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COMMISSION EUROPEENNE POUR L'EFFICACITE DE LA JUSTICE (CEPEJ)

Manuel européen sur la législation en matière de médiation

Tel qu'adopté lors de la 32ème réunion plénière de la CEPEJ
Strasbourg, 13 et 14 juin 2019

Liste des abréviations

ADR/MARL	Modes alternatifs de règlement des litiges
CEDH	Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales signée à Rome le 4 novembre 1950
CEPEJ	Commission Européenne pour l'Efficacité de la Justice
CJUE	Cour de Justice de l'Union Européenne
CNUDCI	Commission des Nations Unies pour le droit commercial international
Convention de Singapour sur la médiation	Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation, à signer
Directive sur la Médiation	Directive 2008/52/CE du Parlement européen et du Conseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale
Lignes Directrices sur la médiation (ensemble ou spécifiquement : pénale/familiale et civile/administrative)	Lignes directrices visant à améliorer la mise en œuvre de la Recommandation existante concernant la médiation en matière pénale de la CEPEJ (CEPEJ(2007)13) Lignes directrices visant à améliorer la mise en œuvre des Recommandations existantes concernant la médiation familiale et en matière civile de la CEPEJ (CEPEJ(2007)14) Lignes directrices visant à améliorer la mise en œuvre de la Recommandation sur les modes alternatifs de règlement des litiges entre les autorités administratives et les personnes privées de la CEPEJ (CEPEJ(2007)15)
Loi-type de la CNUDCI (2002)	Loi-type de la CNUDCI sur la conciliation commerciale internationale de 2002
Loi-type de la CNUDCI (2018)	Loi-type de la CNUDCI sur la médiation commerciale internationale et les accords de règlement internationaux issus de la médiation de 2018 (modifiant la loi-type de la CNUDCI sur la conciliation commerciale internationale de 2002).
Recommendation relative à la justice restaurative	Recommandation CM/Rec(2018)8 du Comité des Ministres aux États membres relative à la justice restaurative en matière pénale (adoptée par le Comité des Ministres le 3 octobre 2018)
Recommendations sur la Médiation (ensemble ou spécifiquement : pénale/familiale et civile/administrative)	Recommandation (1998) 1 sur la médiation familiale Recommandation (1999) 99 relative à la médiation en matière pénale Recommandation (2001) 9 sur les modes alternatifs de règlement des litiges entre les autorités administratives et les personnes privées Recommandation (2002) 10 sur la médiation en matière civile
UE	Union Européenne

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Préface

En décembre 2016, le Groupe de travail sur la médiation[1] (CEPEJ-GT-MED) a été autorisé à exécuter son deuxième mandat. La CEPEJ l'a notamment chargé de concevoir de nouveaux outils regroupés dans un ensemble de documents, la Boîte à outils pour le développement de la médiation[2], afin de garantir une mise en œuvre efficace des recommandations et directives sur la médiation.

Dans le cadre de son mandat, le CEPEJ-GT-MED a élaboré sa feuille de route, sur la base du rapport préparé par l'expert scientifique du groupe de travail, M. Leonardo D'Urso, sur « L'impact des lignes directrices de la CEPEJ concernant la médiation civile, familiale, pénale et administrative ». La CEPEJ a adopté le document en juin 2018. La nécessité d'un nouveau cadre juridique pour développer le recours effectif à la médiation en matière civile, familiale, pénale et administrative est l'une des principales conclusions établies dans la feuille de route. Recommandation a donc été faite que la CEPEJ et le CEPEJ-GT-MED élaborent des Directives pour la préparation d'un cadre juridique qui pourraient servir de méthode et de référence pour de futures réformes législatives et y incluent des recommandations pour renforcer l'efficacité des législations nationales en vigueur. Lors de la réunion du CEPEJ-GT-MED de novembre 2018, Mme Miglė Žukauskaitė a été nommée experte scientifique du groupe de travail et chargée d'élaborer le Manuel sur la législation en matière de médiation. M. Rimantas Simaitis, Mme Nina Betetto et M. Leonardo d'Urso, membres du groupe de travail, se sont portés volontaires pour contribuer au Manuel en apportant leurs suggestions et leur expertise.

Pour préparer le Manuel, le CEPEJ-GT-MED a passé au crible les législations nationales des 18 pays suivants : Allemagne, Autriche, Azerbaïdjan, Belgique, Croatie, Chypre, Espagne, Finlande, France, Irlande, Italie, Lituanie, Pologne, République tchèque, Serbie, Slovénie, Suisse et Turquie. À noter toutefois que, dans la majorité des cas, seules les principales lois sur la médiation ou seulement les extraits pertinents des codes lui ont été communiqués. Il est donc tout à fait possible[3] que certains aspects de la médiation soient réglementés par d'autres lois ou actes exécutifs nationaux et n'aient donc pas été inclus dans leur étude. Enfin, il convient de noter que les traductions proposées ici ne sont pas officielles et ont été traduites par les services de traduction du Conseil de l'Europe à des fins méthodologiques.

[1] Composition du groupe de travail : M. Rimantas Simaitis (Président), Lituanie, Mme Anna Márová, République tchèque, Mme Maria Oliveira, Portugal, Mme Nina Betetto, Slovénie, M. Jean A. Mirimanoff, Suisse, M. Jeremy Tagg, Royaume-Uni, M. Leonardo D'Urso (expert scientifique), Italie.

[2] La Boîte à outils pour le développement de la médiation et les autres documents dans le domaine de la médiation préparés par le CEPEJ-GT-MED et le Conseil de l'Europe sont disponibles à l'adresse : https://www.coe.int/fr/web/cepej/cepej-work/mediation. Le site est régulièrement mis à jour.

[3] En Suisse, par exemple, la médiation pénale des adultes a été introduite à Fribourg et à Genève, tandis que la médiation administrative a été introduite ou est en cours d'introduction dans plusieurs cantons, mais les codes de procédure fédéraux inclus dans la recherche ne le montrent pas.

Introduction

Le Manuel présente les bonnes pratiques dans les États membres du Conseil de l'Europe et montre comment utiliser efficacement les dispositions des Recommandations sur la médiation, les Directives sur la médiation et les autres dispositifs de la Boîte à outils sur le développement de la médiation dans la pratique. Munis du Manuel, les législateurs nationaux sont encouragés à introduire des lois sur la médiation ou à modifier la réglementation existante afin de la rendre conforme aux normes internationales et à veiller à instaurer une médiation de qualité dans leurs pays respectifs. Si une approche systématique des recommandations est encouragée, les rédacteurs doivent aussi prendre en compte trois conditions préalables avant d'utiliser le Manuel. Premièrement, les systèmes juridiques nationaux n'étant pas homogènes, il n'existe pas de solution « universelle ». Il est donc essentiel d'évaluer soigneusement le contexte juridique national et, surtout, le droit impératif. Deuxièmement, plus qu'un modèle cohérent de lois types, le Manuel se veut un recueil de recommandations. Ainsi, tout en veillant à la cohérence de la réglementation, les rédacteurs sont libres de choisir les recommandations qui répondent aux besoins nationaux et de laisser tomber celles qui ne sont pas conformes à leur système juridique. Troisièmement, si une réglementation cohérente de certains aspects de la médiation est un gage de qualité, il faut aussi éviter tout excès de réglementations qui pourraient entraver le développement naturel du processus de médiation. Les rédacteurs sont encouragés à laisser les médiateurs et les parties concernées esquisser eux-mêmes les contours du processus et ne proposer des solutions réglementaires que dans les cas où les parties ne parviennent pas à un accord ou si ces mesures sont adéquates, proportionnées et raisonnables.

Le Manuel est divisé en deux parties. La première contient des recommandations sur l'élaboration des lois sur la médiation qui reflètent les bonnes pratiques en matière de médiation dans les 18 pays étudiés et l'évolution des normes internationales. Chaque recommandation est suivie d'un exemple concret – soit un extrait de la législation en vigueur dans l'un de ces 18 pays soit un document international. Ces exemples contribuent à illustrer la manière dont les recommandations pourraient être mises en œuvre dans la pratique. Les extraits sont des originaux ; ils n'ont pas été modifiés pour mieux coller à la recommandation en question[4]. Dans certains cas, plusieurs exemples sont donnés afin de mieux illustrer la recommandation, tandis que dans d'autres, un extrait d'une loi nationale peut ne pas refléter l'intégralité de la recommandation. De ce fait, les recommandations plutôt que les exemples doivent être la première source d'orientation générale.

La note explicative (seconde partie du Manuel) est une analyse comparative des législations nationales en matière de médiation et explique en détail la signification et l'importance pratique de certaines dispositions et recommandations. Les chapitres de la deuxième partie reprennent ceux de la première partie ; les utilisateurs du Manuel sont donc invités à se reporter à la note explicative après avoir lu chaque groupe de recommandations pour s'informer sur la pratique dans d'autres pays et comprendre le raisonnement derrière les propositions formulées dans la première partie. La note explicative contient également des références aux documents adoptés par la CEPEJ dans le cadre de sa Boîte à outils sur le développement de la médiation et aux dispositions de documents internationaux, dont la Convention de Singapour sur la médiation, la Loi type de la CNUDCI (2018) et la Directive sur la médiation. Le lecteur y trouvera également des références aux arrêts pertinents de la CJUE, ainsi qu'à certains aspects de la médiation dans les pays qui n'ont pas directement servi de base pour le Manuel. Il va de soi que les deux parties du Manuel doivent être lues et appliquées à la lumière des Recommandations et Lignes directrices sur la médiation.

[4] Seules les informations entre crochets sont incluses par l'auteur à des fins de clarification.

Le Manuel comprend les chapitres ci-dessous. Les rédacteurs des textes législatifs nationaux sur la médiation peuvent soit suivre la structure prévue, soit la réorganiser en fonction des normes rédactionnelles nationales, en tenant compte des recommandations formulées ci-après.

Chapitre	Description et contenu
I. Champ d'application	Ce chapitre formule des recommandations sur la forme consolidée de l'acte juridique et explique pourquoi, dans la pratique, il est important que le champ d'application de la loi soit relativement large.
II. Définitions	Ce chapitre donne des exemples de terminologie harmonisée avec les normes de la CEPEJ dans le domaine de la médiation pour éviter de multiplier les interprétations.
III. Médiateur	Consacré aux médiateurs, ce chapitre porte sur les conditions de base que ceux qui veulent devenir médiateurs doivent remplir, sur les conditions que les prestataires de formation à la médiation et la formation elle-même, ainsi que les personnes morales agissant en tant que prescripteurs de médiation, doivent respecter. Le but est de garantir la qualité des médiations et d'introduire une approche systématique de la fonction de médiateur.
IV. Entrée en médiation	Le chapitre définit les voies de recours possibles à la médiation, volontaires et obligatoires, y compris la médiation ordonnée par un juge et une première session de médiation obligatoire préalablement à la procédure judiciaire.
V. Processus de médiation	Ce chapitre propose une approche systématique, conforme aux normes de la CEPEJ, de l'UE et de la CNUDCI, des aspects procéduraux de la médiation, y compris la préparation, le début et la fin de la médiation, ainsi que les garanties procédurales et les autres aspects du processus.
VI. Accord de règlement	Ce chapitre couvre les conditions requises pour que les accords de règlements de médiation et les recommandations sur l'application de ces règlements soient conformes aux normes de la CEPEJ, de l'UE et de la CNUDCI.
VII. Incitations à la médiation	Ce chapitre donne des exemples d'incitations économiques pour que les parties tentent une médiation, ainsi que les sanctions éventuelles pour ne pas avoir agi de bonne foi pendant le processus de médiation. L'importance du rôle des juges, avocats et autres agents d'exécution y est aussi soulignée.
VIII. Information sur la médiation	Ce chapitre présente les différents moyens de diffuser l'information sur la médiation et de la promouvoir, ainsi que l'importance de la collecte de données statistiques sur la médiation.
IX. Dispositions transitoires	Ce chapitre explique les approches étape par étape possibles pour mettre en œuvre la nouvelle législation sur la médiation, y compris les dispositions transitoires et des projets pilotes à titre expérimental.

Recommandations concernant l'élaboration de la législation en matière de médiation

Afin d'harmoniser autant que faire se peut les lois nationales sur la médiation, il est fortement recommandé de veiller à ce que toute nouvelle loi ou modification d'une loi existante soit conforme aux documents suivants :

1. Comité des Ministres du Conseil de l'Europe, Recommandation (98) 1 sur la médiation familiale ;
2. Comité des Ministres du Conseil de l'Europe, Recommandation (2001) 9 sur les modes alternatifs de règlement des litiges entre les autorités administratives et les personnes privées ;
3. Comité des Ministres du Conseil de l'Europe, Recommandation (2002) 10 sur la médiation en matière civile ;
4. Comité des Ministres du Conseil de l'Europe, Recommandation CM/Rec(2018)8 relative à la justice restaurative en matière pénale ;
5. Directive 2008/52/CE du Parlement européen et du Conseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale ;
6. Directive 2013/11/UE du Parlement européen et du Conseil du 21 mai 2013 relative au règlement extrajudiciaire des litiges de consommation et modifiant le règlement (CE) no 2006/2004 et la directive 2009/22/CE (directive relative au RELC) ;
7. Loi-type de la CNUDCI sur la médiation commerciale internationale et les accords de règlement internationaux issus de la médiation de 2018(modifiant la loi-type de la CNUDCI sur la conciliation commerciale internationale de 2002).

Le ou les rédacteurs devraient également prendre en compte les éléments suivants :

1. Boîte à outils pour le développement de la médiation et tous les outils élaborés par le Groupe de travail sur la médiation de la CEPEJ au Conseil de l'Europe ;
2. Lignes directrices visant à améliorer la mise en œuvre de la Recommandation existante concernant la médiation en matière pénale de la CEPEJ (CEPEJ(2007)13) ;
3. Lignes directrices visant à améliorer la mise en œuvre des Recommandations existantes concernant la médiation familiale et en matière civile de la CEPEJ (CEPEJ(2007)14) ;
4. Lignes directrices visant à améliorer la mise en œuvre de la Recommandation sur les modes alternatifs de règlement des litiges entre les autorités administratives et les personnes privées de la CEPEJ (CEPEJ(2007)15) ;
5. Guide de bonnes pratiques en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants : Médiation, 2012 ; Conférence de La Haye de droit international privé. Disponible à l'adresse : https ://assets.hcch.net/upload/guide28mediation_fr.pdf.
6. Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation, qui sera bientôt signée, Singapour. Disponible à l'adresse : https ://uncitral.un.org/sites/uncitral.un.org/files/annex_i_-_f.pdf ;
7. une évaluation minutieuse des résultats concrets de toute loi existante en matière de médiation dans la juridiction concernée.

1. Champ d’application

a) Autoriser le recours à la médiation dans les litiges dès lors qu’un règlement est légalement possible en vertu du droit national, éviter les restrictions artificielles du champ d’application de la médiation.
b) Inclure explicitement dans le champ d’application de la loi les médiations menées dans des dossiers internationaux.
c) Renforcer les grands principes de la médiation dans une seule loi afin d’inclure la médiation dans les dossiers faisant intervenir plusieurs domaines du droit (notamment les litiges civils, familiaux, du travail, administratifs et pénaux) ainsi que la médiation extrajudiciaire et judiciaire. Dans le texte, prévoir des exceptions ou des références à d’autres actes juridiques lorsqu’il faut tenir compte des particularités de la médiation dans différents types de litiges ou dans des procédures spécifiques.
d) Décider si des institutions juridiques de droit public peuvent être partie prenante à la médiation en tant que parties au litige, compte tenu en particulier de la médiation dans les litiges administratifs.
e) Ne pas exclure en bloc les litiges sensibles (médiation familiale en cas de violence familiale ou médiation entre la victime et l’auteur de l’infraction), mais prévoir des mesures de protection (dans les obligations du médiateur ou au moyen de critères sur la base desquels un juge peut recommander ou ordonner aux parties de tenter une médiation) pour protéger la partie la plus faible.

Exemples :

1. *La présente loi réglemente les conditions de la médiation dans les litiges civils, les fonctions des autorités qui travaillent dans le domaine de la médiation, les exigences pour les personnes qui veulent fournir des services de médiation, le processus de médiation, les modalités de la médiation conduite ou renvoyée par le tribunal, la responsabilité disciplinaire du médiateur.*
2. *Les dispositions de la présente loi s’appliquent à la médiation extrajudiciaire et judiciaire, sauf en cas de litiges découlant de droits et obligations dont le règlement serait nul en vertu du droit national. La présente loi ne s’applique pas aux tentatives faites par le juge saisi pour régler un litige au cours d’une procédure judiciaire concernant le litige en question.*
3. *Les types de médiation sont la médiation extrajudiciaire et la médiation conduite ou renvoyée par les tribunaux. Les dispositions de la présente loi sur la médiation s’appliquent à la médiation extrajudiciaire et à la médiation judiciaire, sauf disposition contraire de la présente loi. Les dispositions de la présente loi régissant les activités du médiateur s’appliquent également aux juges agissant en qualité de médiateurs, sauf disposition contraire de la présente loi.*
4. *La présente loi s’applique à la médiation dans les litiges nationaux et internationaux.*
5. *La présente loi met en œuvre la législation de l'Union européenne, précisée à l'annexe de cette loi.*
6. *D'autres actes juridiques régissant le règlement des litiges civils peuvent établir des particularités concernant différents types de litiges*[5]*.*

Le recours à la médiation pour régler un litige est possible si les parties sont libres de traiter leur réclamation, à moins qu’une autre loi n’impose la compétence exclusive d’un tribunal ou d’une autre autorité, que la médiation ait lieu avant ou après l’ouverture d’une procédure judiciaire ou autre.
Le recours à la médiation est notamment possible dans les litiges fonciers portant sur l’exécution de l’obligation de faire et dans d’autres litiges relatifs à des questions de propriété,

[5] République de Lituanie, Loi sur la médiation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 1.

dans les litiges familiaux, commerciaux, administratifs, dans les litiges portant sur des questions de protection de l'environnement, dans les litiges de consommation, ainsi que dans tout autre litige si la médiation est adaptée à la nature des relations contentieuses et peut en faciliter le règlement.
Les dispositions de la présente loi s'appliquent également à la médiation pénale et délictuelle dans les litiges de propriété et les demandes en réparation, ainsi qu'aux conflits du travail, sauf disposition contraire prévue dans une loi spéciale.
Les dispositions de la présente loi ne s'appliquent pas au règlement des différends relatifs à l'évaluation et au recouvrement des recettes publiques[6].

2. Définitions

a) Définir (au minimum) les termes « médiation » et « médiateur ». Envisager d'inclure les définitions suivantes : « prescripteur de médiation », « accord d'entrée en médiation » (pour le contrat initial avant la médiation), « accord de règlement de médiation » (pour le contrat final issu de la processus), « parties » et « participants ».
b) Inclure dans la définition de la médiation : confidentiel ; processus structuré ; vise le règlement amiable d'un différend ; deux ou plusieurs parties à un différend ; assistance d'un ou plusieurs médiateurs – tiers neutre.
c) Inclure dans la définition du médiateur : tiers indépendant et neutre ; conduit la médiation ; sans pouvoir décisionnel.
d) Ne pas inclure dans la définition du médiateur ou de la médiation : interdiction pour un médiateur de faire des propositions aux parties pendant la médiation.

Exemples :

« M[édiation] » : Processus structuré et confidentiel, dans lequel un tiers impartial, connu sous le nom de médiateur, assiste les parties en facilitant la communication entre elles afin d'aider à résoudre les questions relevant de leur litige.[7]

'Un médiateur est une personne indépendante et impartiale, sans pouvoir de décision, qui guide les parties à travers la médiation[8].

« Prescripteur de médiation » : désigne toute entité publique ou privée (y compris les dispositifs de médiation judiciaires) qui gère ou administre un processus de médiation mené par un médiateur neutre tiers, quelle que soit sa dénomination ou sa profession (ci-après le « médiateur »), intervenant sous sa direction pour aider des parties à résoudre leur litige à l'amiable[9].

[c]ontrat relatif à la conduite de la médiation [accord d'entrée en médiation] *en tant que contrat écrit entre les parties au conflit et au moins un médiateur*[10].

[6] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 3.
[7] CEPEJ, Groupe de travail CEPEJ ad hoc chargé de l'harmonisation des définitions utilisées par la CEPEJ, Rapport de la 4e réunion, 23-24 janvier 2019, Annexe II : Document CEPEJ(2018)2PROV8. Disponible à l'adresse : https ://rm.coe.int/rapport-reunion-bologne-en-23-24-janvier-2019/1680933333.
[8] République fédérale d'Allemagne, Loi sur la médiation. *Bundesgesetzblatt* I, p. 1577, 2012, Sec. 1 (2).
[9] CEPEJ, Code de conduite européen relatif aux prescripteurs de médiation, extrait de la *Boîte à outils pour le développement de la médiation – Assurer la mise en œuvre des lignes directrices de la CEPEJ sur la médiation*, CEPEJ(2018)7REV [consulté le 2019-03-10], disponible sur : https ://rm.coe.int/boite-a-outils-pour-le-developpement-de-la-mediation-assurer-la-mise-e/16808c3f53, p. 26.
[10] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll. art. 14 (e).

[a]ccord de règlement [accord de règlement dans le cadre d'une médiation] – *accord écrit conclu entre les parties à l'issue du processus de médiation*[11]*.*

« P]arties » désigne les personnes physiques ou morales qui ont recours à la médiation[12]*.*

Les autres parties prenantes de la médiation – avocats, représentants, traducteurs, experts et spécialistes, salariés d'un organisme de médiation et autres personnes qui y participent avec le consentement mutuel des parties[13]*.*

3. Médiateur

3.1. Normes concernant les médiateurs

3.1.1. Liste

a) Établir une liste ou un registre des médiateurs, géré par une autorité publique ou une association professionnelle.

Exemples :

Le Registre [des médiateurs] est un système d'information de l'administration publique géré par le ministère.
Seule une personne inscrite au registre est autorisée à fournir les services d'un médiateur si son autorisation d'exercer les activités du médiateur n'a pas été suspendue, à moins que la présente loi n'en dispose autrement.[14]

b) Faire passer un examen (pratique et théorique) aux candidats qui veulent figurer sur la liste.

Exemple :

1. Les personnes qui souhaitent figurer sur la liste des médiateurs de la République de Lituanie doivent remplir les conditions suivantes : <...> 3) passer le test d'aptitude des médiateurs <...> ;

<Lors du test d'aptitude des médiateurs, les examinateurs testent l'aptitude des personnes qui souhaitent figurer sur la liste des médiateurs de la République de Lituanie à fournir des services de médiation, à mettre en pratique leurs connaissances et compétences théoriques, ainsi que leurs connaissances de l'éthique professionnelle <...>[15]*.*

c) Décourager les personnes qui ne figurent pas sur la liste ou leur interdire de faire de la médiation.

