risk of abuses of the power of large governmental or commercial entities as the opposing party

According to the Position Paper, the risks outlined above could be reduced or ameliorated if courts and judges followed a defined procedure before considering, requiring or recommending that parties adopt an ADR process.

As regards the ideal model for Member States to aspire to, the watchwords would seem to be user-friendliness, affordability and speed, alongside quality control, simplicity and ease of comprehension.

5. Analysis of answers to the questionnaire

5.1 Explanation

The purpose of the questionnaire was to collect information on the approaches used and solutions developed in the EU states, regarding alternative dispute resolution schemes (ADR), provided for within or ordered by a Court in civil proceedings and their relation to the role of existing judicial systems.

The present analysis is only an attempt to evaluate the given answers of the ENCJ Members and Observers, since many of the answers to the individual questions were not in a simple form of Yes or No. From the responses it is also perceived that the dimensions of the ADR (in the context of judicial proceedings) are still relatively unknown to the judiciaries and, therefore, Members do not deal with data, which would enable a better quality of answers. And finally, from the answers it is also apparent that legal systems across Europe regulate the increasing availability of ADR in a very different way, which is demonstrated by the fact that Members had a slightly different interpretation of the meaning of certain questions.

5.2 Findings

A general outline of ADR availability through the Courts

ADR techniques are present in all countries. The most common forms of ADR are mediation, conciliation and negotiation. All countries provide for mediation through their judicial systems (attached to or dependant on official judicial mechanisms). The majority provide negotiation and conciliation. Other forms of ADR techniques are rare in the context of official judicial mechanisms.

Among those, who could provide an approximate number of ADR procedures (attached to or dependant on official judicial mechanisms) in the overall number of disputes formally resolved in civil court proceedings (12 countries), the vast majority of countries has a very low percentage (under 5 %) of ADR within judicial proceedings. We did not research the potential reasons for this.

The answers also show that a majority of countries do not monitor or study and analyse ADR in a systematic and comprehensive way.

An overview of legislative regulation of Court related ADR procedures in civil proceedings

All countries (save Bulgaria) have legislation regulating ADR at some level. All countries provide for Court related ADR procedures in civil cases, business and labour-law cases. With the exception of cases regarding legal capacity law, that are excluded from the scope of Court related ADR in 7 countries, 6-7 countries also allow ADR in the context of judicial proceedings in social security, administrative and minor offence cases.

A majority of countries (12) have provisions in their legislation that ensure basic procedural safeguards in Court related ADR procedures, namely regarding the right to an equal position; that a solution reached within ADR proceedings is a reflection of the real will of the parties; protection from the disclosure of data revealed in ADR in further judicial proceedings; different forms of the principle of confidentiality.

Some other safeguards in the national legislations are:

- the requirement that the agreement, reached in the Court related ADR process, is not contrary to morality or the law;
- the time frame of the ADR procedure;
- ADR on a voluntary basis;
- the statutory conditions for mediators and the provision of training for mediators.

In the majority of countries (9) Courts do not have the ability to order the parties to pursue an ADR procedure. It is only in Italy and France that the judges have this authority in general. In some countries Courts can order ADR procedures only in certain types of disputes.

In some countries (Slovenia and Hungary) judges have an option to order the parties to attend a so-called informational ADR session, the purpose of which is to inform the parties of the benefits of ADR.

Providing it is approved by a judge/Court/notary, the solution reached in the process of Court related ADR can be binding upon the parties in eleven countries. In 16 countries the solution achieved in the process of Court related ADR is enforceable. These two responses appear contradictory. This discrepancy may be the result of different interpretation of questions by Members.

Thirteen countries have no sanction if the parties do not take part in ADR procedures, which is consistent with the majority of countries not having mandatory ADR (or have mandatory ADR only in certain types of cases). ADR procedure is a prerequisite for judicial proceedings, in certain cases, only in 2 countries (France and Italy). Some countries (4) sanction failure to participate by cost implications.