Exemple :

[11] République d'Azerbaïdjan, Loi de la République d'Azerbaïdjan sur la médiation, 2019, art. 1.0.7.
[12] République de Chypre, De certains aspects de la médiation en droit civil, *Journal officiel*, Supplément 1(I) : 16.11.2012, n° 4365, 2012, No L.159 (I)/ 2012, art. 2.
[13] République d'Azerbaïdjan, Loi de la République d'Azerbaïdjan sur la médiation, 2019, art. 1.0.6.
[14] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll. art. 14 et 15(1).
[15] République de Lituanie, Loi sur la médiation, *Valstybės žinios*, 2008, n° 87-3462 ; *Teisės aktų registras*, n° 2017-12053, art. 6 et 11.

Dans la mesure où les faits ne constituent pas une infraction pénale relevant de la compétence des tribunaux, la commission d'une infraction administrative est passible d'une amende pouvant aller jusqu'à 3 500 euros,
1. si une personne se présente comme médiateur agréé ou utilise un titre similaire pouvant prêter à confusion <…>[16]
1. <...> .

d) Établir au sein d'une autorité publique ou d'une association professionnelle responsable un organisme disciplinaire qui peut suspendre des médiateurs ou les radier s'ils ne répondent plus aux critères fixés.

Exemple :

<...> Le ministère se réserve le droit de radier un médiateur du registre

a) si le médiateur dont l'autorisation d'exercer les activités de médiateur a été suspendu en vertu de l'article 21(1) a) ne demande pas le renouvellement de son agrément dans les cinq ans suivant la suspension de son autorisation d'exercer les activités de médiateur, b) si le médiateur dépose au ministère une demande de radiation du registre, il est radié du registre le dernier jour du mois civil suivant le mois au cours duquel sa demande a été déposée, c) si l'autre État membre a retiré au médiateur invité son autorisation d'exercer des activités comparables à celles d'un médiateur, le médiateur invité est radié du registre à compter du jour où la décision prend effet, ou d) s'il était inscrit au registre alors qu'il ne remplissait pas certaines conditions pour y figurer. <…> Le ministère radie tout médiateur du registre en cas de manquement grave ou répété aux obligations du médiateur prévues par la présente loi, malgré les avertissements écrits reçus du ministère[17]*.*

3.1.2. Normes

a) Établir des critères de base pour les candidats qui veulent devenir médiateurs, y compris l'âge, l'éducation, la réputation et l'absence de casier judiciaire.

Exemple :

Toute personne qui répond aux critères suivants peut figurer sur la liste :
- *avoir la capacité de contracter ;*
- *ne pas avoir fait l'objet d'une condamnation* res iudicata *pour avoir commis intentionnellement une infraction pénale faisant l'objet de poursuites d'office ;*
- *avoir au moins le premier niveau d'études postsecondaires ;*
- *avoir suivi une formation à la médiation conformément au programme établi par le ministre de la Justice <...>*[18]*.*

[16] République d'Autriche, Loi sur la médiation en matière civile. *Bundesgesetzblatt* I n° 29/2003, art. 32.
[17] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll. art. 22.
[18] République de Slovénie, Loi sur le règlement extrajudiciaire des différends. *Uradni List*, n° 97/2009, art. 8 (1).

b) Établir l'obligation pour les médiateurs d'adhérer à un code de conduite.

<u>Exemple :</u>
Le ministère de la Justice et les administrations publiques compétentes, en collaboration avec les institutions de médiation, encouragent et exigent la formation initiale et continue adaptée des médiateurs, l'élaboration de codes de conduite volontaires, ainsi que l'adhésion des médiateurs et des institutions de médiation à ces codes[19].

a) Utiliser la référence au Code de conduite européen pour les prescripteurs de médiation comme norme minimale[20].

<u>Exemple :</u>
Un médiateur doit adhérer au Code de conduite européen pour les médiateurs[21].

3.1.3. Formation

a) Exiger une formation de base et spécifique comme condition préalable à l'inscription des médiateurs sur la liste. Définir les exigences de formation pour les juges, les avocats, les notaires, les policiers, les procureurs et les autres professionnels qui veulent devenir médiateurs, en tenant compte des antécédents, du niveau initial de connaissances et des compétences pratiques des personnes à former (si différentes des conditions générales).

<u>Exemple :</u>
La formation des médiateurs comprend l'acquisition et le développement organisés des connaissances pratiques et des compétences nécessaires à l'exécution indépendante, efficace et avec succès des tâches de médiation. La formation des médiateurs peut être de base et spécialisée. La formation de base est obligatoire pour obtenir le statut de médiateur. Des formations spécialisées sont organisées dans des domaines particuliers des différents types de litiges[22].

a) Mettre en place un système d'accréditation et de contrôle des institutions nationales de formation à la médiation.

<u>Exemple :</u>
Le programme de formation visé à l'article 44 de la présente est mis en œuvre par des autorités publiques, d'autres autorités et organisations et par des personnes morales agréées par le ministère. Les conditions et la procédure d'agrément visées au paragraphe 1 du présent article, ainsi que le suivi de la mise en œuvre de la formation, sont étroitement réglementés par un acte juridique du ministre. Le ministère tient un registre des agréments délivrés visés au paragraphe 1 du présent article[23].

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[19] Royaume d'Espagne, Loi sur la médiation en matière civile et commerciale. *Boletín Oficial del Estado*, n° 5/2012, art. 12.
[20] Commission de l'Union européenne, Direction de la justice, Code de conduite européen pour les médiateurs, 2004. Disponible à l'adresse : http ://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_fr.pdf.
[21] République de Lituanie, Loi sur la médiation, Valstybės žinios, 2008, n° 87-3462 ; Teisės aktų registras, n° 2017-12053, art. 4 (3).
[22] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 43.
[23] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 45.

b) Exiger que la formation prévoie une partie pratique et une partie théorique et préciser les exigences minimales pour les thèmes qui seront abordés pendant la formation. Utiliser le Programme de base de formation des médiateurs[24] comme norme minimale.

<u>Exemple :</u>

(1) Après consultation du Conseil consultatif pour la médiation, le ministre fédéral de la Justice adopte par ordonnance des dispositions plus spécifiques sur la formation des médiateurs. Les contenus de la formation peuvent varier en fonction des domaines spécialisés.
(2) La partie théorique est divisée en domaines de formation spécifiques et comprend 200-300 unités de formation ; la partie pratique comprend 100-200 unités de formation.
1. La partie théorique inclut
a) une introduction à l'histoire des problèmes et à l'évolution de la médiation, y compris les hypothèses de base et les principes directeurs ;
b) la procédure, les méthodes et les phases de la médiation, en accordant une attention particulière aux approches axées sur la négociation et le règlement des différends ;
c) les bases de la communication, en particulier des techniques de communication, de de questionnement et de négociation, de la conduite et de la modération des réunions, en particulier dans les situations de conflit ;
d) l'analyse des conflits ;
e) les domaines d'application de la médiation ;
f) les théories de la personnalité et les formes d'intervention psychosociale ;
g) les questions éthiques de la médiation, en particulier la position du médiateur ;
h) les questions juridiques de la médiation, notamment en matière civile, ainsi que les aspects juridiques des conflits qui doivent faire l'objet d'une attention particulière dans le cadre d'une médiation ;
2. La partie pratique inclut
a) l'expérience individuelle et des séminaires pratiques pour l'application des techniques de médiation au moyen de jeux de rôles, de simulations et d'une réflexion ;
b) le travail en groupe de pairs ;
c) une étude de cas et la participation à la supervision pratique dans le domaine de la médiation.
(3) la formation requise pour une profession et l'expérience pratique acquise par son exercice doivent être prises en compte de manière adéquate (article 10)[25].

c) Exiger des médiateurs qu'ils se forment régulièrement et mènent un certain nombre de médiations pour continuer de figurer sur la liste.

<u>Exemple :</u>

Une personne qui – (a) est inscrite au Registre des médiateurs <...> doit continuer à se former à la médiation en suivant au moins vingt-quatre (24) heures de formation tous les trois (3) ans à compter de la date de son inscription au Registre des médiateurs, et présenter une attestation de formation au ministre <...>[26].

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[24] CEPEJ, Programme de base de formation des médiateurs. Extrait de la Boîte à outils pour le développement de la médiation – Assurer la mise en œuvre des lignes directrices de la CEPEJ sur la médiation, CEPEJ(2018)7REV [consulté le 2019-03-10], disponible sur : https ://rm.coe.int/boite-a-outils-pour-le-developpement-de-la-mediation-assurer-la-mise-e/16808c3f53 p. 20-24

[25] République d'Autriche, Loi sur la médiation en matière civile. *Bundesgesetzblatt* I n° 29/2003, art. 29.

[26] République de Chypre, De certains aspects de la médiation en droit civil, *Journal officiel*, Supplément 1(I) : 16.11.2012, n° 4365, 2012, No L.159 (I)/ 2012, art. 12.

d) Mettre en place un système de reconnaissance des formations suivies ou des qualifications obtenues à l'étranger.

> <u>*Exemple :*</u>
> *Le ministre inscrit au Registre la personne physique qui le demande :*
> *<…>*
> *si elle a réussi l'examen de Médiateur ou si sa qualification est reconnue conformément à une autre réglementation juridique[2.] <….> >*
>
> [2] *Loi n° 18/2004 Coll. sur la reconnaissance des qualifications professionnelles et autres qualifications des États membres de l'Union européenne et de certains membres d'autres États, et de la modification de certaines lois (loi sur la reconnaissance des qualifications professionnelles), telle que modifiée.*[27]

e) Envisager d'inclure la formation à la médiation dans les programmes de certaines facultés (droit, psychologie, etc.) des universités.

3.2. Obligations, droits, responsabilité

3.2.1. Obligations

a) Obliger les médiateurs à respecter les normes d'indépendance, de neutralité et d'impartialité.

> <u>*Exemple :*</u>
> *Peuvent être agréés par la commission visée à l'article 1727 les médiateurs qui répondent au moins aux conditions suivantes :*
> *<…>*
> *3° présenter les garanties d'indépendance, de neutralité et d'impartialité nécessaires à l'exercice de la profession de médiateur agréé*[28] *;*

b) Obliger les médiateurs à respecter la règle de confidentialité, avec des exceptions bien précises.

> <u>*Exemple :*</u>
> *Le médiateur et les personnes impliqués dans le processus de médiation ont un devoir de confidentialité, à moins que d'autres textes n'en disposent autrement. Cette obligation concerne toutes les informations portées à leur connaissance dans l'exercice de leur activité. Nonobstant toute autre disposition légale concernant l'obligation de confidentialité, cette obligation ne s'applique pas*
> *1. si la divulgation du contenu de l'accord de règlement conclu dans le cadre du processus de médiation est nécessaire à la mise en œuvre ou à l'exécution dudit accord,*
> *2. si la divulgation est nécessaire pour des raisons impérieuses d'ordre public, en particulier lorsqu'elle est nécessaire pour éviter une atteinte au bien-être d'un enfant ou pour prévenir un préjudice grave à l'intégrité physique ou psychique d'une personne, ou*
> *3. si les faits en question sont de notoriété publique ou ne sont pas suffisamment importants*

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[27] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll. art. 16 (1 d).

[28] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1726(1-3).

pour justifier un traitement confidentiel.
Le médiateur informe les parties de l'étendue de son devoir de confidentialité[29]*.*

c) Obliger les médiateurs à divulguer tout problème susceptible d'affecter leur indépendance et leur impartialité et mettre fin à la médiation s'il persiste.

Exemple :
Le médiateur informe les parties de toutes les circonstances qui pourraient nuire à son indépendance ou à son impartialité. Dans ce cas, il ne peut agir en qualité de médiateur que si les parties y consentent expressément[30]*.*

d) Faire obligation aux médiateurs de communiquer aux parties toutes les informations nécessaires sur leur expérience professionnelle, sur le processus de médiation, les droits et obligations des parties et sur l'effet juridique des scénarios qui en résulteront.

Exemple :
Avant l'entrée en médiation, le Médiateur informe les parties au conflit de son rôle pendant la médiation, de l'objet et des principes de la médiation, des effets du contrat sur l'exécution de la médiation (contrat de médiation[31]*) et de l'accord de règlement de la médiation, de la possibilité de mettre fin à la médiation à tout moment, des honoraires du médiateur pour l'exécution de la médiation et du coût de la médiation. Le Médiateur informe clairement les parties au conflit du fait que l'entrée en médiation n'affecte en rien le droit des parties au conflit de demander la protection de leurs droits et intérêts autorisés par voie de procédure judiciaire, et que seules les parties au conflit sont responsables du contenu de l'accord de règlement de la médiation*[32]*.*

3.2.2. Droits

a) Ne pas interdire aux médiateurs de tenir des réunions individuelles (apartés) avec chacune des parties.

Exemple :
Le médiateur a les mêmes obligations envers toutes les parties. Il facilite la communication entre les parties et veille à ce que ces dernières participent au processus de médiation de manière adéquate et équitable. Il peut s'entretenir séparément avec les parties, avec l'accord de toutes les parties[33]*.*

b) Ne pas interdire aux médiateurs de formuler des propositions pour le règlement à la demande ou avec le consentement des parties.

[29] République fédérale d'Allemagne, Loi sur la médiation. *Bundesgesetzblatt* I, p. 1577, 2012, art. 4.
[30] République fédérale d'Allemagne, Loi sur la médiation. *Bundesgesetzblatt* I, p. 1577, 2012, art. 3 (1).
[31] Plus communément appelé accord de médiation.
[32] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll. art. 3.4).
[33] République fédérale d'Allemagne, Loi sur la médiation. *Bundesgesetzblatt* I, p. 1577, 2012, art. 2 (3).

Exemple :

À la demande ou avec le consentement des parties, le médiateur peut faire une proposition de règlement amiable. La proposition peut être fondée sur ce que le médiateur juge approprié compte tenu de ce que les parties ont proposé dans le cadre de la médiation[34].

c) Permettre aux médiateurs de recevoir une rémunération ou une compensation.

Exemple :

Un médiateur a droit à des honoraires et au remboursement des dépenses engagées dans le cadre de la médiation, à moins qu'il n'ait accepté d'intervenir à titre gracieux. Les honoraires et frais sont à la charge des parties[35].

d) Permettre aux médiateurs de participer à la rédaction de l'accord de règlement de la médiation sauf si ce n'est pas compatible avec le droit national contraignant, pour des raisons graves.

Exemple :

<Le médiateur participe à la préparation et à la rédaction de l'accord, si les parties à la procédure en conviennent <...>[36].

e) Permettre aux médiateurs de mettre fin à la médiation si un accord de règlement n'est pas probable, sans avoir à motiver sa décision.

Exemple :

Les parties peuvent mettre fin à la médiation à tout moment. Le médiateur peut mettre fin à la médiation, en particulier s'il est d'avis qu'on ne saurait raisonnablement attendre une communication autonome ou un accord entre les parties[37].

3.2.3. Responsabilité

a) Engager la responsabilité civile des médiateurs et des prescripteurs de médiation.

Exemple :

Le médiateur est responsable de tout dommage causé aux parties du fait de son non-respect du code d'éthique, de son comportement illégal, intentionnel ou par négligence grave, conformément aux règles générales de la responsabilité en matière de dommages et intérêts[38].

b) Engager la responsabilité administrative ou disciplinaire des médiateurs et des prescripteurs de médiation en cas de manquement. Envisager de rendre publiques les

[34] République de Finlande, Loi sur la médiation en matière civile et la confirmation des règlements devant les tribunaux ordinaires, n° 394/2011, art. 7(2).
[35] République de Pologne, Code de procédure civile, *Dziennik Ustaw*, 1964, point 1595 de 2015, article 183[5].
[36] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 26.
[37] République fédérale d'Allemagne, Loi sur la médiation. *Bundesgesetzblatt* I, p. 1577, 2012, art. 2(5).
[38] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 35.

décisions dépersonnalisées de l'organe disciplinaire, comme c'est le cas des décisions judiciaires.

<u>Exemple :</u>

Les missions de la Commission [fédérale de médiation] sont les suivantes :

<…>

traiter les plaintes à l'encontre des médiateurs ou des organismes qui dispensent les formations, donner des avis en cas de contestation des honoraires des médiateurs et imposer des sanctions à l'encontre des médiateurs qui ne satisferaient plus aux conditions prévues à l'article 1726 ou aux dispositions du code de déontologie établi par la Commission[39].

c) Définir clairement les sanctions applicables.

<u>Exemple :</u>

La commission disciplinaire et de traitement des plaintes <...> peut imposer les sanctions suivantes à l'égard d'un médiateur certifié :

- *l'avertissement ;*
- *la réprimande ;*
- *l'obligation d'accomplir un stage pendant la durée et selon les modalités fixées par la commission disciplinaire et de traitement des plaintes ;*
- *l'obligation d'exercer sa profession exclusivement en comédiation pendant la durée et selon les modalités fixées par la commission disciplinaire et de traitement des plaintes ;*
- *la suspension pour une période qui ne peut excéder un an ;*
- *le retrait de la certification.*[40].

d) Exiger une assurance responsabilité professionnelle.

<u>Exemple :</u>

(1) Le médiateur souscrit une assurance responsabilité professionnelle auprès d'un assureur autorisé à exercer son activité en Autriche afin de couvrir les dommages résultant de son activité et la renouvelle pendant toute la durée de son inscription sur la liste des médiateurs.

(2) Le contrat d'assurance doit inclure les dispositions suivantes :

1. le droit autrichien est applicable au contrat ;

2. le montant minimum de l'assurance s'élève à 400 000 euros par sinistre ;

3. l'exclusion ou la limitation de la garantie subséquente de l'assureur n'est pas admissible.

(3) Les assureurs sont tenus d'informer immédiatement et spontanément le ministre fédéral de la Justice de toute circonstance entraînant ou pouvant entraîner la résiliation ou la limitation de la couverture d'assurance ou de tout écart par rapport à l'assurance initiale et de fournir des informations sur ces circonstances à la demande du ministre fédéral de la Justice. Le médiateur doit à tout moment être en mesure de prouver qu'il a souscrit une assurance responsabilité professionnelle[41].

[39] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1727(2-6).

[40] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1727/5 (4).

[41] République d'Autriche, Loi sur la médiation en matière civile. *Bundesgesetzblatt* I n° 29/2003, art. 19.

3.3. Prescripteurs de médiation

a) Établir un registre des prescripteurs de médiation et fixer des critères clairs pour l'inscription au registre, la suspension et la radiation du registre.

<u>Exemple :</u>

Les entités publiques ou privées qui donnent des garanties de sérieux et d'efficacité, sont autorisées à mettre en place des prescripteurs de médiation et, à la demande de toute partie intéressée, à gérer les procédures de médiation dans les domaines visés à l'article 2 du présent décret. Les prescripteurs doivent être inscrits au registre.
La création du registre et sa révision, l'inscription, la suspension et la radiation des personnes inscrites, la constitution de sections distinctes du registre pour le traitement des dossiers nécessitant une expertise spécifique des questions de consommation et des affaires internationales, ainsi que la fixation des honoraires dus aux prescripteurs de médiation sont régis par des décrets spéciaux du ministre de la Justice, en consultation avec le ministre du Développement économique, pour ce qui concerne l'objet de la consommation <…> [42].

1. Les prescripteurs de services de médiation établis par des entités publiques et privées sont inscrits au registre, sur simple demande.
2. Le directeur s'assure du professionnalisme et de l'efficacité des candidats et, en particulier :
a) la capacité financière et organisationnelle du demandeur et la compatibilité de la médiation avec l'objet social ; pour démontrer sa capacité financière, le demandeur doit disposer d'un capital d'au moins 10 000 euros ; pour démontrer sa capacité organisationnelle, le demandeur doit certifier qu'il peut exercer l'activité de médiation dans au moins deux régions italiennes ou dans au moins deux provinces de la même région, même par les accords visés dans l'Article 7, au paragraphe 2, lettre c) ;
b) la possession par le demandeur d'une assurance d'un montant d'au moins 500.000,00 EUR pour la responsabilité découlant, de quelque manière que ce soit, de la conduite de la médiation ;
c) les exigences d'honorabilité des membres, associés, administrateurs ou représentants des prescripteurs susmentionnés, conformément à celles prévues à l'article 13 du décret législatif n° 58 du 24 février 1998 ;
d) la transparence administrative et comptable du médiateur, y compris pour les relations juridiques et économiques entre le médiateur et l'entité s'il s'agit d'une division interne de l'entité, afin de démontrer l'indépendance financière et opérationnelle nécessaire ;
e) les garanties d'indépendance, d'impartialité et de confidentialité dans l'exécution du service de médiation et la conformité du règlement avec la loi et le présent décret, ainsi qu'en ce qui concerne la relation juridique entre le prescripteur et les médiateurs ;
f) le nombre de médiateurs, au moins cinq, qui ont déclaré leur disponibilité pour mener des médiations pour le demandeur ;
g) les bureaux du prescripteur[43].

b) Encourager l'établissement de règles de procédure et le respect d'un code de conduite pour les prescripteurs de médiation. Utiliser le Code de conduite européen relatif aux prescripteurs de médiation[44] comme norme éthique minimale.

[42] République d'Italie, Décret législatif du 4 mars 2010, n. 28, art. 16 (1 et 2).
[43] République d'Italie, Décret du Ministère de la Justice, 2010, n. 180, art. 4.
[44] CEPEJ, Code de conduite européen relatif aux prescripteurs de médiation, extrait de la *Boîte à outils pour le développement de la médiation – Assurerla mise en œuvre des lignes directrices de la CEPEJ sur la médiation*, CEPEJ(2018)7REV [consulté le 2019-03-10], disponible sur : https ://rm.coe.int/boite-a-outils-pour-le-developpement-de-la-mediation-assurer-la-mise-e/16808c3f53, p. 25-28.

> <u>*Exemple :*</u>
> *Le prescripteur de médiation soumet au ministère de la Justice, en même temps que la demande d'inscription au registre, son règlement et son code d'éthique et l'informe de tout changement ultérieur. Le règlement doit prévoir, conformément au présent décret législatif, les procédures en ligne que le prescripteur de médiation est susceptible d'utiliser pour garantir la sécurité des communications et la confidentialité des données. Les tableaux des honoraires versés aux prescripteurs de médiation établis par des entités privées doivent être joints au règlement et soumis pour approbation*[45]*.*

c) Soumettre les prescripteurs de médiation à l'obligation de confidentialité concernant le processus de médiation.

> <u>*Exemple :*</u>
> *Sauf si les parties en conviennent autrement, les parties à un différend, les médiateurs et les prescripteurs de médiation s'engagent à garder confidentielles toutes les informations obtenues pendant la médiation ou qui s'y rapportent <...>*[46]*.*

3.4. Autres professions juridiques

a) Autoriser les autorités judiciaires à conduire des médiations (selon le droit national contraignant).

> <u>*Exemple :*</u>
> *Le Conseil de la magistrature :*
> *(1) définit la procédure pour l'organisation et l'exécution de la médiation judiciaire ;*
> *(2) définit les conditions auxquelles que les juges qui veulent exercer en tant que médiateurs doivent satisfaire, ainsi que la procédure d'octroi et de retrait du statut de médiateur concernant les juges ;*
> *(3) définit la procédure pour l'établissement et l'administration de la liste des juges qui ont obtenu le statut de médiateur judiciaire <…>*[47]*.*
>
> *<…> Les juges peuvent conduire une médiation uniquement en dehors de leurs heures de travail et uniquement à titre gracieux*[48]*.*

b) Autoriser d'autres professions juridiques (avocats[49], notaires, membres des forces de l'ordre) à mener des médiations, sous réserve d'une formation et d'un examen adéquats, le cas échéant.

> <u>*Exemple :*</u>
> *(1) Le barreau a organisé la formation des avocats à la médiation et organise l'examen des*

[45] République d'Italie, Décret législatif du 4 mars 2010, n. 28, art. 16 (3).
[46] République de Lituanie, Loi sur la médiation, *Valstybės žinios*, 2008, n° 87-3462 ; *Teisės aktų registras*, n° 2017-12053, art. 17 (1).
[47] République de Lituanie, Loi sur la médiation, *Valstybės žinios*, 2008, n° 87-3462 ; *Teisės aktų registras*, n° 2017-12053, art. 3 (3).
[48] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 33.
[49] Dans le Manuel, le terme « avocat » est utilisé au sens de la Recommandation Rec (2000)21 du Conseil de l'Europe : « une personne qualifiée et habilitée conformément au droit national à plaider, à agir au nom de ses clients, à pratiquer le droit, à ester en justice ou à conseiller et représenter ses clients en matière juridique ».

médiateurs en vertu de la loi sur la médiation.
(2) Sauf disposition contraire, les dispositions de la loi sur la médiation s'appliquent également au contenu du texte et à ses exigences <...>[50].

a) Définir les limites d'un médiateur agissant en qualité de juge, d'arbitre, d'avocat (conseiller juridique), de notaire, de membres des forces de l'ordre, de policier police ou de procureur dans un litige impliquant les mêmes parties.

Exemples :
Toute personne qui est ou a été partie, représentant d'une partie, conseiller ou instance de décision dans un conflit ne peut pas intervenir en qualité de médiateur dans ce conflit. De la même manière, un médiateur ne peut pas représenter, conseiller ou décider dans un conflit auquel la médiation se rapporte. Toutefois, à l'issue de la médiation et avec l'accord de toutes les parties concernées, il peut intervenir dans le cadre de ses autres compétences professionnelles pour exécuter le résultat de la médiation[51].

4. Entrée en médiation

4.1. Base volontaire

a) Permettre aux parties d'engager une médiation à tout moment, avant (dans une clause de médiation) ou après la survenance du litige.

Exemple :
Toute partie peut proposer aux autres parties, indépendamment de toute procédure judiciaire ou arbitrale, avant, pendant ou après le déroulement d'une procédure judiciaire, de recourir au processus de médiation <...>[52].

b) Veiller au respect de la clause de médiation qui dispose que toute action juridictionnelle ou requête auprès d'une institution arbitrale est irrecevable à moins qu'une médiation n'ait été tentée ou que le délai fixé dans la clause de médiation ne soit arrivé à échéance.

Exemple :
L'accord est contraignant si les parties sont convenues de tenter une médiation et se sont expressément engagées à n'intenter ou poursuivre aucune action judiciaire, arbitrale ou autre pendant une période définie ou jusqu'à ce que des conditions bien précises aient été remplies. Dans ce cas, le tribunal, les arbitres ou les autres instances saisis dans la même affaire rejettent, à la demande de l'autre partie, toute demande d'introduction ou de poursuite de l'action[53] ;

c) Établir précisément la procédure d'entrée en médiation par l'une des parties, en indiquant clairement la forme de la proposition, ainsi que le délai dans lequel l'autre partie doit répondre.

[50] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll, Partie 7, sec. 49a.
[51] République d'Autriche, Loi sur la médiation en matière civile. *Bundesgesetzblatt* I n° 29/2003, art. 16 (1).
[52] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1730 (1).
[53] République de Croatie, Loi sur la médiation. *Narodne Novine*, 2011, n° 18/11, art. 18.

Exemple :

Lorsqu'une partie présente une proposition relative à la conclusion d'un accord d'entrée en médiation, l'autre partie doit se prononcer par écrit sur ladite proposition dans un délai de 15 jours.

Si le recours au processus de médiation est prescrit par une loi spéciale préalablement à une procédure judiciaire ou autre, ou si les parties sont convenues, au moment de conclure l'accord, de s'efforcer de régler le différend par la médiation avant de recourir à une procédure judiciaire ou autre, la partie concernée propose à l'autre partie, par écrit, de conclure un accord d'entrée en médiation[54].

d) Encourager les juges et les autres agents chargés du règlement des différends à recommander la médiation et à fournir les informations nécessaires aux parties.

Exemple :

(1) Dans le cadre d'une procédure judiciaire, administrative ou autre, l'instance chargée de la procédure peut, dans les litiges visés à l'article premier de la présente loi, recommander aux parties de régler leur différend par la médiation conformément aux dispositions de la présente loi si elle estime que le litige peut être réglé par ce moyen.
2) L'autorité visée au paragraphe 1 du présent article peut convier les parties à une réunion d'information sur le recours à la médiation[55].

4.2. Base obligatoire

4.2.1. Participation à une séance initiale de médiation, préalablement à une procédure judiciaire

a) Envisager d'introduire l'obligation, pour les parties, de participer à une séance initiale de médiation ou une séance d'information sur la médiation avec un médiateur, et prévoir la possibilité de poursuivre la médiation au cours de la même séance si les parties en conviennent.
b) Permettre aux parties de se retirer de la médiation après la séance initiale sans leur demander de motiver leur décision.
c) Insister sur le fait que les parties ne peuvent pas être contraintes à régler leur différend.
d) Envisager de faire de la participation à une séance initiale de médiation une condition préalable aux procédures judiciaires concernant certains types de litiges. Envisager d'inclure au moins les litiges relatifs au droit de la famille, au droit du travail ainsi qu'à la copropriété et aux relations entre voisins.
e) Veiller à ce que la participation à la séance initiale n'entraîne pas de frais importants pour les parties ni de retards importants pour intenter une action judiciaire.
f) Veiller à ce que les garanties procédurales décrites au chapitre 5.4 soient respectées.
g) Indiquer clairement quand l'obligation de tenter une médiation est satisfaite et quand les parties sont autorisées à intenter une action judiciaire.
h) Envisager de mettre en œuvre des projets pilotes pour tester l'obligation de tenter une médiation dans la pratique avant d'élargir de telles pratiques à l'ensemble du système, comme décrit au chapitre 9.

[54] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 17.
[55] République de Croatie, Loi sur la médiation. *Narodne Novine*, 2011, n° 18/11, art. 19.

Exemple :

Toute personne qui a l'intention d'introduire une action en justice dans un litige relatif à des problèmes de copropriété, de droits réels immobiliers, de partage, de succession, de pactes familiaux, de location, de bail, de prêt, de location à des fins commerciales, d'indemnisation pour faute médicale et/ou paramédicale ou pour diffamation par voie de presse ou par tout autre moyen publicitaire, d'assurance, de contrat bancaire et financier doit, préalablement à une action en justice et avec l'assistance d'un conseiller juridique, participer à la procédure de médiation prévue dans le présent décret ou la procédure de conciliation <...>. La tentative de médiation est une condition préalable à la procédure judiciaire. <...> Lorsque la médiation est une condition préalable à toute procédure judiciaire, la condition est réputée remplie même si la première réunion avec le médiateur se conclut sans qu'il y ait eu accord[56].

La durée de la procédure de médiation est limitée à trois mois[57].

<…> Lors de la première réunion, le médiateur explique aux parties la fonction et les modalités de la médiation. Lors de cette même réunion, le médiateur invite ensuite les parties et leurs avocats à faire part de leurs commentaires concernant la possibilité d'engager une médiation et, le cas échéant, il conduit la médiation <…>[58].

Sans préjudice des dispositions des paragraphes 5 bis et 5 ter du présent article, en liaison avec le décret visé au paragraphe 2 de l'article 16, il est décidé ce qui suit : <...> d) la réduction du montant minimal des honoraires dans les cas où la médiation est une condition préalable en vertu du paragraphe 1-bis de l'article 5 ou est ordonnée par le tribunal en vertu du paragraphe 2 de l'article 5 <…>.
En l'absence d'accord à l'issue de la première réunion, aucune indemnisation n'est due au prescripteur de médiation[59].

29.1. Le médiateur explique l'essence, les avantages et les règles du processus de médiation aux parties qui assistent à la séance de médiation initiale, conjointement et séparément. Le même jour ou à la demande des parties, un autre jour désigné par le médiateur, les parties devraient décider si elles veulent assister aux séances de médiation ultérieures.
29.2. Si, après avoir fourni les informations prévues à l'article 22 de la présente loi (à l'exclusion de l'article 22.1.1) et la notification indiquant la date, l'heure et le lieu de la première séance de médiation, les parties ou l'une d'elles ont refusé de participer à la médiation initiale par écrit ou ne sont pas présentes à la séance, l'organisation de médiation délivre un certificat de "non-participation à la séance initiale" qui indique le nom des personnes présentes et les présente aux parties. Sauf si décidé autrement entre les parties, la notification, prévue par la première phrase du présent article, doit être présentée aux parties 5 jours avant la tenue de la première séance de médiation.
29.3. Si l'une des parties ou les deux ne s'entendent pas pour poursuivre le processus de médiation, et si le médiateur refuse de poursuivre le processus de médiation conformément aux articles 3.3 et 26.4 de la présente loi, le médiateur doit mettre fin au processus de médiation et délivrer un certificat de "Non-poursuite après la médiation initiale" et le présenter aux parties.
29.4. L'absence d'une partie à la première séance de médiation sans excuse valable entraîne la responsabilité prévue par la loi.
29.5. Si les parties décident de poursuivre le processus de médiation, un accord sur l'application du processus de médiation est conclu entre elles et le processus de médiation est mené à bien conformément à l'article 24 de la présente loi.

[56] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 5 (1bis et 2bis).
[57] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 6 (1).
[58] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 8 (1).
[59] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 17 (4 et 5ter)

29.6. Si les parties ne parviennent pas à conclure un accord de règlement à l'issue du processus de médiation et si le médiateur refuse de poursuivre le processus de médiation conformément aux articles 3.3 et 26.4 de la présente loi, le médiateur met fin au processus de médiation, prépare le protocole pertinent et le présente aux parties.
29.7. Dès réception du rapport ou du protocole visé aux articles 29.2, 29.3 et 29.6 de la présente loi, la partie peut saisir le tribunal ou l'arbitrage (jury). Le rapport ou le protocole pertinent doit être joint à la demande. [60]

4.2.2. Médiation renvoyée par un juge

a) Permettre aux juges, après qu'ils ont apprécié la nature du dossier et s'ils le jugent opportun, de renvoyer les parties à une séance initiale de médiation avant de poursuivre la procédure judiciaire.

Exemple :
Le président de la chambre juridictionnelle saisie peut, lorsque cela est faisable et opportun, ordonner aux parties de se rencontrer une première fois pendant trois heures en présence d'un médiateur agréé (ci-après le « médiateur ») et surseoir à statuer pour une durée maximale de trois mois. Si les participants ne s'entendent pas sur le médiateur dans un délai raisonnable, le président de la chambre juridictionnelle en choisit un sur la liste établie par le ministère. Au bout de trois mois, le tribunal reprend la procédure. La première réunion ne peut être ordonnée pendant toute la durée de la mesure provisoire de protection en cas de violence domestique[61]*.*

b) Préciser ce que l'injonction du tribunal renvoyant les parties à tenter la médiation doit contenir ; au minimum, la durée de la mission et le médiateur choisi par les parties, ou dans l'absence d'un tel choix, désigné par un juge.

Exemple :

Les parties, ou en l'absence des parties, leur avocat, peuvent demander conjointement au juge de désigner le médiateur ou les médiateurs qu'elles présentent. Le juge accède à cette demande, sauf si le médiateur ou les médiateurs proposés par les parties ne satisfont pas aux conditions visées à l'article 1726.
Si les parties ne s'accordent pas sur le médiateur ou les médiateurs à désigner, le juge désigne, de préférence à tour de rôle, un médiateur ou des médiateurs agréés selon l'article 1727 sur la base d'une liste de tous les médiateurs établie par la Commission fédérale de médiation. Dans la mesure du possible, le juge choisit un médiateur établi à proximité du domicile des parties.
La décision ordonnant aux parties de tenter de résoudre le litige par une médiation visée au paragraphe 1er mentionne le nom et la qualité du médiateur agréé ou des médiateurs agréés, fixe la durée de la mission, sans que celle-ci puisse excéder six mois, et fixe la cause à la première date utile suivant l'expiration du délai.[62].

[60] République d'Azerbaïdjan, Loi de la République d'Azerbaïdjan sur la médiation, 2019, art. 28.
[61] République tchèque, Code de procédure civile. 1963 (tel que modifié en 2012), No 99/1963 Coll. art. 100 (2).
[62] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1734 (1/1 et 2).

c) Ne pas autoriser de recours en cas de décision ordonnant la médiation.

> <u>Exemple :</u>
> *La décision ordonnant, prolongeant ou mettant fin à la médiation n'est pas susceptible de recours*[63].

5. Processus de médiation

5.1. Avant la médiation

5.1.1. Désignation d'un médiateur

a) Autoriser les parties à choisir elles-mêmes le médiateur et prévoir une procédure pour en désigner un si elles ne parviennent pas à se mettre d'accord : le médiateur peut être désigné par le tribunal, par l'autorité chargée de gérer la liste des médiateurs, par le prescripteur de médiation ou par un autre tiers.
b) Permettre aux parties de désigner plusieurs médiateurs, agissants à titre de co-médiateurs, si c'est leur choix.

> <u>Exemple :</u>
> Le processus de médiation est conduite par un ou plusieurs médiateurs, désignés d'un commun accord par les parties. Si les parties ne parviennent pas à s'entendre sur le médiateur, elles peuvent demander que celui-ci soit désigné par le tribunal ou une autre autorité compétente chargée de la procédure[64].

5.1.2. Décision sur les coûts

a) Permettre aux parties de décider de la répartition des coûts de la médiation par elles-mêmes. Dans l'absence d'un accord, fixer comme règle générale que chacune des parties supporte ses propres frais et que les coûts de la médiation sont répartis à parts égales entre toutes les parties.

> <u>Exemple :</u>
> *Sauf convention contraire entre les parties, chaque partie supporte ses propres frais et les coûts de la médiation sont partagés à parts égales entre les parties ou conformément à une loi distincte ou au règlement des organismes de médiation*[65]*.*

b) Définir en quoi consistent les frais de médiation lorsque les parties et le prescripteur de médiation ne précisent pas le contraire dans leur accord. Pourront être définis les honoraires du médiateur, les frais de déplacement et d'organisation.

> <u>Exemple :</u>
> *Le médiateur a droit à la rémunération fixée pour l'exécution de la médiation et au remboursement de ses dépenses en espèces négociées. Les dépenses en espèces couvrent les frais de déplacement, les frais postaux et la production de transcriptions et de copies. Le*

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63 Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1737.
64 République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 20.
65 République de Croatie, Loi sur la médiation. *Narodne Novine*, 2011, n° 18/11, art. 20.

Médiateur peut demander aux Parties au Conflit de lui verser une avance sur ses honoraires de médiation et sur le remboursement de ses dépenses en espèces négociées[66].

5.1.3. Accord d'entrée en médiation

a) Exiger que les parties et le médiateur concluent un accord écrit avant la médiation.

<u>Exemple :</u>

Les parties définissent entre elles, avec l'aide du médiateur, les modalités d'organisation de la médiation et la durée du processus. Cette convention est consignée par écrit dans un protocole de médiation signé par les parties et par le médiateur. Les frais et honoraires de la médiation sont à charge des parties par parts égales, sauf si elles en décident autrement[67].

b) Exiger des parties que leur accord de médiation contienne, au minimum : les noms des parties ; le nom du médiateur et du prescripteur de médiation, le cas échéant ; un exposé succinct du différend ; la durée de la médiation, si un délai doit être prévu ; les honoraires ou le mode de fixation des honoraires du médiateur ; la répartition des coûts de la médiation.
c) Élaborer un modèle d'accord d'entrée en médiation. Faire référence aux modèles de formulaires de médiation[68] adoptés par la CEPEJ comme norme minimale.
d) Autoriser les modifications ultérieures de l'accord.

<u>Exemple :</u>

22.1. L'accord sur le recours au processus de médiation doit être conclu par écrit et préciser les éléments suivants :
22.1.1. la date, l'heure et le lieu de la conclusion du contrat ;
22.1.2. les nom et qualité des parties ;
22.1.3. l'objet du litige ;
22.1.4. des renseignements sur le médiateur (les médiateurs) ou l'organisme de médiation ;
22.1.5. les règles et modalités de paiement concernant le processus de médiation ;
22.1.6. sauf convention contraire entre les parties, l'obligation pour les parties de respecter la confidentialité du processus de médiation et les responsabilités en cas de violation de cette obligation ;
22.1.7. la durée du processus de médiation ;
22.1.8. le déroulement du processus de médiation ;
22.1.9. d'autres dispositions du Code civil azerbaïdjanais, de la présente loi et d'autres textes législatifs.
22.2. des modifications et des révisions peuvent être apportées à l'accord de recours au processus de médiation si les parties y consentent[69].

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[66] République tchèque, Loi sur la médiation et la modification de certaines lois, 2012, n° 202/2012 Coll. Sec. 10 (1).
[67] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1731 (1).
[68] CEPEJ, Modèles de formulaires de médiation. Extrait de la Boîte à outils pour le développement de la médiation – Assurer la mise en œuvre des lignes directrices de la CEPEJ sur la médiation, CEPEJ(2018)7REV, disponible sur : https ://rm.coe.int/boite-a-outils-pour-le-developpement-de-la-mediation-assurer-la-mise-e/16808c3f53, p. 30-33.
[69] République d'Azerbaïdjan, Loi de la République d'Azerbaïdjan sur la médiation, 2019, art. 22.1 et 22.2.

5.2. Entrée en médiation

a) Définir clairement le moment de l'entrée en médiation.
b) Si les parties sont tenues de signer un accord d'entrée en médiation, préciser que la médiation doit être considérée comme ayant commencé le jour de la signature dudit accord.
c) S'il s'agit d'une médiation judiciaire, fixer comme date d'entrée en médiation le jour où le tribunal décide ou ordonne le renvoi en médiation. Établir des incitations pour une mise en œuvre effective d'une telle ordonnance ou décision.
d) Si les parties ne sont pas tenues de signer l'accord d'entrée en médiation et uniquement dans ce cas, fixer le jour de l'entrée en médiation à un autre moment facile à fixer, comme l'acceptation de la proposition de médiation ; la date de la première réunion ; le dépôt de la demande auprès d'un prescripteur de services de médiation[70].

Exemples :

La date de début du processus de médiation est la date à laquelle l'accord de médiation a été signé, lorsqu'il est conclu par écrit, ou, si l'article 15 s'applique [référence à la médiation judiciaire]*, la date à laquelle la décision visée au paragraphe (3) dudit article a été rendue ou, dans tout autre cas, la date à laquelle le médiateur a pris des mesures spécifiques pour débuter la médiation*[71]*.*

La médiation commence avec l'acceptation d'une demande de médiation [par la partie adverse]*, sauf prescription ou convention contraire pour les litiges devant obligatoirement faire l'objet d'un processus de médiation*[72]*.*

5.3. Pendant la médiation

a) Autoriser et encourager l'utilisation de moyens électroniques pendant la médiation ainsi que la médiation en ligne si les parties y consentent, à condition que les principes de la médiation et les garanties procédurales soient respectés.

Exemple :

1. Les parties peuvent convenir que tout ou partie des mesures de médiation, y compris la session constitutive et les suivantes qu'elles jugent opportunes, seront mises en œuvre par voie électronique, par vidéoconférence ou par tout autre moyen analogue de transmission de la voix ou de l'image, à condition de garantir l'identité des parties concernées et le respect des principes de la médiation énoncés dans la présente loi.
2. La médiation, si elle porte sur une réclamation dont le montant n'excède pas 600 euros, est menée de préférence par des moyens électroniques, sauf si l'une des parties n'y a pas accès[73]*.*

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[70] NB D'un point de vue pratique, le processus de médiation ne commence qu'après la conclusion de l'accord entre les parties et le médiateur qui accepte de conduire le processus de médiation. Cependant, d'un point de vue juridique, le moment où l'on considère que le processus démarre peut différer selon les pays.
[71] République de Chypre, De certains aspects de la médiation en droit civil, *Journal officiel*, Supplément 1(I) : 16.11.2012, n° 4365, 2012, No L.159 (I)/ 2012, art. 17.
[72] République de Croatie, Loi sur la médiation. *Narodne Novine*, 2011, n° 18/11, art. 6 (2).
[73] Royaume d'Espagne, Loi sur la médiation en matière civile et commerciale. *Boletín Oficial del Estado*, n° 5/2012, art. 24.

b) Encourager la participation des avocats.

> <u>*Exemples :*</u>
> *Une partie peut -*
> *<…>*
> *(b) se faire accompagner à la médiation et se faire assistée par une personne (y compris un conseiller juridique) qui n'est pas une partie, ou*
> *(c) obtenir un conseil juridique indépendants à tout moment pendant la médiation[74].*

c) Permettre la participation de tiers (y compris des experts) à la demande ou avec l'accord des parties au litige ; soumettre toute partie tierce à l'obligation de confidentialité.

> *Exemple :*
> *Dans le cadre de sa mission et pour les besoins de celle-ci, le médiateur peut, avec l'accord des parties, entendre les tiers qui y consentent ou lorsque la complexité de l'affaire l'exige, recourir aux services d'un expert, spécialiste du domaine traité. Ceux-ci sont tenus à l'obligation de confidentialité visée au paragraphe 1er, alinéa 1er. Le paragraphe 2* [interdiction de témoigner au tribunal et de révéler les éléments de la médiation] *s'applique à l'expert[75].*

5.4. Garanties procédurales

5.4.1. Confidentialité

a) Informer que le processus de médiation est confidentiel, à moins que les parties n'en conviennent autrement.

> <u>*Exemple :*</u>
> *Toutes les informations, propositions et déclarations relatives à la procédure de médiation sont confidentielles, sauf si les parties n'en soient convenues autrement <...>[76].*

b) Préciser que l'obligation de confidentialité s'applique à toutes les déclarations et propositions formulées en relation avec ou pendant la médiation, y compris les communications orales et écrites préparées en amont ou pendant la médiation, ainsi que les documents et notes préparés en amont ou pendant la médiation.