In answer to the question "who bears the costs of Court related ADR?" the answers were very varied and therefore difficult to evaluate (to draw a common denominator). Legal systems of ENCJ Members take account of the varied situations. For family disputes the State usually bears the costs of Court related ADR. However, countries mostly tend to the solution that the parties must themselves bear the costs of ADR procedures.

The participation of judges and Court related ADR procedures

The participation of judges in promoting peaceful ways of resolving disputes (through the ADR techniques) is desirable and expected in all countries.

In 2 countries (Romania and Scotland) only experts can conduct ADR procedures, attached to the court. In 3 countries (England and Wales; France; Hungary) only judges can do so. In 12 countries ADR can be conducted by both judges and experts.

In all countries, where judges conduct Court related ADR techniques (save in Italy and Northern Ireland), judges are provided with training. In 11 countries this kind of training is voluntary and in 2 countries (Slovenia and Hungary) is mandatory.

Only 2 countries allow their judges to carry out extrajudicial types of ADR procedures. Fourteen countries gave a clear no to this question. In 2 countries (Slovenia and Bulgaria) there is no specific rule in relation to this.

The influence of Court related ADR on the work and mission of courts and on the right to a fair trial in a reasonable time

Only 5 countries confirmed that they perceive a positive effect of ADR procedures on the work of courts. Some countries commented that they do not have data which would enable them to answer this question. Some did not answer at all.

In 4 countries (Bulgaria, Finland, France and Slovenia) civil society organisations, lawyers and/or judges expressed the view that ADR could jeopardise the right to a fair trial.

A brief overview of legislative regulation of Court related ADR procedures in criminal proceedings

In answers to the question "are there any ADR techniques available in the criminal proceedings?" nine countries replied positively and the other nine gave negative answers. All those who have this option in criminal proceedings have national legislation regulating the manner in which it is applied.

Countries have different features of Court related ADRs in criminal proceedings:

- mediation
- conciliation
- negotiation
- plea bargaining
- payment of compensation
- composition (e. g. an agreement among the creditors of an insolvent debtor to accept an amount less than they are owed, in order to receive immediate payment).

6. Presentation of the findings of the Project Team

6. 1 Litigation compared with ADR

1. The traditional tool of dispute resolution is **litigation**, which is an action brought in court to enforce or to defend a particular right within civil disputes, within the framework of the law and the constitution.

2. **Alternative dispute resolutions** (ADR) are alternatives to litigation for resolving disputes - with (or without) the help of a third party.

3. ADR came in to effect to offer tools to resolve disputes between parties, that do not have the characteristics of litigation which is usually considered as problematic at a social level. For this reason, the features that usually distinguish ADR are: **privacy**, **control by the parties themselves**, **speed** and **affordability**.

4. Speed and affordability is likely to involve a simplification compared to litigation. However, simplification may require a reduction of the guarantees that the judicial system normally gives to the parties so they can have a fair trial. Such simplification may focus on methods of evidence gathering and a relaxation of the rules of admissibility and procedure.

6. 2 Different kinds of ADR including Court related ADR

1. The answers to the questionnaire submitted to the Project Team by participants show that ADR techniques are present in almost all European countries and that there are numerous types of ADR, which are different from traditional forms of litigation.

2. Since the Project Team dealt with the issues related to ADR, from the perspective of the judges, we did not focus on **arbitration**, which is a way of resolving a dispute using an independent and impartial third party who will listen to both sides of the dispute and then decide the best way to resolve it. Arbitration is a technique similar to the traditional judicial proceeding because the arbitrator, having a binding decision-making power, intervenes for resolving the dispute.