> <u>*Exemple :*</u>
> *En application du paragraphe (2) et de l'article 17, toutes les communications (y compris les déclarations orales) et tous les enregistrements et notes relatifs à la médiation sont confidentiels et ne peuvent être divulgués dans le cadre d'une procédure devant un tribunal ou autrement[77].*

[74] République d'Irlande, Loi sur la médiation, 2017, n° 27, art. 6 (4).
[75] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1728 (3)
[76] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 13.
[77] République d'Irlande, Loi sur la médiation, 2017, n° 27, art. 10 (1).

c) Imposer la confidentialité à tous les participants à la médiation, quelle que soit la raison de leur participation au processus, et engager leur responsabilité en cas de violation.

d)

<u>Exemple :</u>

Les parties, leurs représentants légaux et leurs avocats, le médiateur, les tiers participant au processus de médiation, ainsi que les personnes exécutant des tâches administratives pour les besoins de la médiation, sont tenus de garder confidentielles toutes les informations, propositions et déclarations relatives au processus de médiation et sont responsables des dommages causés par la violation de cette obligation[78]*.*

e) Définir les exceptions à la règle de confidentialité. Ne sont pas soumises à l'obligation de confidentialité les informations requises pour mettre en œuvre ou exécuter l'accord de règlement de la médiation, protéger l'intégrité physique ou psychologique d'une personne, protéger l'intérêt supérieur des enfants, prévenir une infraction ou informer de sa commission, ainsi qu'aux fins de poursuites contre le médiateur pour manquement dans le cadre de la médiation.

<u>Exemple :</u>

Le paragraphe (1) ne s'applique pas à aux échanges et/ou aux enregistrements et notes si leur divulgation –
a) est nécessaire pour mettre en œuvre ou exécuter un accord de règlement de la médiation,
b) est nécessaire pour empêcher une partie de subit un préjudice corporel ou psychologique,
(c) est exigée par la loi,
d) est nécessaire dans le but de prévenir ou de divulguer –
i) la commission d'une infraction (y compris la tentative de commission d'une infraction),
(ii) la dissimulation d'une infraction, ou
(iii) une menace à l'encontre d'une partie, ou
(e) est demandée ou proposée pour prouver ou réfuter une action civile relative à une négligence ou un manquement du médiateur pendant la médiation ou une plainte contre un organisme professionnel concernant une telle négligence ou un tel manquement[79]*.*

f) Étendre l'obligation de confidentialité aux réunions (à huis clos) entre le médiateur et une partie, en informant que ces informations ne doivent pas être révélées à une autre partie sans le consentement explicite de la première.

<u>Exemple :</u>

Le médiateur peut, s'il l'estime opportun, échanger et tenir des réunions avec les parties séparément, toute information communiquée aux médiateurs par une partie est confidentielle et ne doit pas être divulguée à l'autre partie ou à un tiers sans l'autorisation préalable de la partie qui a communiqué l'information en question[80]*.*

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[78] République de Serbie, Loi sur la médiation dans le règlement des différends, *Служебеном* гласнику, n° 55/2014, art. 13.

[79] République d'Irlande, Loi sur la médiation, 2017, n° 27, art. 10 (2).

[80] République de Chypre, De certains aspects de la médiation en droit civil, *Journal officiel*, Supplément 1(I) : 16.11.2012, n° 4365, 2012, No L.159 (I)/ 2012, art. 18 (2).

5.4.2. Caractère volontaire

a) Établir que le processus de médiation est volontaire et que les parties doivent y consentir de leur plein gré, sans que cela ne soit en contradiction avec l'obligation d'avoir recours à une séance initiale de médiation, puisque cette dernière n'implique pas une obligation à régler le différend par la médiation.
b) Interdire au médiateur ou aux autorités publiques de contraindre les parties à parvenir à un accord ou à une décision contraignante pour les parties quant au résultat du processus de médiation.
c) Préciser les dispositions qui ne sont pas obligatoires et ne s'appliqueront pas, sauf accord contraire des parties.
d) Exiger des parties qu'elles s'entendent par écrit si elles sont disposées à déroger à des dispositions procédurales non impératives.

> Exemple :
> *5.1 La médiation est volontaire (conformément aux articles 28 et 29* [recours à la médiation obligatoire] *de la présente loi) par nature et les parties désignent librement les médiateurs.*
> *5.2 La médiation est mise en œuvre sur la base d'un contrat d'« entrée en médiation » conclu avec l'accord mutuel des parties.*
> *5.3 Pendant le processus de médiation, les parties peuvent, à leur discrétion, exercer leurs droits substantiels et procéduraux pour augmenter ou réduire le montant de leurs réclamations et refuser la médiation à l'une quelconque de ses étapes, conformément aux articles 28 et 29 de la présente loi.*
> *5.4 La médiation repose sur la coopération des parties au règlement du différend, ainsi que sur le dialogue et la négociation[81].*

5.4.3. Éléments de preuve et citations comme témoin

a) Dans toute procédure arbitrale, judiciaire ou analogue, déclarer irrecevable toutes les déclarations et propositions formulées pour le processus de médiation, y compris les éléments écrits et oraux formulés pour ou préparés pendant la médiation ou à son sujet, que la procédure soit ou non liée au litige faisant l'objet de la médiation.
b) Informer que les offres, aveux ou concessions faits pendant la médiation ne pourront pas être utilisés par les autres parties dans une procédure arbitrale, judiciaire ou analogue.
c) Noter que le seul fait qu'un élément de preuve, qui aurait été recevable à d'autres titres, soit utilisé pendant la médiation, ne le rend pas irrecevable. Rappeler que les parties doivent être autorisées à présenter leurs propres éléments de preuve, qu'ils aient été ou non utilisés dans le cadre du processus de médiation.
d) Préciser que les médiateurs, les parties et les autres participants à la médiation ne sont pas tenus de témoigner dans le cadre d'une procédure arbitrale, judiciaire ou autre concernant les informations portées à leur connaissance pendant la médiation.
e) Définir les exceptions aux règles susmentionnées, lesquelles peuvent être les mêmes que les exceptions à l'obligation générale de confidentialité.

> Exemple :
> *(1) Dans les procédures arbitrales, judiciaires ou autres, il est interdit de faire des déclarations, de proposer ou de produire des éléments de preuve, sous quelque forme que ce soit, en relation avec l'un des éléments suivants :*

[81] République d'Azerbaïdjan, Loi sur la médiation, 2019, art. 5.

- le fait qu'une partie avait proposé ou accepté la médiation ;
- l'exposé des faits ou les propositions formulées par les parties durant le processus de médiation ;
- la recevabilité des réclamations ou des faits durant le processus de médiation, si la recevabilité et les observations ne font pas partie intégrante de l'accord de règlement ;
- les documents préparés aux seules fins du processus de médiation, sauf si la loi dispose que leur communication est nécessaire à la mise en œuvre ou à l'exécution de l'accord de règlement ;
- la volonté des parties d'accepter les propositions faites durant le processus de médiation.
- d'autres propositions formulées durant le processus de médiation.

(2) Sauf si les parties en décident autrement, le médiateur et les personnes qui participent au processus de médiation à quelque titre que ce soit ne peuvent être contraints de témoigner dans le cadre de procédures arbitrales, judiciaires ou autres en relation avec des informations et des données résultant du processus de médiation ou en relation avec ce dernier.

3) Dans les procédures judiciaires, arbitrales ou autres, les preuves visées au paragraphe 1 sont rejetées comme étant irrecevables. Exceptionnellement, les données ou informations visées au paragraphe 1 du présent article peuvent être divulguées ou utilisées à des fins de preuve dans le cadre de procédures devant un tribunal arbitral, une cour de justice ou une autre instance publique :
- si c'est nécessaire pour protéger l'ordre public, uniquement dans les conditions et dans les limites prescrites par la loi, ou
- si c'est nécessaire pour mettre en œuvre ou exécuter l'accord de règlement.

(4) Toute personne qui agit en violation des paragraphes 1 et 2 du présent article sera tenu pour responsable du préjudice qui en résulterait.

5) Les dispositions des paragraphes 1 à 4 du présent article s'appliquent indépendamment du fait que la procédure arbitrale, judiciaire ou toute autre procédure similaire soit ou non liée au différend faisant ou ayant fait l'objet de la médiation.

6) À l'exception des cas prévus au paragraphe 1 du présent article, les preuves qui autrement sont considérées comme recevables dans une procédure arbitrale, judiciaire ou toute autre procédure similaire ne sont pas irrecevables du seul fait qu'elles ont été utilisées dans une procédure de médiation[82].

[82] République de Croatie, Loi sur la médiation. *Narodne Novine*, 2011, n° 18/11, art. 15.

5.4.4. Prescription et délais de prescription

a) Suspendre la prescription et les délais de prescription pendant toute la durée de la médiation.

> <u>Exemple :</u>
> *L'entrée en médiation conformément aux dispositions de l'article 17 implique la suspension de la prescription et du délai de prescription pendant le processus de médiation.*
> *En cas d'échec de la médiation, la prescription ou le délai de prescription qui a été suspendu recommence à courir le jour où le processus de médiation prend fin[83].*

b) Suspendre les procédures judiciaires pendant toute la durée de la médiation judiciaire.

> <u>Exemple :</u>
> *1 Le tribunal peut conseiller en tout temps aux parties de procéder à une médiation.*
> *2 Les parties peuvent déposer en tout temps une requête commune visant à ouvrir une procédure de médiation.*
> *3 La procédure judiciaire reste suspendue jusqu'à la révocation de la requête par une partie ou jusqu'à la communication de la fin de la médiation[84].*

c) Préciser quand la suspension commence et prend fin en se référant au début et à la fin de la médiation. Il est possible de définir un autre point de repère en veillant à éviter toute ambiguïté. Le début et la fin de la médiation sont confirmés par écrit afin de minimiser les risques de litiges quant à la durée du processus de médiation.

> <u>Exemple :</u>
> *La signature du protocole suspend le cours de la prescription durant la médiation.*
> *Sauf accord exprès des parties, la suspension de la prescription prend fin un mois après la notification faite par l'une des parties ou par le médiateur à l'autre ou aux autres parties de leur volonté de mettre fin à la médiation. Cette notification a lieu par lettre recommandée[85].*

5.4.5. Mesures provisoires

a) Permettre aux parties de demander l'application de mesures provisoires durant la médiation.

> <u>Exemple :</u>
> *La procédure de médiation n'exclut en aucun cas l'octroi de mesures provisoires, y compris conservatoires, ou la publication des demandes et des moyens[86].*

[83] République de Chypre, De certains aspects de la médiation en droit civil, *Journal officiel*, Supplément 1(I) : 16.11.2012, n° 4365, 2012, No L.159 (I)/ 2012, art. 27 (1 et 2).
[84] Confédération suisse, Code de procédure civile, 2008, art. 214.
[85] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1731 (3 et 4).
[86] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 5 (3).

5.5. Fin de la médiation

a) Définir les motifs pour mettre fin à la médiation. Inclure au minimum les motifs suivants : les parties ont conclu un accord de règlement de la médiation, une ou plusieurs parties ont demandé de mettre fin à la médiation ; un médiateur ou un prescripteur de médiation a déclaré que la médiation était terminée ; le délai prévu pour la médiation est arrivé à échéance, le cas échéant.
b) Exiger que toutes les déclarations soient faites par écrit afin de déterminer la date exacte de la fin de la médiation.

Exemple :

La médiation prend fin :

- si une partie envoie à l'autre partie et au médiateur une déclaration écrite dans laquelle elle informe se retirer du processus de médiation, sauf si, après le retrait d'une partie, deux parties ou plus participent encore au processus et veulent poursuivre la médiation ;
- si les parties envoient au médiateur une déclaration écrite pour l'informer qu'elles mettent fin au processus ;
- si le médiateur décide de mettre fin à la médiation au motif que, après avoir donné aux parties la possibilité de faire connaître leur point de vue, il est clair que tout effort supplémentaire pour parvenir à un règlement amiable du différend n'a pas de sens ;
- si aucun règlement amiable n'intervient dans les 60 jours suivant l'entrée en médiation ou dans tout autre délai prévu par l'accord conclu entre les parties ;
- si un accord de règlement est conclu[87].

c) Exiger du médiateur qu'il rédige une note à la fin de la médiation si les autorités ou le tribunal doivent être informés du résultat de la médiation ou si une preuve que la médiation a eu lieu doit être présentée (clause de médiation, obligation de recourir à la médiation et autres cas prévus par le droit national). Une telle note doit aussi être préparée à la demande des parties.
d) Ne pas exiger que les données confidentielles figurant au point 5.4.1 ci-dessus soient incluses dans la note de fin.

Exemple :

§ Le médiateur rédige le procès-verbal de la médiation.
§ 2. Le procès-verbal de la médiation doit préciser :
1) la date et le lieu de la médiation ;
2) les prénoms, noms (raisons sociales) et adresses (siège social) des participants à la médiation ;
3) les prénom, nom et adresse du médiateur ;
4) les résolutions prises concernant l'issue du litige ; et
5) les signatures du médiateur et des participants à la médiation ; si l'un des participants n'est pas en mesure de signer le procès-verbal, une note doit en préciser les raisons.
§ 3. Le médiateur soumet immédiatement le procès-verbal de la médiation à l'autorité publique afin qu'il soit consigné dans les registres et en remet une copie aux participants à la médiation.[88]

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[87] République de Croatie, Loi sur la médiation. *Narodne Novine*, 2011, n° 18/11, art. 12.
[88] République de Pologne, Code de procédure administrative, *Dziennik Ustaw*, 1960, point 1257 de 2017, art. 96 m.

6. Accord de règlement

6.1. Forme et contenu

a) Exiger que l'accord de règlement de la médiation soit rédigé par écrit, signé par les parties et attesté par la signature du médiateur, en indiquant le prescripteur de la médiation, le cas échéant, ainsi que la date et le lieu de la conclusion.

Exemple :

L'accord de règlement de la médiation peut couvrir tout ou partie des questions objet de la médiation.
L'accord doit indiquer l'identité et l'adresse des parties, le lieu et la date de sa signature, les obligations de chacune des parties et que la procédure de médiation est conforme aux dispositions de la présente loi, en indiquant le ou les médiateurs qui sont intervenus et, le cas échéant, l'institution où la médiation a eu lieu[89].

b) Autoriser un accord sur les faits si aucun accord sur le fond n'a été conclu.

Exemple :

Si elles ne parviennent pas à un accord en raison d'un désaccord sur des questions juridiques, les parties peuvent conclure un accord écrit sur des questions de fait. Les questions de fait couvertes par l'accord mutuel des parties sont considérées comme incontestables dans les procédures judiciaires ou autres[90].

c) Dans le cadre d'une médiation judiciaire, autoriser les accords sur une partie du litige ainsi que les accords couvrant un plus grand nombre de questions que l'objet de la demande ou de la demande reconventionnelle.

Exemples :

Les dispositions relatives un règlement dans le cadre d'une procédure judiciaire en suspens s'appliquent de la même manière à un règlement dans le cadre d'une médiation judiciaire et à la confirmation d'un tel règlement. Toutefois, un règlement confirmé dans le cadre d'une médiation judiciaire peut également couvrir des questions qui ne figurent pas dans les demandes initiales des parties[91].

La médiation peut porter sur tout ou partie du litige[92].

6.1. Exécution

a) Veiller à ce que le contenu de l'accord de règlement de la médiation puisse être rendu exécutoire par une décision de justice, un acte notarié ou avec l'autorisation d'un autre agent public (magistrat, agent chargé de l'exécution, ou autre) à la demande de toutes les parties ou de l'une d'entre elles avec le consentement de l'autre (ou des autres).

[89] Royaume d'Espagne, Loi sur la médiation en matière civile et commerciale. *Boletín Oficial del Estado*, n° 5/2012, art. 23.
[90] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 26.
[91] République de Finlande, Loi sur la médiation en matière civile et la confirmation des accords devant les tribunaux ordinaires, n° 394/2011, art. 8.
[92] Royaume de Belgique, Code judiciaire. *Moniteur belge*, 1967, art. 1735 (2).

Exemple :

Le contenu d'un accord de règlement écrit dans le cadre de la médiation est rendu exécutoire par un tribunal -

a) à la demande conjointe de toutes les parties ; ou

b) à la demande de l'une des parties avec le consentement explicite des autres, sauf si ce consentement explicite figure dans l'accord de règlement[93]*.*

b) Encourager les parties à préciser dans l'accord de règlement si ses dispositions doivent être rendues exécutoires.

Exemple :

Il appartient aux parties à la médiation de décider –

(a) si et quand elles ont conclu un accord de règlement et

(b) si elles donnent force exécutoire à l'accord de règlement[94]*.*

c) N'autoriser l'exécution directe des accords de règlement que si les parties y consentent et à condition qu'elles soient représentées par des avocats qui peuvent garantir que les dispositions de l'accord ne sont pas contraires au droit impératif.

Exemple :

Si toutes les parties à la médiation sont assistées par un avocat, l'accord conclu entre elles et par leurs avocats constitue titre exécutoire pour l'expropriation forcée, l'exécution par la remise et cession, l'exécution des obligations de faire et de ne pas faire, ainsi que l'inscription d'hypothèque judiciaire. En signant l'accord, les avocats attestent et certifient que l'accord est conforme aux normes impératives et à l'ordre public <...>[95]*.*

d) Définir clairement les motifs pour lesquels l'exécution peut être refusée. Inclure au moins l'accord qui est contraire au droit impératif ou à l'ordre public.

Exemple :

Le contenu de l'accord sur le règlement du différend par la médiation ne sera pas rendu exécutoire si la conclusion dudit accord n'est pas autorisée par la loi, si l'accord est contraire à l'ordre public, si l'accord n'est pas applicable ou si l'objet de l'exécution est impossible à exécuter[96]*.*

[93] République de Chypre, De certains aspects de la médiation en droit civil, *Journal officiel*, Supplément 1(I) : 16.11.2012, n° 4365, 2012, No L.159 (I)/ 2012, art. 32 (1).

[94] République d'Irlande, Loi sur la médiation, 2017, n° 27, art. 11 (1).

[95] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 12 (1).

[96] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 27.

e) Veiller à ce que la réglementation sur l'accord de règlement soit conforme aux dispositions des textes internationaux existants sur l'exécution, dont la Convention de Singapour et le Guide de bonnes pratiques en vertu de la Convention de La Haye du 25 octobre 1980.

> Exemple :
> *Une partie qui se prévaut d'un accord de règlement en vertu de la présente Convention fournit à l'autorité compétente de la Partie à la Convention devant laquelle la demande ou le moyen ont été introduits :*
> *a) L'accord en question signé par les parties ;*
> *b) Une preuve que l'accord est issu de la médiation, telle que :*
> *i) La signature du médiateur apposée sur ledit accord ;*
> *ii) Un document signé par le médiateur indiquant que la médiation a eu lieu ;*
> *iii) Une attestation de l'institution qui a administré la médiation ; ou*
> *iv) En l'absence des preuves visées aux sous-alinéas i), ii) ou iii), toute autre preuve susceptible d'être acceptée par l'autorité compétente[97].*

f) Envisager de ratifier la Convention de Singapour sur la médiation afin de garantir une reconnaissance efficiente des accords de règlements internationaux et d'autres conventions garantissant une reconnaissance et une exécution simplifiées, telles que la Convention de La Haye de 1996 sur la protection des enfants[98]. Envisager d'élaborer un système de reconnaissance des accords de règlement internationaux provenant de pays non membres de la Convention de Singapour.

7. Incitations à la médiation

7.1. Obligation d'informer

7.1.1. Avocats

a) Obliger les avocats à informer par écrit leurs clients sur la médiation.
b) Indiquer clairement les informations qui doivent être communiquées au client, au minimum : des explications sur le processus de médiation, les garanties procédurales prévues pendant la médiation, les incitations financières (le cas échéant), les conditions de l'obligation de tenter la médiation (le cas échéant), la durée moyenne de la procédure judiciaire.
c) Demander aux clients qu'ils confirment par leur signature qu'ils ont lu et compris l'information fournie.
d) Établir clairement les conséquences du non-respect de l'obligation d'informer.

> Exemple :
> *Lorsqu'une réclamation ou un différend lui est soumis, l'avocat est tenu d'informer le client de la possibilité de recourir à la procédure de médiation régie par le présent décret et des avantages fiscaux prévus aux articles 17 et 20. L'avocat informe également le client des cas dans lesquels la procédure de médiation est une condition préalable à la procédure judiciaire.*

[97] Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation, qui sera bientôt signée, Singapour. Disponible à l'adresse : https ://uncitral.un.org/sites/uncitral.un.org/files/annex_i_-_f.pdf, art. 4 (1)http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf.
[98] Conférence de La Haye de droit international privé, Convention concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants, 1996, La Haye. Disponible à l'adresse : https ://assets.hcch.net/docs/e74e817b-1faa-4aa9-bd29-3ff68da03f43.pdf.

Les informations doivent être claires et remises au client par écrit.
En cas de manquement à l'obligation d'information, le contrat entre l'avocat et le client est nul.
Le document contenant les informations ci-dessus est signé par le client et doit être joint à la réclamation ou à la demande initiale de toute procédure judiciaire. Le tribunal qui constate que le document n'est pas joint, s'il ne prend pas les mesures prévues au paragraphe 1-bis de l'article 5, informe la partie de son droit de demander une médiation[99]*.*

7.1.2. Juges et autres agents publics

a) Autoriser et encourager les juges et les autres agents publics chargés du règlement des différends à communiquer aux parties à un litige toutes les informations nécessaires sur la médiation ou de les orienter vers une réunion d'information tenue par une autre personne s'ils estiment qu'un règlement amiable est prévisible.
b) Examiner la possibilité de mettre en place une formation initiale obligatoire de sensibilisation à la médiation pour les juges, ainsi que des activités permanentes de sensibilisation.

Exemple :
Le président du tribunal peut inviter les parties à assister à une réunion d'information sur les modes de règlement amiable des litiges, en particulier la médiation. La réunion d'information peut être conduite par un juge, un greffier, un magistrat, un juge assistant ou un médiateur permanent[100]*.*

c) Demander que les agents qui fournissent une assistance juridique informent la personne concernée de la possibilité de recourir à la médiation ainsi que de ses avantages. Établir la priorité de la tentative de médiation avant l'action en justice si les parties ou l'une des parties bénéficient de l'assistance juridique.

Exemple :
Les personnes qui fournissent une aide juridique primaire cherchent des possibilités d'aider les demandeurs à résoudre leurs litiges à l'amiable. La possibilité de résoudre le différend par la médiation doit également être expliquée aux demandeurs[101]*.*

7.2. Incitations financières

7.2.1. Sanctions

a) Permettre aux juges de ne pas respecter le principe du « perdant payeur » (si applicable) et de répartir les coûts de la procédure judiciaire et/ou de la médiation en prenant en compte la mauvaise foi des parties vis-à-vis de la médiation ou pendant celle-ci.

[99] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 4 (3).
[100] République de Pologne, Code de procédure civile, *Dziennik Ustaw*, 1964, point 1595 de 2015, article 1838 (4).
[101] République de Lituanie, Loi sur l'aide judiciaire garantie par l'État, *Valstybės žinios*, 2000, n° 30-827, art. 15 (6).

Exemple :

Lorsqu'il adjuge les dépens relatifs aux procédures visées à l'article 16 [tribunal invitant les parties à envisager la médiation], *le tribunal peut tenir compte, s'il le juge bon, –*
a) du fait qu'une partie à la procédure refuse de manière déraisonnable d'envisager ou n'envisage pas de recourir à la médiation ou,
b) du fait qu'une partie à la procédure refuse de manière déraisonnable d'assister ou n'assiste pas à la médiation,
après avoir été invitée à le faire en vertu du paragraphe 16(1)[102]*.*

b) Prévoir une liste non exhaustive de ce qui pourrait être considéré comme de la mauvaise foi. Inclure au minimum (sauf si non applicable) : le fait de refuser une recommandation ou une invitation à tenter la médiation sans motif valable ; de ne pas assister à une session de médiation ou d'information obligatoire. Laisser l'évaluation des autres cas à la discrétion du juge, qui décidera au cas par cas.

Exemple :

Si un tribunal a établi qu'une partie a refusé de participer à une médiation obligatoire sans motif valable ou qu'elle a fait une demande de médiation obligatoire de mauvaise foi, a eu recours à la médiation de mauvaise foi ou a présenté des demandes de mauvaise foi pendant la médiation, il peut aussi déroger aux règles sur la répartition des frais énoncées aux paragraphes 1, 2 et 3 du présent article[103]*.*

7.2.2. Droits de timbre et frais de justice

a) Accorder aux parties qui ont eu recours à la médiation avant de passer à la procédure judiciaire une réduction (au moins en partie) sur les droits de timbre ou d'autres frais.

Exemple :

Si, avant de saisir le tribunal, les parties ont tenté de régler leur différend par la médiation, le droit de timbre, calculé conformément au paragraphe 1 du présent article, est réduit à 75 pour cent mais ne peut être inférieur à 5 euros. Dans le cas cité dans le présent paragraphe, une preuve écrite de la tentative de règlement du différend par la médiation doit être produite. La réduction du droit de timbre prévue au présent paragraphe ne s'applique pas s'il est établi que la partie a présenté la demande de médiation de mauvaise foi, a eu recours à la médiation de mauvaise foi ou a fait des demandes de mauvaise foi pendant la médiation. La réduction ne s'applique pas si la médiation obligatoire est menée conformément à la loi sur la médiation de la République de Lituanie[104]*.*

b) Accorder aux parties qui sont parvenues à un accord de règlement pendant la procédure judiciaire ou administrative une réduction (au moins partielle) sur les droits de timbre ou les autres frais.

Exemple :

En cas de conclusion d'un accord visant à résoudre le différend par la médiation après l'ouverture de la procédure judiciaire ou autre et avant les conclusions de la première première

[102] République d'Irlande, Loi sur la médiation, 2017, n° 27, art. 21.
[103] République de Lituanie, Code de procédure civile, *Valstybės žinios*, 2002, n° 36-1340, art. 93 (4).
[104] République de Lituanie, Code de procédure civile, *Valstybės žinios*, 2002, n° 36-1340, art. 80 (8).

audition avant procès, les parties peuvent être exonérées des frais judiciaires ou administratifs, conformément avec la loi qui réglementent les frais de justice et les frais administratifs[105]*.*

7.2.3. Aides financières

a) Fournir des services de médiation gratuits à ceux qui n'ont objectivement pas les moyens d'en assumer les coûts ou en réduire considérablement le coût par le biais de l'aide juridique ou d'autres mécanismes.

Exemple :

Aide juridictionnelle garantie par l'État – assistance juridictionnelle primaire, assistance juridique secondaire et médiation extrajudiciaire garantie par l'État conformément aux dispositions de la présente loi.

Les frais de médiation comprennent la préparation des documents relatifs à la médiation, les honoraires du médiateur et les frais liés à la préparation de l'accord de règlement. L'État garantit et couvre 100 % des coûts de l'assistance juridictionnelle primaire et de la médiation.[106]

b) Envisager d'introduire d'autres aides financières ou exonérations fiscales pour ceux qui ont recours à la médiation.

Exemple :

En cas de succès de la médiation, les parties qui versent des honoraires aux prescripteurs de médiation agréés bénéficient d'un crédit d'impôt proportionnel aux honoraires, à concurrence de cinq cents euros, conformément aux dispositions des paragraphes 2 et 3. En cas d'échec de la médiation, le crédit d'impôt est réduit de moitié[107]*.*

c) Mettre en place des systèmes nationaux d'aide financière pour la formation des médiateurs ; la formation à une utilisation efficace de la médiation pour les juges, les arbitres, les avocats, les notaires, les policiers, les procureurs, les agents d'exécution et les travailleurs sociaux ; des programmes pilotes de médiation et d'autres programmes ; d'autres activités de recherche et développement et innovations dans le domaine de la médiation ; le développement et la promotion de bonnes pratiques dans le domaine de la médiation et de bonnes pratiques pour une utilisation efficace de la médiation par les juges, les arbitres, les avocats, les notaires, les policiers, les procureurs, les agents d'exécution et les travailleurs sociaux.

Exemple :

Les fonctions du Département sont les suivantes :
a) Veiller à ce que les services de médiation soient fournis régulièrement et efficacement.
b) Publier des articles sur la médiation, encourager et soutenir les études scientifiques sur ce

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[105] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 31.

[106] République de Lituanie, Loi sur l'aide juridictionnelle garantie par l'État, *Valstybės žinios*, 2000, n° 30-827, art. 2 (11) et 14 (3 et 4).

[107] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 20 (1).

thème.
c) Exécuter tout type de décisions ou de procédures relatives au fonctionnement du Conseil et coopérer avec le ministère compétent, les autres institutions et organisations publiques, les universités, les organisations professionnelles dotées du statut d'institution publique, les fondations et associations d'intérêt public et les personnes physiques et morales bénévoles adaptées en fonctions de leurs tâches.
ç) Faire connaître l'institution de médiation, informer le public, organiser ou soutenir les organisations scientifiques telles que les congrès, colloques et séminaires nationaux et internationaux... <...> >
ğ) Effectuer des études et des recherches sur les lois et textes réglementaires qui relèvent de sa compétence et formuler des recommandations à la Direction générale <...> [108].

8. Informations sur la médiation

8.1. Diffusion et promotion

a) Obliger les organismes publics ou les autorités chargés de la médiation à diffuser des informations sur la médiation ; fournir des informations détaillées sur les médiateurs ou prescripteurs de médiation ainsi que leurs coordonnées.
b) Obliger les organismes publics ou les autorités chargées de la médiation à promouvoir la médiation par divers moyens, y compris internet.
c) Inclure dans les compétences de médiation le développement des institutions ou organes gouvernementaux ou d'autorégulation, la mise en œuvre et le suivi des stratégies nationales de sensibilisation à la médiation.
d) Envisager d'introduire l'obligation de nommer un responsable de la médiation dans chaque tribunal pour mener les projets liés à la médiation, organiser le suivi des programmes liés à la médiation, coordonner la sensibilisation à la médiation et la collecte des données statistiques.
e) Autoriser et encourager l'éducation à la médiation dans les écoles (en particulier, les programmes de médiation par les pairs), les universités et les établissements d'enseignement supérieur.

<u>Exemple :</u>
Le ministère de la Justice se charge <...> d'informer le public sur la procédure de médiation et sur les prescripteurs agréés au moyen de campagnes publicitaires spéciales, notamment sur internet[109].

8.2. Données statistiques

a) Au niveau national, recueillir et agréger des données statistiques provenant des médiateurs ou des prescripteurs de médiation, des programmes de médiation judiciaire et autres, dans le respect du principe de confidentialité.
b) Intégrer la Grille de référence pour les indicateurs de performance de la médiation (statistiques de base sur la médiation)[110] adoptée par la CEPEJ dans le système

[108] République de Turquie, Ordonnance sur l'application de la médiation aux différends juridiques. Resmî Gazete, 2018, n° 30439, art. 52.
[109] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 21.
[110] CEPEJ, Grille de référence pour les indicateurs de performance de la médiation (statistiques de base sur la médiation). Extrait de la Boîte à outils pour le développement de la médiation – Assurer la mise en œuvre des lignes directrices de la CEPEJ sur la médiation, CEPEJ(2018), disponible sur : https ://rm.coe.int/boite-a-outils-pour-le-developpement-de-la-mediation-assurer-la-mise-e/16808c3f53, p. 41-50.

statistique afin de pouvoir recueillir et comparer ces données entre les États membres du Conseil de l'Europe. A minima, demander les informations figurant dans la Grille.

<u>*Exemple :*</u>

Les types d'affaires et les autres indicateurs peuvent être adaptés en fonction de la législation et de la pratique nationales. Toutefois, pour rendre possible une comparaison entre les différents États membres du Conseil de l'Europe, il est souhaitable de tenir des statistiques de manière à pouvoir en extraire les principaux indicateurs, conformément à la grille proposée ci-dessous.
La grille ne présente que des statistiques de base. Les prescripteurs de médiation, les associations, instituts ou fédérations œuvrant dans ce domaine, les médiateurs individuels et les États membres peuvent collecter et analyser des données rendant compte d'autres indicateurs de performance qu'ils jugent raisonnables et utiles dans le contexte particulier qui les intéresse.
Si possible, les données statistiques devraient être collectées et évaluées plus d'une fois par an.
Il est conseillé d'utiliser les technologies de l'information et de la communication et des logiciels spécialisés pour tenir des statistiques sur la médiation et les analyser, car cela permet de travailler plus vite et plus efficacement.
Dans tous les cas, la collecte de données statistiques et leur analyse ne doivent pas porter atteinte au principe de confidentialité, qui est fondamental dans le domaine de la médiation[111].

Le médiateur est tenu :
<...> de soumettre au ministère de la Justice un rapport annuel sur les médiations qu'il a menées et contenant des informations sur le type de litige, le lieu où la médiation a été conduite et son issue, en respectant le principe de confidentialité des données[112].

c) Publier les données statistiques, y compris sur internet.

<u>*Exemple :*</u>

Les fonctions du Département sont les suivantes :
<...> suivre les pratiques de médiation à l'échelon national, tenir des statistiques et les publier [113].

9. Dispositions transitoires

a) Envisager d'introduire des innovations dans le domaine de la médiation par le biais de projets pilotes afin de tester, contrôler, analyser, adapter et mettre au point les méthodes qui seront les mieux adaptées et les plus efficaces dans le contexte national avant de les étendre à tout le pays.
b) Dans le cadre d'expériences pilotes, envisager d'introduire des dispositions pour une durée limitée et ayant une portée limitée (certains types de litiges seulement) ou sur un territoire ciblé (limité à certains districts ou tribunaux spécifiques).

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[111] CEPEJ, Grille de référence pour les indicateurs de performance de la médiation (statistiques de base sur la médiation). Extrait de la Boîte à outils pour le développement de la médiation – Assurer la mise en œuvre des lignes directrices de la CEPEJ sur la médiation, CEPEJ(2018)7REV [consulté le 2019-03-10], disponible sur : https ://rm.coe.int/boite-a-outils-pour-le-developpement-de-la-mediation-assurer-la-mise-e/16808c3f53, p. 42.
[112] République de Serbie, Loi sur la médiation dans le règlement des différends, *Службеном* гласнику, n° 55/2014, art. 34.
[113] République de Turquie, Loi sur la médiation dans les litiges civils (y compris en matière pénale). *Resmî Gazete*, 2012, n° 6325, art. 30 (1d).

<u>Exemple :</u>

Toute personne qui a l'intention d'introduire une action en justice dans un litige relatif à des problèmes de copropriété, de droits réels immobiliers, de partage, de succession, de pactes familiaux, de location, de bail, de prêt, de location à des fins commerciales, d'indemnisation pour faute médicale et/ou paramédicale ou pour diffamation par voie de presse ou par tout autre moyen publicitaire, d'assurance, de contrat bancaire et financier doit, préalablement à une action en justice et avec l'assistance d'un conseiller juridique, participer à la procédure de médiation prévue dans le présent décret ou la procédure de conciliation prévue dans le décret législatif du 8 octobre 2007, n. 179, ou la procédure établie en vertu de l'article 128- bis de la Loi consolidée sur les banques et le crédit du décret législatif du 1er septembre 1993 n° 385, tel que modifié, pour toutes les matières qu'ils régissent. La tentative de médiation est une condition préalable à la procédure judiciaire. Cette disposition s'appliquera pendant quatre ans à compter de la date de son entrée en vigueur. Au terme d'une période de deux ans à compter de la date d'entrée en vigueur, le ministère de la Justice suivra les résultats de l'expérience de médiation <...>[114] .

En quatre ans, la disposition a été modifiée en conséquence :

Avant l'introduction d'une procédure judiciaire et avec l'aide d'un conseiller juridique, ceux qui ont l'intention d'intenter une action en justice devant un tribunal dans le cadre d'une action relative à un litige concernant une question de copropriété, de biens immobiliers, de partage, d'héritage, de clauses familiales, de bail, de bail commercial, de dommages et intérêts pour faute professionnelle médicale et/ou paramédicale ou diffamation par voie de presse ou tout autre moyen de publicité, assurance, contrats bancaires et financiers, sont tenus de participer à la procédure de médiation prévue par le présent décret ou à la procédure de conciliation prévue par décret législatif du 8 octobre 2007, n. 179, ou la procédure établie en vertu de l'article 128- bis de la Loi consolidée sur les banques et le crédit du décret législatif du 1er septembre 1993 n° 385, tel que modifié, pour les matières qui y sont réglementées. La tentative de médiation est une condition préalable aux procédures judiciaires. A compter de 2018, le Ministre de la justice rendra compte chaque année au Parlement des effets produits et des résultats obtenus en application des dispositions du présent paragraphe. <…>[115].

[114] République italienne, Décret législatif du 4 mars 2010, n. 28, art. 5 (1bis).
[115] République d'Italie, Décret du 4 mars, 2010, n. 28, Art. 5 (1bis), tel que modifiée par la loi n. 96 du 21 juin 2017.

Explanatory note

[La note explicative n'existe qu'en anglais et sera traduite ultérieurement]

1. Scope

The mediation process indeed has its distinctive features depending on the field of law where it is applied. The same is true to the different types of application, varying from private dispute settlements to court mediation schemes or international and domestic disputes. However, there are even more characteristics that are alike in the mediation process, regardless of the type of dispute where it is applied. This suggests that the best approach towards the scope of law on mediation is consolidation of the provisions in one legal act, making exceptions and references to other legal acts where it is necessary to take into account the peculiarities or where certain aspects have to be regulated in the act of different legal value under the national law.

A consistent approach towards the profession of mediators as well as the procedure itself allows setting a basic standard of quality, while not precluding the legislators from implementing higher standards where necessary. The adoption of basic standards applicable to every type of mediation ensures that the probability of negative user experience is reduced to a minimum. This allows building the confidence of the general public, subsequently improving the availability of the procedure. Moreover, it helps avoid discrepancies, when parts of the procedure are regulated differently in separate legal acts without good practical reason. It can also help develop mediation infrastructure, including the authorities in charge and disciplinary bodies, responsible for monitoring the overall quality of the mediation process. It brings clarity to the public, consequently making the procedure easy to access. Hence, it is in line with the Availability / Accessibility / Awareness (AAA) methodology developed in the Guidelines on mediation.

Therefore, the scope of the law on mediation shall remain broad and be limited solely to the disputes which are capable of settlement under the national law, including at least out of court and court-related mediation, mediation in international disputes, as well as different fields of law (e.g., mediation in civil, labour, administrative and criminal disputes), with due respect to the modalities outlined in the subchapters 1.1. to 1.3.

1.1. Out of court and court-related mediation

The same general principles apply to out of court as well as court-related mediation. However, there are some apparent differences, as the latter is conducted when the dispute has already been introduced in court. This adds a certain level of formalisation, especially with regard to the initiation, duration of mediation, and the suspension of court proceedings. This suggests that the main legal act on mediation can be applicable to both out of court and court-related mediation, while the procedural differences can be addressed in the same or another legal act where such distinction is needed. Note should be taken that court-related mediation does not necessarily have to be conducted by a judge or a court clerk as this is only one of the possible models. In court-related mediation, the dispute can also be referred to an independent mediator outside the judiciary. In Slovenia, for example, '[t]*he court may adopt and implement the alternative dispute settlement programme as an activity organised directly in court (court-annexed programme) or on the basis of a contract with a suitable provider of alternative dispute settlements (court-connected programme)'*[116].

The majority of countries subject to this research follow the recommendation provided above and explicitly state that the act shall apply to out of court and court-related mediation or, at least, do not expressively exclude court mediation out of the scope of the national law on mediation (e.g., Belgium, Croatia, Cyprus, the Czech Republic, France, Ireland, Lithuania, Poland, Serbia, Switzerland, Turkey). However, there still are countries which regulate solely court-related mediation, leaving out of court mediation unregulated. For example, the Finnish Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts only applies to court mediation, merely touching on the homologation and enforcement of settlements mediated out of court.

The first approach of the ones mentioned above, namely, consolidating the provisions in one legal act is encouraged. The good practice shall be considered Belgian and Lithuanian models explicitly stating that the act applies to out of court and court-related mediation unless indicated otherwise. Both Belgian Judicial Code and

[116] The Republic of Slovenia, Alternative Dispute Settlement Act. *Uradni list*, No. 97/2009, Art. 5 (1).

Lithuanian Law on Mediation dedicate a separate chapter to court-related mediation, where modalities are outlined. A similar approach is implemented in Azerbaijan. Other legal acts, which do not include a separate chapter on court-related mediation, incorporate these modalities in the provisions of other chapters. However, as mentioned above, the modalities of court-related mediation can also be regulated in a separate legal act, if that brings more clarity to the process.

While all the procedural requirements will be discussed in detail in the other chapters of the Explanatory note, the sole intention of the list provided below is to attract attention to possible differences and peculiarities of court-related mediation. The explanations provided herein are, thus, brief and include references to the other parts of the document.

a) the timing of the referral

As stated in the Guide to the Judicial Referral to Mediation[117] adopted by CEPEJ, parties shall be referred to mediation at the earliest possible time when they are able to make an informed decision on the participation in mediation. However, at certain cases, referring parties to mediation already further into litigation might be more effective, as they have a chance to vent their emotions and get a taste of the possible hurdles of the judicial proceedings. Even late referral to mediation can still save resources of the court and the parties. It is, thus, recommended to allow referral of a dispute to mediation at any phase of the proceedings (as is the case in, e.g., Azerbaijan, Belgium, France, Poland, Serbia, Switzerland) in all instances. Some countries, however, limit the timing to the conclusion of the preparation of a case (e.g., Finland) or to the first hearing (in Ireland, for example, it is no '*later than 14 days before the date on which the proceedings are first listed for hearing*'[118]).

b) requirements for mediators in court-related mediation, if different

As will be discussed in chapter 3.4., some countries allow judges to act as mediators in court-related mediation along with other mediators from the register, while the requirements for them to enter the list slightly differ. For example, in Lithuania, a separate register for judges acting as mediators is maintained by the National Court Administration. However, in that case, judges who act as mediators can only conduct court-related mediation[119]. Such an approach is encouraged as judges, trained and acting as mediators, might be more willing to recommend parties to refer their dispute to mediation. Having conducted mediations themselves, the judges will also be better able to tell which parties might be likely to settle when ordering to mediate their dispute, as will be explained in chapter 4.

On the other hand, there are countries, for example, Finland, which do not allow other mediators, who are not judges, to conduct court-related mediations. Such an approach is not recommended as an external mediator at some cases might be a better fit to conduct a mediation. If national legislators are cautious not to raise the costs of the proceedings, external mediators, if chosen by the parties, can be remunerated on their part.

c) costs of court-related mediation

National legislators shall be careful not to commercialise court-related mediation as a costly service can create opposition among the members of the general public and increase the reluctance to using it. To avoid such a scenario, several countries have had the exact amount payable to a mediator set by means of hourly rates or otherwise (e.g., Lithuania, Poland, Slovenia). Setting maximum rates in court-related mediation can ensure that it is accessible to the parties. On the other hand, regard also has to be paid to guarantee that mediators are dully remunerated for their work.

Moreover, the fee for court-related mediation can also be covered by the state. There are countries where court-related mediation is provided free of charge for the parties for a set number of hours. In

[117] CEPEJ, Guide to the Judicial Referral to Mediation. From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 14-18, point. 1.

[118] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 16 (4).

[119] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 23 (2).

Slovenia, for example, the court fully reimburses the fee of a mediator only in disputes arising in relations between parents and children and labour disputes due to termination of an employment contract, while in other disputes only the first 3 hours are reimbursed (except for commercial disputes, which are not reimbursed at all)[120]. In Lithuania, the first 4 hours of every court-related mediation are reimbursed or the whole mediation might be conducted free of charge if a judge is serving as a mediator[121]. Such an approach is also encouraged as it works as an additional incentive to mediate, as will be discussed in chapter 7.2.

With regard to the division of costs, in most of the countries the same provisions as will be outlined in chapter 5.1.2. apply (namely, that every party bears its own costs and shares the fee of the mediator equally). However, some countries include the costs of court-related mediation in the overall costs of the proceedings and the judge takes them into account when adopting the decision on costs (for example, France).

d) initiation of mediation

Court-related mediation, like out of court mediation, can be initiated upon request by one party with the consent of the other or upon request of both parties. National legislators are encouraged to define the steps of how such a request should be made. For example, a request can be submitted in writing or orally, provided that it was included in the protocol of the hearing. Mediation can also be suggested by a third person (for instance, a bank or an insurer) if the parties to a dispute consent to it. However, unlike out of court mediation, court-related mediation can also be initiated by a recommendation or an order from a judge. As will be discussed in detail in chapter 4., allowing both methods of initiation by a judge is highly recommended.

e) documentation of the referral

After parties express their consent to mediate a dispute or after mediation is ordered by a judge, it is recommended to document the referral through a decision, an order by a judge or other document in accordance with the provisions of national legal acts regulating court proceedings. As will be discussed in more detail in chapter **Erreur ! Source du renvoi introuvable.**., it shall include, at least, the ruling on suspension of the judicial proceedings for the duration of mediation[122], indicate the mediator and the date of the next hearing after the termination of mediation.

f) the maximum duration of the mediation and the possibility to prolong it

Justice delayed is justice denied; thus, in order not to hinder the right of effective judicial protection, the maximum duration of court-related mediation shall be set by national legislators. As will be explained in chapter **Erreur ! Source du renvoi introuvable.**., most countries allow dedicating up to 3 months for court-related mediation. However, the possibility of prolonging such a period in certain cases should also be considered, especially taking into account the number of the parties, the complexity of the case, and the nature of the dispute. For example, some countries allow prolongation of the duration upon the request of a mediator (e.g., France) or parties (e.g., Cyprus, Poland, Turkey).

g) the termination of court-related mediation.

Upon the termination of mediation, the judge shall receive information on the course or the outcome of the mediation. Hence, national legislators shall foresee such a procedure, preferably by requiring the mediator to provide a note of termination of the mediation, as will be explained in chapter 5.5. In Belgium, for example, *'[a]t the end of his mandate, the mediator shall inform by writing if the parties have managed or not to settle'*.

1.2. Mediation in international disputes

[120] The Republic of Slovenia, Alternative Dispute Settlement Act. *Uradni list*, No. 97/2009, Art. 22.
[121] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 23 (7).
[122] The reasons for that are explained in chapter 5.4.4.

Commercial, family, labour, and other social relations have long passed the national borders opening the floodgates to the disputes where parties are domiciled in different countries. The Recommendation on Mediation (family) has long ago recognized the need for necessary measures with regard to international mediation[123]. Since then a number of harmonisation initiatives have been introduced to accommodate the changing needs of the potential users of mediation.