3. The most common forms of ADR are negotiation, conciliation and mediation.

> 3.1. **Negotiation**, is a dialogue between two or more people or parties intended to reach a beneficial outcome over one or more issues where a conflict exists with respect to at least one of these issues. It aims to resolve points of difference, to gain advantage for an individual or for a group, or to craft outcomes to satisfy various interests. It is often conducted by putting forward a position and making small concessions to achieve an agreement. The degree to which the negotiating parties trust each other to implement the negotiated solution is a major factor in determining whether negotiations are successful.
>
> 3.2. **Conciliation,** helps the parties find a common view in order to resolve their dispute. To reach this goal, parties refer to an impartial third party, who is the conciliator. The conciliator is trained and qualified so has skills enabling him/her to help the parties reach an agreement through compliance with a series of behavioural rules which he/she set in advance (for example; how the case is to be presented; who should present it; any time constraints for presentation etc.).
>
> 3.3. **Mediation**, is an informal procedure which takes place, as arbitration, in front of one or more impartial third parties (mediators) and it leaves to the parties the responsibility of their own decisions: the mediator works to find points of agreement and to try to help those in conflict to agree on a fair result. A mediator does not have any decision-making power. Mediation has become very common in trying to resolve family law disputes. In some Member States it is also used in criminal proceedings where it has a role in promoting restorative justice.

4. **ODR** (online dispute resolution) is a form of ADR, however it is not Court related and therefore does not form part of the scope of this project.

5. **Court-related** (or court-administered) **ADR** is a particular form of ADR in some Member States, which can include ADR processes which are either a voluntary part of the pre-trial process or ADR processes which are facilitated or offered by the Court during the course of a case with the consent of the parties. These actions may result in settlement of all or part of the issues; in the event of a settlement not being reached the

parties may still return to the Court and resume the hearing.

Cases can be classified as Court-related ADR even where the judge only has the task of nominating the individual who will be in charge of facilitating the dispute resolution.

6.3 An analysis of Court related ADR as a dispute resolution tool

1. Every citizen involved in a conflict has the **right to have access to a dispute resolution tool conducted by an independent and impartial judicial body, previously established by law** (see art. 47, paragraph 2 **,** first part, EU Charter of Fundamental Rights, which states: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”; as well as art. 6, par. 1, first part, ECHR, according to which “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).

2. In addition to litigation, ADR should constitute a dispute resolution tool.

3. ADR may limit the access to a fair trial in that it may involve, by agreement, different standards in relation to the admissibility of evidence and the rules of practice and procedure at the hearing of disputes, so its use should only be on a consensual basis.

4. Many parties may regret a case they contest and few will regret a case they settle. In principle, therefore ADR may be preferred to litigation since it may lead to an agreed solution, thus, ADR may promote **social harmony.**

Another feature of ADR is the **reduction of the workload for the courts**. This is why it cannot only be considered as a **social value** but **also a legal one**, in the sense that judicial proceedings in modern societies should be the last resort for dispute resolution.

5. As a general principle ADR should be considered in all appropriate cases. A Judge therefore should, in appropriate cases, be proactive in recommending ADR. Judges need to be trained and encouraged to consider ADR as an alternative to litigation.

6. ADR should take place at the earliest possible stage in the dispute.

7. As a general principle ADR should be made available to the parties to civil proceedings.

8. Failure to participate in ADR procedure may be sanctioned.

8.1 When an ADR procedure is adopted before the trial, the **trial** can be **delayed** until after the ADR procedure is finalised.

8.2 When access to ADR is ordered after the beginning of the trial, the **trial** can be **suspended** until the ADR procedure is finalised.

8.3 In some Member States a "mitigated form of mandatory" ADR can result in the imposition of **pecuniary penalties** if the party does not attend, but not to the suspension or inadmissibility of the trial.

6.4 The ideal model of ADR taking in to account associated risks

1. There is always a risk of unfair proceedings for the parties involved in an ADR process (see I.3), which can impair the right to a fair trial by an independent and impartial tribunal established by law. This must be avoided. Although ADR is something positive the process of a fair trial within a reasonable time must be preserved. ADR and judicial trials must be complementary. Therefore, **ADR procedures should be regulated in legislation**. They should not however be so regulated as to lose the flexibility which is one of their biggest advantages.

2. The ELI-ENCJ Position Paper has classified the **risks connected to ADR**:

2.1. the risk that persons will be denied an independent judicial determination;
2.2. the risk that persons will settle their claims without having first had access to independent legal advice;
2.3. the risk that individual parties have an inadequate understanding of the available methods of dispute resolution;
2.4. the risk of abuses of power by large governmental or commercial entities.