First started the UNCITRAL Model Law (2002) which set the base or influenced several legislations in Europe (e.g., Belgium, Croatia, Slovenia) and all over the world[124]. While the primary focus of the Model Law (2002) was international commercial mediation, countries took the legacy to broaden its scope to make it applicable to domestic matters in a broader array of disputes (usually, still within the civil domain[125]).

Second came the EU Mediation Directive, which has introduced the minimum legal framework on mediation in cross-border disputes for the member states to adhere to, including a requirement to render mediation settlements emerging from these disputes enforceable. In many cases, the Directive was the reason why the member states started regulating mediation in the first place. More frequently than not, the standards provided therein where also applied to national disputes, especially in cases were no or only vague regulation was in place[126]. Many countries subject to this research have chosen to broaden the scope to all international disputes instead of limiting it to cross-border disputes emerging from the relations within the EU (e.g., Belgium, Croatia, Cyprus, Lithuania, Spain). However, some were more formalistic and apply their law following the letter of the Directive to the disputes within the EU, or European Economic Area at most (e.g., the Czech Republic, Finland, Serbia).

The third was the UNCITRAL Singapore Mediation Convention. Adopted in 2018, it introduced the regime on the enforcement of international mediation settlements. Along came the revised Model law (2018), also offering the mechanism for enforcement. A long time will have to pass before the convention is ratified in a significant amount of countries for it to be used in practice. Nonetheless, national legislators are encouraged to take into account the provisions of the convention when drafting their national laws to adhere to the international standards set therein.

The list provided above is not exhaustive, nor does it suggest by any means that these are the sole international documents with regard to mediation. The Hague Conference of International Private Law tends to include a provision on mediation in the conventions it adopts[127]; the EU has adopted several other legal acts concerning alternative dispute resolution[128]; in the United States (hereinafter – the US) a Uniform Mediation Act was adopted for the use of the states within the US. However, the three documents outlined in the previous paragraphs are the most relevant for the member states of the Council of Europe and, therefore, they will remain the key source of international standards referred to further in the Explanatory note.

In the light of the harmonisation, national legislators cannot be forced to remove the diversity completely and mirror every provision stated in the international documents. However, they are strongly encouraged (and will be throughout the Explanatory note) to adhere to the standards set therein. First, this can help attract international contractors and foster the economic growth of the country itself. Second, setting common standards on the international level improves the availability of mediation for users coming from different parts of the world.

[123] Recommendation on Mediation (family), *Principles of Family Mediation*, para. VI (c).

[124] The full list of countries which adopted legislation based or influenced by the Model law (2002) is available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status.

[125] This is true to all three countries subject to this research, that were influenced by the provisions of the Model Law.

[126] HOPT, K. J. and STEFFEK, F. Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues from *Mediation: Principles and Regulation in Comparative Perspective*. Oxford: Oxford University Press, 2013, p. 6-7.

[127] See, for example, The Hague Conference on International Private Law, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and
Measures for the Protection of Children, 1996, the Hague. Available at: https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf, art. 31; The Hague Conference on Private International Law, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation, the Hague, 2012. Available at: https://assets.hcch.net/upload/guide28mediation_en.pdf.

[128] See, for example, the European Parliament and the Council of the European Union, Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ, L 165/63, 2013; the European Parliament and the Council of the European Union, Regulation on online dispute resolution for consumer disputes (EU) 524/201, OJ, L 165/1, 2013.

In that regard, it is recommended not to block the internalisation and broaden the scope of application to include disputes where parties to the dispute are domiciled or habitually resident in different states.

1.3. Different fields of law

The majority of the national legal acts on mediation that formed basis for this research has developed laws on mediation only in the civil domain (e.g., Cyprus, the Czech Republic, Ireland, Italy, Lithuania, Slovenia, Spain), excluding mediation in criminal or administrative matters from the scope of the main legal act on mediation. These national legislators have chosen to either leave mediation in criminal or administrative disputes unregulated and, thus, inapplicable, or to regulate it in executive acts or as a component of other laws (for example, mediation in criminal cases is regulated in separate legal acts in the Czech Republic and Lithuania). Some countries do not have a single comprehensive law on mediation at all and have chosen to integrate provisions on mediation in, mainly, procedural codes (e.g., Belgium, Poland, France, Switzerland) or introduce separate legal acts on civil, penal and administrative mediation.

However, there are some good examples of consolidation. The Azerbaijanian model shall be considered the most comprehensive so far, as it not only lists different types of disputes falling under the scope of the law (including disputes arising out of civil and economical, family, labour, administrative law relations, as well as criminal cases and administrative offenses[129]) but also provides separate articles addressing features of these different types. Mediation in criminal and administrative matters also falls under the scope of the Serbian Act on Mediation in Dispute Resolution. In Germany, mediation can be applied in every dispute where settlement is legally possible, including criminal cases concerning misdemeanour.

A general overview of mediation in other than civil disputes cannot be provided due to the fact that, as rightly stated by Hopt and Steffek, '*their structures have frequently developed organically, they are less the result of systematically planned legislation and are also understandable in the context of the respective legal system*'[130]. However, as highlighted in the Recommendations and Guidelines on Mediation (administrative) and Recommendation concerning restorative justice, attention could be drawn to certain aspects concerning mediation in administrative and penal matters. These aspects shall be taken into account when drafting a law on mediation.

a) Mediation in matters concerning administrative authorities

As rightly emphasised in the Guidelines on Mediation, '*[a]lternatives to litigation between administrative authorities and private parties will only become established in member States if a policy that addresses the use of these means of dispute resolution is adopted*'[131]. Even though Recommendations and Guidelines on Mediation encourage countries to introduce a possibility to use alternative means for resolving a dispute between these parties[132], only three countries subject to this research expressively regulate mediation in administrative matters, namely France, Poland, and Switzerland. All three of them have incorporated the provisions in their respective codes of administrative proceedings. However, the procedure foreseen for administrative disputes in France or Switzerland is not in substance different from the one applied in civil disputes, nor it introduces some important peculiarities characteristic to administrative relations. Poland, on the other hand, includes several provisions distinguishing the administrative procedure from the civil one. However, the majority of the provisions are common to mediation, regardless of the dispute in question. In Germany, as mentioned above, the national law on mediation also comprises other fields, including administrative law[133] and the Code of Administrative Court Procedure allows *mutatis mutandis* application of the provisions on mediation foreseen in the Code of Civil Procedure[134]. In Serbia, the Act on Mediation in

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[129] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 3.1.
[130] HOPT, K. J. and STEFFEK, F. Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues from *Mediation: Principles and Regulation in Comparative Perspective*. Oxford: Oxford University Press, 2013, p. 72.
[131] Guidelines on Mediation (administrative), para. 10.
[132] Recommendation on Mediation (administrative), appendix, para. 1 (i); Guidelines on Mediation (administrative), para. 10-11.
[133] ZIMMER, D. and HÖFT, J., Mediation in Antitrust Cases. *European Competition Law Review*, 2013, p. 434-442.
[134] The Federal Republic of Germany, the Code of Administrative Court Procedure. *Bundesgesetzblatt* I, p. 686, 1991, Sec. 173.

Dispute Resolution also applies to administrative matters[135]. These examples support the recommendation of consolidated legal act, as the majority of principles are shared in all types of mediation.

The main differences between mediation in the civil domain and the public domain arise from the status of the parties. While mediation can be conducted between the parties to the same administrative procedure, it can also be applied in disputes between the authority conducting administrative procedure and a person subject to that procedure (in Poland, for example, '*[t]he parties to mediation may be: 1) the authority conducting the proceedings and the party or parties to these proceedings; or 2) the parties to the proceedings*'[136]). Hence, in the latter case, the relationship between parties to a mediation is clearly subordinate. In this regard, additional provisions concerning mediator's neutrality and impartiality might come in handy. First, as will be discussed in chapter 3.1., only a certified and properly trained mediator shall be allowed to conduct mediations. Specificities of the training for mediators conducting mediations in administrative matters are outlined in the Basic Mediator Training Curriculum[137] adopted by CEPEJ. Second, employees of the authority, which is a party to the dispute, shall not be allowed to conduct mediations in such disputes[138] (in Poland, for example, *'[a]n employee of the public administration authority before which the proceedings have been pending may not serve as a mediator'*[139]).

Moreover, the status of the authority governed by public law implies that the authoritative party only has the discretion to act within the limits explicitly defined to it by the law. It also implies that mediation can only be possible in cases where national law unambiguously allows settlement, which raises the question of the eligibility of the case for mediation. For example, in the Netherlands, disputes between the tax authorities and taxpayers can be resolved by mediation[140]; mediation also has potential in competition law disputes with regard to commitments in mergers, private actions for damages following infringements of competition law and settlement proceedings allowing reductions in fine for breaches of competition law.

The mediation process itself has to be more formalised as it may be subject to subsequent judicial review (in Poland, for example, *'[o]n the basis of the arrangements made in mediation proceedings, the authority repeals or amends the contested act or performs or takes another action according to the circumstances of the case within its scope of competence*'[141], however, a person can lodge a complaint with the voivodship administrative court with regard to such an action[142]). Therefore, national legislators are especially encouraged to specify in detail the necessary procedural steps before and after mediation, as outlined in chapter 5. Moreover, it is recommended to reflect the involvement of the third parties, as their interests might also be affected by the outcome of the mediation.

b) Mediation in penal matters

The Recommendations on Mediation (Penal) has already emphasised '*the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community*'. However, in the Guidelines on Mediation (Penal) several obstacles towards the use of mediation in criminal matters, including among others a lack of awareness of restorative justice and mediation, a lack of availability of victim-offender mediation, a lack of specialised training[143], were still identified. Yet, not all the countries subject to this research offer or regulate victim-offender mediation in probation services and other institutions to tackle the aforementioned problems. However, there are several that do. As mentioned above, Azerbaijan has included mediation in penal matters under the scope of the main legal act on mediation; the Czech Republic and Lithuania have

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[135] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 3.
[136] The Republic of Poland, the Code of Administrative Procedure, Art. 96a (4).
[137] CEPEJ, Basic Mediator Training Curriculum. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 19-23., point 4.
[138] Guidelines on Mediation (administrative), para. 31.
[139] The Republic of Poland, the Code of Administrative Procedure, Art. 96f (3).
[140] VOS, R. Mediating Tax Disputes in the Netherlands. *Dutch-Flemish Magazine for Mediation and Conflict Management,* 2014, vol. (18) 3.
[141] The Republic of Poland, the Act of 30 August 2002 Law on Proceedings before Administrative Courts, *Dziennik Ustaw*, 2002, item 1302 of 2018, Art. 117 (1).
[142] The Republic of Poland, the Act of 30 August 2002 Law on Proceedings before Administrative Courts, *Dziennik Ustaw*, 2002, item 1302 of 2018, Art. 118 (1).
[143] Guidelines on Mediation (penal), appendix, para. 7.

implemented separate legal acts offering a framework for mediation at probation authorities. France, Poland, Switzerland (with regard to minors[144]) and Turkey have introduced several provisions concerning mediation in their respective criminal codes or codes of criminal procedure. Serbia has extended the scope of application of their main legal act on mediation to also include mediation in criminal matters, while Germany limits the application of the main legal act to the cases of misdemeanour.

As outlined in the Recommendation concerning restorative justice, recently adopted by the Council of Europe Committee of Ministers, victim-offender mediation in penal matters is an essential tool of restorative justice – a '*process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party*'[145]. If used effectively, restorative justice can increase safety as the offenders can better understand the consequences of their actions. Moreover, it can establish or rebuilt relations between the victims and offenders, reducing recidivism. It can also help reduce the psychological harm and compensate the monetary damage inflicted by an offense or a crime. With the right safeguards in place, the society can highly benefit from restorative methods as, instead of eliminating certain individuals from it, these methods are capable of positively transforming the behaviour and re-introducing them back to the society. While restorative justice itself is not the main subject of this research, the further paragraphs of this subchapter will solely outline the details that shall be taken into account when introducing mediation in the criminal law domain. These details are based on the Recommendation concerning restorative justice[146], which highlights the most important aspects of victim-offender mediation, as well as national provisions, which, at certain instances, provide a more in-depth regulation.

The distinctive features of mediation in penal matters, yet again, primarily lay on the status of the parties. The victim-offender relation implies the need for safeguards with regard to the weaker party. Accordingly, mediation shall not be conducted without the explicit and informed consent of the victim (such a provision exists in Czech, French, German, Lithuania, Polish legal acts) and the offender[147]. National legislators are also encouraged to introduce additional safeguards with regards to domestic violence cases (in France, for example, in case of domestic violence, mediation cannot be conducted unless the victim explicitly demands; if the domestic violence occurs again after the mediation was started, no further mediation sessions can be initiated[148]). Lastly, probation services are frequently applied in juvenile delinquency cases. Therefore, as emphasised in Recommendations concerning restorative justice[149], national legislators shall ensure that children participating in mediation can be accompanied by their legal representatives as well as the availability of social workers or representatives of the responsible official bodies if such a need arises during mediation. In the Czech Republic, for example, '*[t]he Probation and Mediation Service, when carrying out their mission, cooperates closely with bodies which are empowered by the special law with the execution of socio-legal protection of children and providing benefits in material need to inadaptable citizens with social care*'[150].

Additional safeguards shall also be introduced with regard to the procedure itself. First, the selection of cases suitable for mediation shall guarantee that the secondary victimisation will be prevented, as well as ensure that the offender is not aggressive or dangerous in any other way. In that regard, a two-tier selection procedure applied in Lithuania[151] can be introduced. Such a procedure not only allows conducting the primary theoretical evaluation based on a set of criteria but also meet parties individually before deciding if the case should be subjected to mediation. Second, if the risk of secondary victimisation remains high, mediators shall also be allowed and encouraged to conduct entire mediation in individual sessions, without parties meeting one another[152]. Third, mediators willing to conduct victim-offender mediations shall also be

[144] For minors. Penal mediation for adults was only introduced in Friburg in Geneva.
[145] Recommendation concerning restorative justice, appendix, para. 3.
[146] Which was built on Recommendations on Mediation (penal) and prepared taking into account the Guidelines on Mediation (penal).
[147] Recommendation concerning restorative justice, appendix, para. 16 and 19.
[148] The French Republic, the Code of Criminal Procedure, Art, 41-1 (5).
[149] Recommendation concerning restorative justice, appendix, para. 24.
[150] The Czech Republic, Probation and Mediation Service Act, 2000, No. 257/2000 Coll., Sec. 5 (2).
[151] The Republic of Lithuania, the Rules on Mediation in the Probation Authorities, 2017, No V-532, Sec. 9.
[152] Guidelines on Mediation (penal), para. 33.; The Republic of Lithuania, the Rules on Mediation in the Probation Authorities, 2017, No V-532, Sec. 10.1.

required to undergo specialised training[153] including basic knowledge of the criminal justice system and other distinctive topics, as outlined in the Basic Mediator Training Curriculum[154]. In Serbia, for example, such training can be required under a general provision, stating that a *'[s]pecialized training is organised for particular areas or types of disputes'*[155].

Moreover, certain procedural guarantees should be introduced with regard to the offender as well. First, the mediator or authorities in charge shall be obliged to unambiguously explain the legal effects of mediation and a settlement reached therein, as well as the process itself and the rights and obligations of the users[156]. Second, mediation in criminal matters shall remain confidential and should not be used to extract additional evidence or admission of guilt from the alleged perpetrator[157], as it would hinder the restorative purpose of mediation. Thus, mediation in penal matters shall take place when there is at least a basic consensus on facts between the parties and the authorities in charge[158]. However, if another crime is revealed during mediation or there is a threat for physical or psychological integrity of a person, general exceptions to confidentiality, as explained in chapter 5.4.1., shall apply[159].

Lastly, regard shall be had to the inclusion of different organisations in the process of restorative justice, varying from the police and prosecutor offices and the judiciary, to community organisations. First, proper communication and system for exchange of information shall be established among official authorities and members of the judiciary[160] (in Lithuania mediators have to establish such a communication with the official authorities as well as social organisation throughout different stages of the procedure, including case evaluation, mediation process, provision of information on the results of mediation and others[161]). Second, social organisations shall be involved and encouraged to participate in the process by, for example, referring potential cases to mediation[162]. Good practice can be seen in the Czech Republic, where *'[t]he Probation and Mediation Services proceed, if useful, in cooperation with the bodies of the social security, schools and educational facilities, providers of health services institutes, registered churches and religious communities, civil associations, foundations and other institutions pursuing humanitarian goals and if need be coordinate such cooperation from the perspective of using probation and mediation in a criminal proceeding'*[163].

2. Definitions

There is no uniform mediation definition that could be found in every national legal act. However, these various definitions are more often than not built on the minimum requirements applied for the mediation process[164] and thus are relatively similar. It indicates that there exists a rather consistent understanding of the main features of the process. The definitions mainly refer to a structured process, where two or more parties are trying to find an amicable solution to their dispute with a guidance of a neutral third party – one or several mediators – without a decision-making power. The definitions also quite often include impartiality, independence, and confidentiality of the process.

International documents do not provide a one-fit-all approach either. Slight differences in definition are natural as every document has a particular goal, scope or audience. Some of the definitions found are more generic and their wording may also cover other types of amicable dispute resolution, such as conciliation (see, for example, the definition provided in the Mediation Directive: *'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be*

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[153] Recommendation concerning restorative justice, appendix, para. 42.
[154] CEPEJ, Basic Mediator Training Curriculum. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 22, point 4.
[155] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Ar. 43.
[156] Recommendation concerning restorative justice, appendix, para. 16.
[157] Recommendation concerning restorative justice, appendix, para. 30.
[158] Recommendation concerning restorative justice, appendix, para. 30.
[159] Recommendation concerning restorative justice, appendix, para. 49.
[160] Recommendation concerning restorative justice, appendix, para. 28.
[161] The Republic of Lithuania, the Rules on Mediation in the Probation Authorities, 2017, No V-532, Sec. 19.
[162] Recommendation concerning restorative justice, appendix, para. 56.
[163] The Czech Republic, Probation and Mediation Service Act, 2000, No. 257/2000 Coll., Sec. 5 (1).
[164] The Hague Conference on Private International Law, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation, the Hague, 2012. Available at: https://assets.hcch.net/upload/guide28mediation_en.pdf, p. 7.

initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question[165]), while others emphasise the differences that can help distinguish mediation from other amicable dispute resolution methods, such as ombudsmen services (see, for example, definition provided by the Hague Conference on Private International Law: '*mediation can be defined as a voluntary, structured process whereby a 'mediator' facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict*'[166]). The definition of mediation provided in the draft CEPEJ Glossary ('*structured and confidential process in which an impartial third person, known as a mediator, assists the parties by facilitating the communication between them for the purpose of resolving issues in dispute*')[167] is also more general in nature as the main function of the glossary is not to define a scope of applicability, but rather to inform and explain.

The Explanatory note will not provide a copybook definition that can be used in every national law. However, since the definition of mediation can broaden or restrict the scope of application of the legal act, certain aspects, which should be taken into account when drafting a law on mediation, are emphasised. First, not to broaden the scope unwillingly, the drafters should carefully evaluate what other amicable dispute resolution procedures are applied in their countries and what distinctions should be made not to include them under the scope of the legal act on mediation. These distinctions can be made taking into account the independence of a mediator, the decision not being binding and others. Second, there exist many types of mediation (e.g., facilitative, evaluative, transformative, narrative), all used throughout the world separately or as a mixture of several of them, in accordance with the circumstances at hand, during a mediation session. Thus, the definition shall not prevent these different types from being employed, as all of them can help parties settle their dispute when used rightly. In that regard, emphasizing that mediation should be exceptionally facilitative may raise doubts whether evaluative mediation is at all allowed.

The same would be true if a definition restricted mediator's right to make proposals. First, some countries (e.g., Azerbaijan, Croatia, Finland, Ireland, Italy, Poland) explicitly allow making such proposals, usually upon request or consent from all the parties to a dispute. For example: '*mediator shall conduct mediation using different techniques leading to an amicable settlement of a dispute, including supporting the parties in formulating their settlement proposals. At the joint request of the parties, the mediator may indicate dispute settlement options which are not binding on the parties*'[168]. Italy has taken it a step forward allowing mediators to make proposals every time the parties have failed to reach a settlement: '<…> *When an agreement is not reached, the mediator may make a settlement proposal. In every case, the Mediator formulates a settlement proposal, if the parties make a joint request to the mediator at any time during the procedure.* <…>'[169]. Allowing mediators to make proposals is considered to be a good practice, as long as these proposals are not binding to the parties.

The definition of a mediator is relatively steady throughout the national laws in consideration as well. The main features emphasised are based on the role of an independent, neutral third party, the function of guiding the parties towards a settlement and absence of decision-making power. While these are the main criteria to be taken into account, drafters can also consider specifying that a person has to be enlisted in the national register to be considered as a mediator in the light of a legal act in question. For example: '*Mediator shall mean a real person who carries out the mediation activity and is enrolled in the register of mediators regulated by the Ministry*'[170]. Being on the list/register of mediators, as will be discussed in chapter 3.1, can ensure that a person

[165] The European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008, art. 3 (a).

[166] The Hague Conference on Private International Law, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation, the Hague, 2012. Available at: https://assets.hcch.net/upload/guide28mediation_en.pdf, p. 7.

[167] CEPEJ, Ad hoc CEPEJ working group entrusted with the harmonisation of the definitions used by CEPEJ, Meeting report of the 4th meeting, January 23-24, 2019, Appendix II: Document CEPEJ(2018)2PROV8. Available at: https://rm.coe.int/rapport-reunion-bologne-en-23-24-janvier-2019/1680933333.

[168] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Article 183^{3a}.

[169] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 11 (1).

[170] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 2 (a).

conducting mediation is adequately trained, examined and continues to develop professionally. It can increase the overall quality of mediations.

3. Mediator

3.1. Requirements for mediators

Guidelines on mediation echo the importance of establishing common international criteria for the accreditation of mediators, as the mobility throughout Europe has highly increased[171]. Introduction of lists/registers for mediators, training providers, and mediation providers can help achieve this goal. While the apparent function of a list/register is systemising information on mediators (or mediation providers; or training providers in the same manner) and presenting it to the interested parties when needed, it also is an extremely useful tool to ensure a high quality of mediations. The reason for this is the opportunity to set clear requirements and high standards for those willing to enter the list. Thus, an increasing number of legislators has introduced official lists of mediators to their respective national laws (e.g., Austria, Azerbaijan, Croatia, Cyprus, Lithuania, Serbia, Turkey) while other countries have chosen to maintain at least a list limited to the scope of court-related mediation (e.g., the Czech Republic, Poland, Slovenia).

Unqualified mediators can damage the reputation of the profession in the eyes of the general public and reduce the rates of recourse to mediation. Foreseeing in the national law that only a person on the list can practice mediation, allows implementing adequate safeguards capable of preventing incompetent people from conducting mediation. Such safeguards could contain: (a) requirements set for those willing to enter the list; (b) adequate training; (c) comprehensive examination; (d) continuous professional development (CPD) and requirement to conduct a certain number of mediations; (e) disciplinary body having the authority to suspend or remove a mediator from the list; (f) sanctions for practicing mediation while not on the list.

(a) requirements

Conducting mediation amounts to a complex mental activity. Hence, it requires a certain level of social maturity in an individual. To reduce the possibility, that a potential mediator has not yet acquired such level, legislators tend to foresee a requirement of possessing a university degree (e.g., Cyprus, Lithuania, Serbia, Slovenia, Spain). In some instances, the requirements are higher – a person has to possess a master's degree (i.e., the Czech Republic) or graduate from the faculty of law (i.e., Turkey). Poland, for example, has introduced a requirement based on age – only a person not younger than 26 can enter the list of permanent mediators. The same is true in Austria; however, a person has to be at least 28. In Azerbaijan, the requirement is twofold and based on both higher education degree and age rating (at least 25 years old). Having a university degree or a degree in higher education can ensure a certain level of knowledge obtained and, at the same time, increase the chances of social maturity. It is therefore considered as a good practice. However, it is also recommended to allow professionals from non-legal background to practice mediation subject to fulfilment of other criteria.

A mediator has to deal with highly sensitive issues while conducting a mediation. As moral standards of impartiality and neutrality are high, so should be the standards for mediator's reputation. Majority of the countries in consideration hold that a person, who has a criminal record should not be eligible to act as a mediator. However, the standards slightly differ: some countries explicitly forbid to practice for persons convicted of serious crime or crime related to corruption (i.e., Lithuania), sentenced to unconditional imprisonment (i.e., Serbia), convicted of an intentional crime or offence (e.g., Slovenia). Others, on top of the intentional crimes, add crimes of negligence committed in connection with the activities performed by a mediator (e.g., the Czech Republic). Austria does not allow to practice if a person is convicted leading to '*doubts as to reliability of practice of mediator*'[172]. Lithuania and France also add dismissal from the post for a breach of administrative or disciplinary duty to the list. In a similar manner, Belgium prevents from practicing mediation not only individuals who have a criminal record, but also those who have disciplinary and administrative sanctions, which are incompatible with the functions of a certified mediator.

[171] Guidelines on Mediation (family & civil: para. 24; penal: para. 22; administrative: para. 36).
[172] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 11 (2).

As countries usually have long-standing national provisions in the context of other professions defining what should be considered as a good repute, it is believed that mediators can be subjected to the same national standards. However, national legislators should evaluate if such restrictions lasting for a lifetime are proportionate and absolutely necessary to reduce the risk of recidivism. Thus, restriction for a certain period could be considered. Such an approach is applied in, for example, Belgium and Lithuania.

Guidelines on Mediation highlight the significance of adherence to the codes of conduct, recommending the use of the European Code of Conduct for Mediators[173] in civil and commercial matters as an internationally accepted minimum standard, as well as encouraging provision of specified codes with regard to the mediation in administrative and penal matters[174]. Adherence to codes of conduct, national or international, is a relatively common requirement (or, in some instances, suggestion) for mediators in the countries subject to this research (e.g., Belgium, Croatia, Cyprus, Ireland, Lithuania, Serbia, Spain). As per good example of Serbia, adherence to such code is taken into account during the procedure of mediation licence renewal ('*In the mediation license renewal procedure, special attention shall be paid to the mediator's compliance with the Code of Ethics in his performance of duties prescribed under this Act and bylaws.*[175]*'*) Moreover, as will be discussed in chapter 3.2.3. disciplinary mechanisms shall be in place for the breach of a code of conduct[176].

The European Union (the EU) Directive 2008/52/EC (the Mediation Directive[177]), implemented throughout the Member States, is in part responsible for such a frequency. Art. 4 of the Directive states that '*Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services* <...>'. The Mediation Directive also draws attention to and requires awareness of the abovementioned European Code of Conduct for Mediators. Codes of Conduct, especially those recognised internationally, provide another possibility to ensure a higher quality of the services, as well as adherence to international standards and are highly recommended.

(b) training

High-quality comprehensive training for mediators is of crucial importance to the quality of mediation. Even though it is common to include a provision in the national law, stating that mediators have to undergo training for mediators, such a vague provision is not enough. National legislators are encouraged to ensure the quality of the training. This can be achieved via:

(1) licencing the training providers or keeping the official list of training providers (for example: '*[t]he Ministry of Justice shall establish, by ministerial decree, the list of mediation trainers. In order to ensure a high-level training of mediators, the decree shall establish the criteria for registration, suspension, and cancellation of enrolment, as well as for the conduct of training. The same decree shall establish the date as of which their participation in the training activities of the present paragraph fulfils the requirement for professional qualification.'*[178]);

(2) setting clear grounds for removal from the list (for example, *'[t]he Federal Minister of Justice shall remove a training institution or course from the list by formal Decision, if necessary by obtaining an opinion from the Advisory Council, if he is notified that one of the requirements of registration has ceased to apply or has not been met, the training goals have not in principle been met, issued certificates are repeatedly grossly incorrect, a training institution despite warning violates its obligation to report or if the sustainability of its activity is not guaranteed'*[179]).

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[173] The Commission of the European Union, Justice Directorate, European Code of Conduct for Mediators, 2004. Available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf;
[174] Guidelines on Mediation (family & civil: para. 28-29; penal: para. 27-28; administrative: para. 38-39).
[175] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 38.
[176] Guidelines on Mediation (family & civil: para. 30; penal: para. 29; administrative: para. 40).
[177] The European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008, p. 3–8, art. 4.
[178] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 16 (5).
[179] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 28 (1).

(3) authorising training programmes (for example: '*[t]he mediation training shall refer to a training, which is received following the completion of a faculty of law and which includes fundamental information on the conduct of the mediation activity, communication techniques, negotiation and dispute resolution methods and behavioural psychology; and the other theoretical and practical information to be set forth in the regulation.*'[180]). When setting the standards for training institutions and programmes, national legislators are encouraged to take into account the Basic Mediator Training Curriculum, which can be found in the Mediation Development Toolkit[181];

(4) determining the minimal duration of the training (for example: '*[a]ny person may be registered in the Register of Mediators, who <…> is a member of the Cyprus Chamber of Commerce and Industry or the Cyprus Scientific and Technical Chamber, is the holder of a recognized university degree and has attended a special training programme to become a mediator of total forty (40) hours, organized by the Cyprus Chamber of Commerce and Industry, or the Cyprus Scientific and Technical Chamber, or has attended an equivalent programme'*[182]);

(5) monitoring training sessions or requiring reports from training providers (for example, *'[t]he registered training institutions in order to prove the sustainability of their activity shall in writing report to the Federal Minister of Justice <…> on the extent, the contents and the success of the training over the past year'*[183]).

Specialised training should also be considered in the light of different types of mediation, especially with regards to subtle issues, such as the best interest of a child or victim-offender mediation. For example, the Czech Republic requires further qualifications from family mediators, as well as separate extension examination, while Azerbaijan allows setting different training requirements in consumer, family, and labour disputes[184]. Serbia also foresees a possibility to require double training (basic and specific) from mediators wishing to conduct mediations in certain types of disputes. Such differentiation is a good practice, as it can positively affect the quality of mediation.

(c) examination

Compulsory examination not only allows to ensure a higher level of training but can also prevent unskilled individuals from entering the list and, subsequently, conducting mediations. It is applied in Belgium, the Czech Republic, Lithuania, Turkey. However, the examination, if applied, should not become an unnecessary formality. It is recommended to form it in two parts: theoretical and practical; establish clear evaluation criteria; consider the possibilities and procedure applied for retaking or appealing the final evaluation. The fee, if applicable[185], should be intended to cover administrative fees of the organisation of the exam and not prevent individuals with a lower income level from taking it.

(d) CPD

Even though mediators might undergo a high-quality training at the beginning of their career and pass the examination to enter the list, if they are not practicing, the knowledge obtained is quickly forgotten. Therefore, in order to ensure that mediators on the list are able to practice and are up to date with the recent developments, national legislators are encouraged to require demonstration of continuous professional development (for example, 24 hours every 3 years in Cyprus[186], 20 academic hours every 5 years in

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[180] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 22 (1).
[181] CEPEJ, Basic Mediator Training Curriculum. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 19-23.
[182] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 7.
[183] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 27.
[184] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 25.2; 26.2; 27.2;
[185] For exampe, in the Czech Republic the fee for taking the examination amounts to 5000 CZK (approx. 200 EUR).
[186] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 12.

Lithuania[187], 10 hours per year in Serbia[188], 50 hours every 5 years in Austria[189], once every 2 years in Azerbaijan[190]) or to submit proof of a certain number of mediations conducted per period of time (for example, 5 mediations in 3 years in Serbia[191]). If the number of ongoing mediations is yet too low on the national level, mediators can be required to be observers in a certain number of mediations (if the parties to a dispute consent). Such a requirement is in line with the Guidelines on Mediation, recommending that the initial training '*be followed by supervision, mentoring and continuing professional development*'[192].

(e) disciplinary body

If a list or register is established, there will have to be a public authority or professional body responsible for its administration – collecting information on the candidates, continuous development of enlisted mediators, approving admission, suspension or removal from the list, collecting a yearly fee, if applicable. National legislators are also encouraged to create disciplinary bodies, which could apply disciplinary sanctions for professional misconduct, for example infringing the provisions of a code of conduct, or not performing their duties, such as neutrality or impartiality. This could also improve the quality of mediations and prevent mediators, who are not fit to perform their function, from mediating. Examples of possible sanctions of disciplinary liability are provided in part 3.2.3 of the explanatory note. Disciplinary bodies could be established separately or as a part of authority or body in charge of the administration of the list. It is crucial to ensure that the decisions of the disciplinary body could be appealed to a higher authority or a court.

(f) practicing while not on the list

The sole establishment of a list does not ensure that individuals will not conduct mediation while not being on it. Safeguards to prevent such unauthorised practice have to be established. They can amount to fines (for example: '*(1) A natural person shall commit an offence by a) using the designation "registered Mediator" or similar expression contrary to Section 11 despite not being registered in the Register, (2) A fine of up to 100 000 CZK may be imposed for an offence committed under paragraph 1.*'[193]) or be achieved in a practical way through other measures.

First, a mediation settlement signed by a mediator not included on the list, might not be transformed into an enforceable document by way of homologation in courts or by notarial deeds. For example, in Belgium, only '*in case of settlement and only if the mediator who conducted mediation is certified in accordance to article 1727, the parties or one of them can submit the mediation settlement obtained in conformity with articles 1731 and 1732 for homologation before a competent judge*[194]'. As will be discussed in chapter **Erreur ! Source du renvoi introuvable.**., a mediator's signature on the mediation settlement is required in many countries and recognised at an international level. Hence, not accepting such a document for homologation and subsequent enforcement could deter parties from using the services of such individuals. Second, in cases where mediation is a compulsory prerequisite before submitting a claim in court, such a requirement could not be considered as met if an individual, who attempted to mediate the dispute, was not on the list of mediators. Third, the limitation periods may not be suspended unless the mediator is registered. In Austria, for example, '*[t]he beginning and the proper continuation of the mediation by a registered mediator suspends the application of the start and running of the statute of limitations*'[195].

However, a threat exists, that such practical methods could prevent parties not only from using the services of that particular individual but from using mediation in general. Hence, fine should be the preferred method of sanctioning and deterring individuals from conducting mediations without entering the list.

3.2. Obligations, permissions, liability

[187] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 8.
[188] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 38.
[189] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 20.
[190] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 12.2.2.
[191] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 38.
[192] Guidelines on Mediation, (family & civil, para. 23; penal, para. 21; administrative, para. 35).
[193] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 25.
[194] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1733.
[195] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 22 (1).

3.2.1. Obligations

Many duties of a mediator have already become traditional and, directly or indirectly, can be found in every national law on mediation or, at least, in the code of conduct to which mediators adhere. These obligations include independence, impartiality, confidentiality (both general and with regards to private meetings with one party), the disclosure of any concerns with regard to mediator's impartiality and providing the information to the parties concerning mediation process and professional background of the mediator.

Nevertheless, more recent duties emerge, generally procedural in nature. Many countries require a mediator to sign the mediation settlement reached (e.g., Cyprus, Czech Republic, Finland, Serbia, Turkey). This requirement is in line with the international documents, such as UNCITRAL Singapore Mediation Convention[196], which recognises mediator's signature on the mediation settlement as evidence, that the agreement has indeed resulted from mediation and, thus, falls under the scope of the convention.

Moreover, as will be discussed in more depth in chapter 5.5., national legislators (e.g., Cyprus, Ireland, Poland, Spain, Turkey) are asking mediators to prepare a note of termination of the mediation. Some countries allow parties to decide themselves what should be encompassed in such a note, apart from the conclusion of the activity, (for example, Turkey[197]) while others define more precisely what should be included (for example, Ireland[198], Poland[199], Spain[200]). A note of termination could be useful for statistical purposes and as a mean of proof that mediation has taken place. However, mediators preparing the note of termination, as well as legislators defining what should be included in such a note, have to be careful not to infringe the confidentiality of mediation.

Other obligations (or permissions) are only relevant in the context of court-related mediation. These include the obligation to notify the court or other authority about the outcome of the case or the permission to access the files of the case.

3.2.2. Permissions

In the same manner as some obligations of a mediator, certain permissions have also become a given. For example, a mediator's right to meet separately with the parties, especially with the consent of the parties and subject to provisions of confidentiality, is well established in many national laws (e.g., Azerbaijan, Croatia, Finland, Germany, Spain, Turkey).

Another example could be the right of a mediator to receive a fee (as long as the mediator is not a judge). While it is generally accepted that mediator should be compensated for the work and other expenses related to mediation (e.g., Azerbaijan, the Czech Republic, Italy, France, Poland, Spain, Turkey), the question of the size of the compensation remains. On the one hand, the market economy can answer this question and, thus, the national laws in some countries do not provide any information on the calculation of the fee. On the other hand, mediation services have to be accessible and affordable (especially in case of mandatory or court-related mediation, as explained in chapter 1.1.). Some countries simply indicate that the costs should be proportionate (for example, in Ireland it is stated that '*the fees and costs of a mediation shall be reasonable and proportionate to the importance and complexity of the issues at stake and to the amount of work carried out by the mediator*'[201]). Others have adopted fee tables for mediators or sometimes, more specifically, for court mediators (e.g., Italy, Lithuania, Poland, Serbia, Turkey). However, if chosen to introduce such tables, the national legislator should pay attention not to infringe competition law, and while making mediation affordable to the public, keep professionals rightly compensated and motivated to work.

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[196] United Nations Convention on International Settlement Agreements Resulting from Mediation, Art. 4 (1b (i)).
[197] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 17 (3).
[198] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 17 (1).
[199] The Republic of Poland, the Code of Administrative Procedure, Art. 96m.
[200] The Kingdom of Spain, Law on Mediation in Civil and Commercial Matters. *Boletín Oficial del Estado*, No. 5/2012, Art. 22.
[201] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 20 (2).

Other rights, such as drafting the settlement agreement, are more controversial as they rely heavily on the national provisions of mandatory law. In Croatia[202], Serbia[203], Slovenia[204] a mediator is allowed to participate in the preparation and drafting of the agreement if the parties to the procedure agree. Having extensive experience with various settlement agreements the mediator could be of great help for the parties, especially when they are not accompanied by lawyers. However, mediators without a legal background should not give legal advice as in some jurisdictions it could amount to practicing law without a license. In Turkey, for example, mediators are not allowed to give legal advice[205], even though, having a law degree is a precondition for entering the list of mediators[206]. Moreover, as discussed in chapter 2., mediators should be allowed to make proposals as long as they are not binding on the parties.

3.2.3. Liability

The issues of mediator's liability, other than disciplinary, are not widely discussed in the national laws on mediation. Apart from disciplinary sanctions, mediators are usually subjected to civil liability. For example, in Serbia *'[a] mediator shall be held accountable for any damage caused to the parties by his failure to comply with the Code of Ethics, by his unlawful conduct, intentionally or with gross negligence, in accordance with the general rules on liability for damages*[207]'; in Croatia '*[t]he mediator shall be liable for the damage caused by his or her violation of the obligation referred to in paragraph 1 of this Article [confidentiality]*[208]'.The strictest sanctions for breach of mediator's duties could be found in Austria, Belgium, and Turkey. In Turkey, mediators, as well as the parties, may face imprisonment of up to 6 months for breaches of confidentiality[209], the same duration is foreseen in the Austrian law[210]. Austrian mediators or parties can also face a fine. In Belgium, mediators may be subject to imprisonment from 1 to 3 years or a fine varying from 100 to 1000 EUR for the infringement of confidentiality[211].

The most common sanctions with regards to disciplinary liability are a warning; a reprimand (public or private); a suspension of the license or temporary removal from the list; a permanent removal from the list (e.g., Azerbaijan, Belgium, Lithuania). The Belgian legislator was even more creative and added such sanctions as mandatory co-mediation and an obligation to complete an internship in the scope of mediation for a certain period of time. Both of them are intended to fix the behaviour of a mediator and teach additional skills instead of preventing them from practice and, thus, should be encouraged.

It is considered that civil and disciplinary liability, as well as an obligation to compensate for the damage caused if properly implemented, should be sufficient to deter mediators from infringing their obligations. However, whatever the sanction, the decision of a disciplinary body should be subject to appeal before a higher authority or a court (for example, in Belgium the section of the Council of State for administrative litigation, upon application, can suspend or annul decisions adopted by The Disciplinary and Complaints Commission[212]). Moreover, potential users of mediation, as well as mediators themselves, shall have a better understanding of what behaviour might cause the application of disciplinary liability. Therefore, it is recommended to make the depersonalised decisions of a disciplinary body public, in a similar way to court decisions.

3.3. Mediation providers

[202] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 10 (2).
[203] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 26.
[204] The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008, Art. 14.
[205] The Republic of Turkey, Ordinance on the Application of Mediation over the Legal Disputes. *Resmî Gazete*, 2018, No. 30439, Art. 17 (5).
[206] The Republic of Turkey, Ordinance on the Application of Mediation over the Legal Disputes. *Resmî Gazete*, 2018, No. 30439, Art. 30 (2b).
[207] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 35.
[208] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 14 (2).
[209] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 33.
[210] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 31 (1).
[211] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1728 (2) and Criminal Code. *Moniteur Belge*, 1867, Art. 458.
[212] The Kingdom of Belgium, Criminal Code. *Moniteur Belge*, 1867, Art. 1727/6.

While the strongest emphasis with regard to the quality of mediation is put on the mediators, activities of the mediation providers are not less important. User satisfaction and come-back rate of the parties to a dispute in huge part lay directly on the smooth administration of their mediation. This includes the initial communication between the parties and the mediator, transparent assignment of a qualified mediator, the arrangement of the payment and allocation of a suitable venue. Moreover, mediation providers shall also disseminate the initial information on mediation and gather aggregated statistical data (as will be discussed in chapter 8.2.). Mediation providers can also ensure the high quality of mediations as they are responsible for hiring competent mediators along with properly trained personnel administering the disputes, as well as monitoring their performance to make sure that it is adequate. Model Mediation Feedback Questionnaire adopted by CEPEJ can be used for the latter[213].

Even though good (as well as bad) performance of mediation providers can have a significant effect on how the general public perceives mediation, the activities of mediation providers, with rare exceptions, are not well (or at all) regulated in the national laws. National legislators are encouraged to change that. First, mediation providers are free to introduce their rules of procedure as not all of the procedural aspects are or should be addressed in the national laws on mediation, as will be discussed in chapter 5.4.2. However, it shall be verified that the provisions of the rules of procedure are in line with the national law. Second, like mediators and the codes of conducts for mediators, mediation service providers could also benefit from adherence to the codes of conduct for mediation providers. It is of crucial importance in countries where the activities of mediation providers remain unregulated. Either way, national legislators are strongly encouraged to offer a model code to which providers can adhere. An example of such a code was also adopted by the CEPEJ and could be used as a well-established standard[214].

With regard to the regulation of the activities of mediation providers, Italian model is an example of good practice. The Ministry of Justice of the Republic of Italy maintains a register of mediation providers. In order to enter the register, providers shall submit to the Ministry their rules of procedure (including the online procedures that may be used by the provider), the code of conduct to which they adhere along with a table of fees applied. Before registration, the Ministry of Justice assesses the suitability of these documents[215]. A rather similar model is also implemented in Azerbaijan[216]. Such a model can ensure that the quality standards are met and verify that the rules of procedure and other documents go in accordance with the national laws on mediation. Moreover, it brings transparency to the parties, who are later able to get acquainted with the documents outlined above and familiarise themselves with what to expect from mediation. Therefore, the implementation of such a model is highly recommended.

3.4. Other legal professions

A legal background is seen neither as a mandatory prerequisite nor as an obstacle for practicing mediation. However, some hurdles can be found in the national legislation, especially with regards to the judiciary. For example, in Poland only judges who have already retired can serve as mediators[217]; in Belgium judges cannot be remunerated for acting as mediators[218]; in Serbia on top of conducting mediations free of charge judges are also obliged to do it solely outside working hours[219]; in Lithuania active members of the judiciary, who are included on the list of mediators, can only serve as mediators in court mediation[220], while in Finnish court mediation schemes only judges can serve as mediators[221].

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[213] CEPEJ, Model Mediation Feedback Questionnaire. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 37-38.

[214] CEPEJ, European Code of Conduct for Mediation Providers. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 24-27.

[215] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 16 (3).

[216] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 11.

[217] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Art. 183^2 (2).

[218] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 298.

[219] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 33.

[220] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 23 (2).

[221] The Republic of Finland, Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, No. 394/2011, Art. 14 (1).

Lawyers, on the other hand, are encouraged to practice mediation in some countries. For example, in Italy all the lawyers registered with the Bar Association are mediators by right, however, lawyers registered with mediation providers must be adequately trained and maintain their competence[222]; in Cyprus, every advocate who holds an annual licence can be registered in the Register of Mediators and conduct mediation in commercial disputed without any additional training (however, training is obligatory if an advocate wishes to serve as a mediator in disputes other than commercial)[223].

The training (and examination, where applicable) for the representatives of other legal professions should be either arranged in a general manner together with other candidates or ensured by the respective authority or professional body in charge. The latter model is implemented in, for example, the Czech Republic (the Bar arranges the training of lawyers in the area of mediation[224]) or Lithuania (the Judicial Council is in charge of the training of judges willing to become mediators[225]). The knowledge already acquired by a professional can also be taken into account. For example, in Austria, '*[t]he assessment of the professional qualification shall take into account the knowledge gained by and the level of completion of qualification of the members of specified professions <…> in the course of their own training and their professional practice and which may assist in their practice of Mediation*'[226].