Taking these risks into account, the ELI-ENCJ Position Paper indicates the **ideal model of ADR** as the following: "*As regards the ideal model for Member States to aspire to, the watchwords would seem to be* ***user-friendliness, affordability and speed****, alongside* ***quality control, simplicity and ease of comprehension****".*

We adopt the conclusions of this paper.

3. Additionally, **confidentiality and economy** are elements that should characterize the ideal model of ADR.

6.5 Protections required for Court related ADR

1. **Member States should monitor and analyse ADR** in a systematic and comprehensive way, in order

1. that the State shall be able to recognize the advantages and disadvantages of ADR and to legislate accordingly, and
2. to enable those involved in ADR to adopt the best practice and procedure.

2. Legislation and/or rules of Court should provide the **basic procedural safeguards in Court related ADR**, namely

1. the right to an equal position/equality of arms;
2. that the solution reached within the ADR proceeding is truly the reflection of real and true will of the participants;
3. protection from disclosure of data revealed in ADR in further judicial proceeding;
4. the principle of confidentiality.

3. In order to support the above mentioned procedural safeguards:

3.1. Only those with **training accredited by an appropriate professional body** should be allowed to lead an ADR procedure.

3.2. Appropriate training should be available to all judges to recognise the advantages and risks together with the potential need for ADR procedure;

3.3. A judge who has led an ADR procedure should not subsequently be the judge in the following trial, unless in accordance with the domestic law, both parties express the wish to continue to proceed with the same Judge and the Judge considers the circumstances of the case are such that it would be appropriate for him/her to do so, taking in to account the need for objective independence and impartiality.

3.4. **Parties** should be **adequately informed** with regard to the rules and procedures of ADR.

General information can be provided by brochures, online or otherwise published in relation to procedure, while specific information is made available only by ADR providers in relation to the case that they are dealing with. In addition there could also be guidance and direction by the judge hearing the case.
We adopt the ELI-ENCJ Position Paper which identified two types of information: *general* information and *specific* information.

3.5. Following the completion of an ADR procedure **the settlement may, if approved by a Court, be formally enforced**.

3.6. Parties should have the opportunity once the ADR is finalised, of r**eopening the case, but only in exceptional circumstances**.

6.6 ADR and criminal proceedings

1. Because of the public interest involved in the prosecution of crime, criminal matters should always be dealt with using traditional criminal proceedings. In many Member States ADR plays no role in criminal proceedings.

2. **Restorative justice** however may be regarded as a part of traditional criminal proceedings.

Part II

Recommendations for Court related ADR in civil proceedings

1. ADR should be made available to the parties in civil cases.
2. ADR should be considered in all appropriate cases.
3. A Judge should, in appropriate cases, be proactive in recommending ADR.
4. The Judiciary should be trained in aspects of ADR.
5. ADR should take place at the earliest possible stage in the dispute.
6. Member States should promote, monitor and analyse ADR.
7. Failure to participate in ADR procedure may be sanctioned.

Part III

Minimum standards for Court related ADR in civil proceedings

1. The basic procedural safeguards in Court related ADR in civil proceedings should provide,
   - the right to an equal position/equality of arms;
   - that the solution reached within the ADR proceeding is truly the reflection of real and true will of the participants;
   - protection from disclosure of data revealed in ADR in further judicial proceeding;
   - the principle of confidentiality.
2. In order to support the above mentioned procedural safeguards:
   - only those with training accredited by an appropriate professional body should be allowed to lead an ADR procedure;
   - appropriate training should be available to all judges to recognise the advantages and risks together with the potential need for ADR procedure.

3. A judge who has led an ADR procedure should not perform the function of judge in the following trial, unless if in accordance with the domestic law, both parties express the wish to continue to proceed with the same Judge and the Judge considers the circumstances of the case are such that it would be appropriate for him/her to do so, taking also in to account the need for objective independence and impartiality.

4. Parties should be adequately informed with regard to the rules and procedures of ADR.

5. Following the completion of an ADR procedure the settlement may, if approved by a Court, be formally enforced.

6. Parties should have the opportunity once the ADR is finalised, of reopening the case, but only in exceptional circumstances, defined by domestic law.