Certain restrictions apply for such individuals willing to take dual responsibilities. Such restrictions are usually related to the subsequent power to impose decisions or use the information obtained during mediation. In Slovenia, a mediator cannot '*act as an arbitrator in respect of a dispute that was or is the subject of the mediation, or in respect of another dispute that has arisen from the same legal relationship or is related to it*'[227], unless otherwise agreed by the parties. The same is true for arbitrators and judges in Croatia; however, '*the parties may authorise the mediator to render an award based on the settlement in the capacity of an arbitrator*'[228]. In Serbia '*[a] judge acting in the case relating to the dispute, and an official deciding on the parties claim relating to the dispute in administrative or other proceedings, may not act as mediators*'[229]. In Turkey[230] and the Czech Republic[231] mediators are forbidden to act as lawyers for the parties or provide legal services with regard to the dispute that he or she mediated. In Azerbaijan '*[m]ediator cannot provide legal or other services to the parties and cannot represent any of the parties at court procedure or arbitration and act as an arbitrator on the subject of mediation process*'[232]. Such restrictions are reasonable as mediators obtain insider information which was shared with them in private. However, parties shall be free to decide otherwise and allow mediator to act in another role as is the case in Austria ('*after the end of the mediation with the approval of all affected parties he* [the mediator] *may act within the scope of his other professional competencies to implement the result of the mediation*'[233]).

To sum up, individuals acting as lawyers, judges, notaries, or enforcement officers should be allowed to serve as mediators as long as: it in is not contrary to mandatory national provisions; they are not acting in another role in the same dispute without an informed consent of the parties; they are adequately trained.

4. Initiation of mediation

Mediation can be initiated either voluntary or through a mandatory referral to attempt mediation. The first one is the most common and could be found in every jurisdiction. Voluntary mediation can take three main

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[222] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 16 (4bis).

[223] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 7 (a).

[224] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., part 7.

[225] In the scope of compulsory mediation. The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 21 (5).

[226] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 10 (2).

[227] The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008, Art. 8.

[228] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 16.

[229] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 21.

[230] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 9 (4).

[231] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 8(2).

[232] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 12.3.

[233] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 16 (1).

forms, namely, mediation clause, initiation by one or both of the parties, and recommendation by an official. All of these voluntary initiation models can function together and, therefore, should be allowed and further encouraged. Mandatory referral to the initial mediation session or the first meeting with a mediator is also gaining momentum as it is introduced as an additional mean to incentivise the parties to mediate in a growing number of countries. Azerbaijan, the Czech Republic, France, Italy, Lithuania, Poland, Serbia, Slovenia, Spain, Turkey have already introduced mandatory referral to the initial mediation session in one or another form on the national level.

4.1. Voluntary basis

4.1.1. Mediation clause

Mediation clause is included in a contract between the parties even before the dispute arise. Model contract clause on mediation[234] was adopted by CEPEJ and can be used as a reference. The examples of such clauses can also be found in the rules or websites of mediation providers, which frequently indicate several different options for the parties to a contract to choose from. For example, International Chamber of Commerce (ICC) offers four different wordings of a mediation clause, varying from an optional choice of mediation to an obligation to use mediation, which, unless successful, shall be followed by arbitration[235]. Regardless of the exact wording of the clause, in cases where parties have obliged themselves to attempt mediation before turning to other proceedings, national legislators should ensure that the dispute is not admissible in court or an arbitration institution unless parties have fulfilled the condition. Such an approach is shared and used in many countries. The proceedings are usually suspended only upon request of the opposing party (e.g., Spain, Hungary, Belgium).

National legislators are also encouraged to define what should be considered as a proper proof showing that mediation has indeed taken place, and the mediation clause is therefore no longer relevant. As will be discussed in chapter 5.5., a note of termination prepared by a mediator after the meditation was concluded could serve this purpose.

4.1.2. Initiation by one or both of the parties

Initiation procedure is not as important in comparison to the moment of commencement of mediation. However, it is recommended to define the procedure clearly, as it might make a difference in the later stages. It is mostly true when parties have to prove that they have fulfilled their obligations to resort to mediation (for example, in case of a mediation clause in the contract or compulsory mediation). Countries that regulate the initiation procedure require the proposal and rejection or acceptance to be made in writing (e.g., Serbia) and prescribe the period of time in which the other party should reply. It varies from 10 days in Azerbaijan[236], 15 days in Serbia[237] to 30 days in Turkey[238]. A period of 15 days is foreseen in the Model contract clause on mediation[239] adopted by CEPEJ and is, therefore, recommended as a non-mandatory point of reference for the parties. After the termination of the prescribed period, no answer is treated as a *de facto* rejection. It is also in line with the provisions of the UNCITRAL Model Law (2018)[240]. Note should be taken that a proposal made by electronic means shall amount to a written proposal.

4.1.3. Recommendation by an official

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[234] CEPEJ, Model contract clause on mediation. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 39;

[235] International Chamber of Commerce, Mediation Clauses [interactive]. Accessed: 2019-03-09. Available at: https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/.

[236] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 21.7.

[237] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 17.

[238] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 13 (2).

[239] CEPEJ, Model contract clause on mediation. From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 39;

[240] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art. 5.

Recommendation by a judge or other official is the least intrusive (however effective) way to inform and encourage the parties to try mediating their case. First, parties might be more willing to accept such a proposal from a neutral party as opposed to a proposal coming from another party. Second, parties are aware that the official offering mediation will later have to adopt a binding decision in their dispute. Thus, they are less willing to reject such a recommendation without a good reason in order not to be seen as uncooperative.

Many countries included in the research have such provisions (e.g., Belgium, the Czech Republic, France, Germany, Ireland, Lithuania, Switzerland, Turkey). Some of them even oblige the judges to make such proposal or provide information on mediation to the parties. In Slovenia, '*the courts shall be obliged to provide the parties with the option of mediation and may also provide other forms of alternative dispute settlement'* in the framework of the alternative dispute settlement programme[241]; in Serbia '[t]*he court or other authority that is required by a special statute to instruct the parties about the possibility of using mediation shall provide all necessary information to the parties with a view to fully informing them about the possibility of using mediation or by referring the parties to a mediator*'[242]. Naturally, following a non-binding recommendation, mediation shall only be commenced upon the consent of both parties to a dispute.

4.2. Mandatory basis

4.2.1. Attendance of an initial mediation session as a condition precedent to legal proceedings

One of the possible means to promote the recourse to mediation is requiring parties to participate in an introductory mediation meeting with a professional mediator as a condition precedent to judicial proceedings. During this initial session, provided free of charge or at a low cost, litigants and their lawyers can make a voluntary decision to either opt-out from mediation or enter in full. It has to be emphasised, to avoid any ambiguities, that requiring mandatory participation in the first meeting with a mediator, which, unless parties decide otherwise, can be continued to a full mediation process, does not oblige parties to settle. Quite to the contrary, parties are merely obliged to participate in an introductory session and are free to leave at any moment, without having to provide reasons for their decision. Such a model has proved to be an effective way to foster the use of mediation in several countries. For example, in Italy, it has significantly raised the numbers of mediations conducted to approximately 150 000 a year while managing to keep the success rate as high as almost 50 percent in cases where parties have decided to continue with mediation after the first meeting. In Turkey, where Italian model of the requirement to participate in the first meeting with a mediator was introduced in January 2018 (for employment disputes), preliminary numbers indicate an increase from 13 000 to 600 000 mediations per year with a success rate at 68 percent[243]. Moreover, in Italy, it reduced the number of incoming litigious cases from 28 to 49 percent in certain types of disputes in which initial mediation session is a condition precedent to court proceedings when compared to the period prior to the introduction of these provisions. It is also believed that requiring parties to participate in the introductory mediation session can reduce the amount of time needed to solve a case in court as a consequence of a lower number of claims reaching it in the first place[244].

Not surprisingly, more countries are choosing to require parties to attend an introductory mediation session as a condition precedent to judicial proceedings to promote the use of mediation in their national jurisdictions. While Italy[245] could be called the pioneer in the field, other countries, such as Azerbaijan (economic, family and labour disputes[246]), Lithuania (family disputes)[247]; Spain (labour disputes), Turkey

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[241] The Republic of Slovenia, Alternative Dispute Settlement Act. *Uradni list*, No. 97/2009, Art. 4(2).
[242] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 9.
[243] Data published by DE PALO, G.
[244] DE PALO, G. *A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs to Be More … Directive: Briefing requested by the JURI committee, European Parliament* [interactive], 2018. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf, p. 6 and 9.
[245] In Italy mediation information sessions are compulsory in disputes related to the following: joint ownership, real estate, partition, inheritances, family covenants, lease, bailment, business lease, damages for medical and/or paramedical malpractice or defamation via the press or any other means of publicity, insurance, bank and financial contracts. The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 5.
[246] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 28. The provision will enter into force on July 1, 2020.

(employment disputes, commercial disputes regarding receivables and compensation claims; extension planned to family and consumer disputes in 2020) have chosen to introduce the requirement to attend an initial mediation session as a condition precedent to legal proceedings as well. In the Act on Mediation in Dispute Resolution, Serbia has also opened the doors for implementation of such a requirement, stating that '*[t]he mediation procedure shall be carried out voluntarily, based on explicit consent of the parties, except in the disputes where a special statute has envisaged the instigation of a mediation procedure as a condition for the conduct of judicial or other proceedings*'[248]. In the UK, in most family cases, a MIAM (mediation information and assessment meeting) is also a legal requirement before taking the case to court.

Nonetheless, the models outlined above slightly differ. In Italy, the requirement is fulfilled when the parties participate in the first meeting with a mediator, which can be transformed into a full mediation process if the parties so agree[249] (in other words, an opt-out model). In Azerbaijan, the model is similar, however, parties can participate in the initial mediation session (where the mediator explains the essence, advantages and rules of the mediation process) jointly or separately and decide whether they wish to continue with mediation the same day or, at the request of the parties, the other day designated by the mediator[250]. In the UK attending a mediation information and assessment meeting is also a legal requirement before making a relevant family application in the United Kingdom[251]. These meetings can also be attended individually or together. If both parties agree, an appointment is made for a subsequent mediation session (in other words, an opt-in model). Both opt-in and opt-out models can be effective; however, when parties are not obliged to participate in the initial information session together, they are not able to continue with the full mediation process on the same day as further arrangements have to be made. This might slightly diminish the rate of actual engagement in the full mediation process.

Requiring parties to participate in the first meeting with a mediator still retains a certain level of compulsion with regard to the initiation of the process. Therefore, national legislators shall be careful not to infringe the principle of effective judicial protection '*stemming from the constitutional traditions common to the Member States*[252]*, which has been enshrined in Articles 6 and 13 of the ECHR*[253] *and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union*'[254]. Therefore, they are encouraged to pay attention to specific criteria established below to be able to ensure effective judicial protection while reaching the primary goals of such a requirement, i.e., an increased amount of (successful) mediations conducted and reduced number of cases pending in court.

The CJEU has adopted two separate decisions concerning the requirement to attempt mediation in the light of the principle of effective judicial protection, namely the judgement of 18 March 2010 in cases C‑317/08 to C‑320/08 *Alassini and Others* and the judgement of 14 June 2017 in case C‑75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*. In neither one of them did the CJEU come to a conclusion that a requirement to attempt mediation infringes the principle of effective judicial protection, the principles of equivalence and effectiveness or the EU law in question[255]. However, it is true only '*provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the*

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[247] The provision will enter into force on 1 January 2020. The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 21.

[248] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 9.

[249] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 8 (1).

[250] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 29.1.

[251] The United Kingdom, Children and Families Act 2014, sec. 10 (1).

[252] Of the European Union.

[253] The European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.

[254] The CJEU, judgement of 18 March 2010 in cases C ‑317/08 to C ‑320/08 Alassini and Others, para. 61.

[255] The CJEU judgement of 14 June 2017 in case C ‑75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa* was adopted in the light of the Directive 2013/11/EU of the European Parliament and of the Council of the European Union on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC., OJ, L 165/63, 2013, while the CJEU judgement of 18 March 2010 in cases C ‑317/08 to C ‑320/08 Alassini and Others was adopted in the light of Directive 2002/22/EC of the European Parliament and of the Council of the European Union of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services, OJ, L 108/51, 2002.

only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires'[256]. The CJEU also stated that the EU law in question '*does not preclude national legislation which entitles a consumer to refuse to participate in a prior mediation procedure only on the basis of a valid reason, to the extent that he may bring it to an end without restriction immediately after the first meeting with the mediator*'[257]. National legislators, regardless if inside or outside the EU, are encouraged to take these criteria into account when implementing a requirement to attempt mediation in their respective national law.

Furthermore, to better protect the rights of the parties, exceptions to a requirement to participate in the first meeting with a mediator can be established. For example, in the UK, several exceptions are outlined when a party to a family dispute shall not be obliged to participate in a MIAM. These exceptions include, for example, urgency, bankruptcy, domestic violence cases, child protection concerns, and others[258]. Several documents adopted by the CEPEJ, namely Guide to the Judicial Referral to Mediation[259] and Frequently Asked Questions (FAQ) on Mediation[260] also outlines situations where mediation might be inappropriate. These situations can also be taken into account when forming the list of exceptions. However, since the aim of these documents was different, not all the situations provided therein are relevant. Moreover, exceptions, if introduced, shall be formulated clearly and unambiguously.

A requirement to attend an introductory first meeting with a mediator where parties can receive first-hand information and understand the essence of the process allows parties to make an educated decision whether mediation is a suitable way to resolve their dispute. Such a model, especially, implemented as an opt-out, can encourage parties to stay and try mediation without restricting their right to effective judicial protection as they can leave without having to provide reasons for not being willing to continue. If implemented correctly, it might be a powerful tool to increase recourse to mediation, as seen from the successful examples in certain countries described above. However, for such a model to work, national legislators shall ensure that the provisions clearly state when such a requirement is met, foresee exceptions where necessary and respect the criteria regarding the right to fair trial outlined above.

4.2.2.Referral to mediation by a judge

The best feature of such an approach towards the requirement to attempt mediation is that it gives the judge a possibility to evaluate the situation before subjecting parties to the first meeting with a mediator. It increases the likelihood of parties settling. However, two common misconceptions surround mediation ordered by a judge which diminishes the credibility of such a referral in the eyes of the general public. First, it has to be noted that the sole fact that mediation was ordered by a judge does not imply that only legal issues of the dispute can be discussed or taken into account during mediation. Parties shall remain free to find a creative solution and take into account their interests and needs when looking for a settlement. Second, it is worth clarifying that judges shall not order the parties to settle, but merely to try mediating their dispute. If the solution is not found during mediation, parties shall retain a possibility to seek for a decision by a judge.

Usually, judges are encouraged to refer parties to mediation in the early stages of judicial proceedings (e.g., Belgium[261], Lithuania). For example, in Belgium '*a judge, if he considers that a reconciliation between the parties is possible, can by his own initiative or on request by one of the parties order mediation after hearing the parties during the introductory hearing, reinstatement hearing at an early date or a hearing scheduled no later*

[256] The CJEU, judgement of 18 March 2010 in cases C 317/08 to C 320/08 Alassini and Others, para. 67.

[257] The CJEU, judgement of 14 June 2017 in case C 75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 70.

[258] The United Kingdom, Family procedure rules, rule 3.8.

[259] CEPEJ, Guide to the Judicial Referral to Mediation. From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 16.

[260] CEPEJ, Frequently Asked Questions (FAQ) on Mediation: A Guide for judges, non-judge staff of courts, mediators, mediation services, legal and other professionals and mediation stakeholders and users of mediation. From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 54.

[261] In Belgium mediation is only partially compulsory – it cannot be ordered if none of the parties consent to it - The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1734 (1).

than the last day of the month following the filing of the defendant's first submissions'[262]. However, in that early phase, a judge might not be completely familiarised with the parties and the case at hand. Moreover, parties' positions and willingness to settle might alter during the course of judicial proceedings. It is, thus, recommended to allow the judge to issue an order requiring parties to try mediation at any stage of the proceedings before the adoption of the decision. For example, in Italy '*the judge, even in the appellate division, after assessing the nature of the case, the stage of the trial, and the conduct of the parties, can order the parties to attempt mediation; in this case mediation is a condition of admission to those proceedings even in cases of appeal. It may take place at any time before the closing arguments, or, otherwise, if a hearing is not expected, before the oral discussion of the pleadings*'[263].

Judges shall set further procedural steps in the order or decision obliging the parties to try mediation and explain the procedure to the parties. These steps should include the term in which mediation has to be conducted with the possibility to prolong the term upon request of a mediator or parties. For example, in Lithuania, the order subjecting a dispute to court-related mediation '*shall also postpone the proceedings and set the exact time for the next hearing. Court-related mediation shall be terminated no later than the date of the next hearing. Upon request of a mediator, the duration of such postponement can be prolonged in an order issued by the judge (or college) seised.*[264]' The time limit for conducting court-related mediation (not necessarily compulsory) is, with rare exceptions[265], set to 3 months (e.g., Cyprus, the Czech Republic, France, Italy, Poland, Slovenia, Turkey), however, it can also be left to the discretion of a judge.

Provisions with regard to the possibility to appeal such order vary across countries. For example, in Belgium[266] or the Czech Republic[267], it is not subject to appeal, while in Slovenia[268] it is. Obliging parties to attend the first meeting with a mediator do not violate parties' rights provided that the conditions stated in the previous chapter are met[269]. Hence, as long as these conditions are ensured in the national legislation, the appeal procedure might not be necessary.

5. Mediation process

5.1. Before mediation

5.1.1. Appointment of a mediator

As a general rule, parties are free to choose a mediator or co-mediators if they so prefer (e.g., Azerbaijan, Belgium, Croatia, Germany, France, Lithuania, Poland, Serbia, Turkey). However, in practice, parties have constraints towards a mediator proposed by another party and are not always able to reach a consensus on who should mediate their dispute. National legal acts usually redirect conflicting parties to another third party that could appoint or recommend a mediator. Slovenia, as recommended by the UNCITRAL Model Law[270], went even further to dispel the constraints of the parties and ensure the impartiality and neutrality of mediators: *'[t]he person or institution may, where appropriate, recommend or appoint a mediator who is of a nationality other than the nationality of the party so as to provide independence and impartiality of mediation, or for other justified reasons'*[271].

Depending on the national provisions, the third party appointing or recommending a mediator could be a public authority in charge of mediation (for example, in Lithuania, in the scope of compulsory mediation parties can either choose a mediator themselves or a mediator can be appointed by the Public legal aid office, which is

[262] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1734 (1).
[263] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 5.
[264] The Republic of Lithuania, the Code of Civil Procedure, *Valstybės žinios*, 2002, No. 36-1340, Art. 231[1] (3).
[265] In the Republic of Serbia, the Act on Mediation in Dispute Resolution, Art. 18 provides for a 60 days term.
[266] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1737.
[267] The Czech Republic, Civil Procedure Code. 1963 (as amended in 2012), No. 99/1963 Coll., sec. 202.
[268] The Republic of Slovenia, Alternative Dispute Settlement Act. *Uradni list*, No. 97/2009, Art. 19 (3).
[269] The CJEU judgement of 14 June 2017 in case C-75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 61.
[270] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art. 6 (5).
[271] The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008. *Uradni list*, No. 56/2008, Art. 7 (3).

in charge of the list of mediators[272]); it could also be a mediation provider, if parties agree on it (for example, in Italy *'[u]pon receipt of the application for mediation, the director of the mediation provider shall appoint a mediator and schedule a first meeting between the parties not more than thirty days from the filing of the application'*[273]).

With regards to court-related mediation, parties are generally free to propose a mediator they prefer, which is usually taken into account by the judge (unless the mediator does not meet the established criteria). If the parties are not able to decide themselves, then it is the judge appointing the mediator. For example, in Belgium *'[t]he parties, or, in their absence, their advocates, can jointly request the judge to appoint the mediator or the mediators that they indicate. The judge grants this request unless the mediator or mediators indicated by the parties do not meet the conditions set out in article 1726. If the parties do not agree on which mediator or mediators to appoint, the judge, preferably, in turn, appoints an accredited mediator or mediators as specified in article 1727 from the list of mediators <…>'*[274].

5.1.2.Decision on costs

While the decision on the division of costs should lay primarily on the parties and should be indicated in the agreement among them and the mediator, it is useful to introduce a rule for situations where a consensus is not reached, especially, with regard to court-related mediation. In the majority of the national laws regulating the division of costs, it is indicated that the parties should bear their own costs, while the cost of mediation shall be born equally (e.g., Croatia, the Czech Republic, Ireland, Serbia, Slovenia, Turkey). It should be also noted that in some cases, especially with regards to court-related mediation, the judge can distribute the costs in a different proportion, with regards to the economic situation of the parties[275]. In other cases, the costs of (unsuccessful) mediation can be included in the costs of the court proceedings that follow (for example, in Poland *'[w]here civil proceedings are initiated within three months of the end of mediation which did not result in a settlement agreement or within three months after a court order refusing to approve a settlement agreement becomes final and non-revisable, the necessary costs of proceedings shall include the costs of mediation in an amount not exceeding a quarter of the fee'*[276]). The deviation from the principle of sharing the costs equally imposed by a judge should not be seen in a negative light. However, national legislators should clearly establish in which cases and under which criteria judges have the discretion to oblige one party to bear a bigger part of costs stemming from mediation, as will be discussed in chapter 7.2.1.

5.1.3.Agreement to mediate

The agreement to mediate is of crucial importance in the countries where mediation is unregulated, or the regulation is scarce. While the parties do not have the discretion to agree on some issues related to mediation, such as suspension of limitation periods, they still can set at least the basic standards to their process. These standards can lay on confidentiality, an understanding that mediation settlement becomes binding solely from the moment it is put in writing and signed, and others.

Countries where mediation process is regulated in detail also choose to require parties to sign an agreement to mediate before mediation (e.g., Azerbaijan, Belgium, the Czech Republic, Cyprus, Ireland, Poland, Spain). They define what should be identified in the agreement to mediate as well. Such an approach is encouraged for three main reasons. First, it brings clarity to the parties and helps avoid disputes over the process and, especially, the fees later. In Lithuania, for example, '*when mediation is provided for a fee <…> mediation can start only after parties and the mediator agree in writing on the size of the fee and the procedure of payment'*[277]. Second, it can be used as a proof where, for example, there is a need to demonstrate that a particular mediator has mediated the dispute and cannot, therefore, be obliged to testify in court. Third, many provisions allow parties to agree other than stated in the legal act or require their explicit consent. For example, parties can:

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[272] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 21 (2 and 3).
[273] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 8 (1).
[274] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1734 (1/1).
[275] The French Republic, Code of Administrative Justice, Art. L213-8.
[276] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Article 98[1] (2).
[277] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 18 (6).

a) opt for co-mediation instead of mediation (for example, in Croatia *'[t]he parties shall agree whether mediation is to be carried out by one or several mediators and who shall be appointed as mediato*r'[278]);
b) diverge from the common rule that the costs of mediation are shared equally while parties bear their own (for example, in Serbia '[*i]n the mediation procedure each party shall bear its own costs and common costs shall be born in equal shares by the parties, unless they have agreed otherwise*'[279]);
c) foresee the participation of third parties or experts (for example, in Germany '*[o]nly with the consent of all parties can third parties become involved in mediation*'[280]);
d) give consent to a mediator to make proposals (for example, in Ireland *'[t]he mediator may, at the request of all the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals*'[281]);
e) abide themselves by the rules of the process established by certain mediation provider (for example, in Serbia *'[t]he parties shall be free to negotiate the rules of mediation procedure by references to certain rules of procedure or otherwise*'[282]) and others;
f) permit the mediator to use separate sessions (caucus) and to define the modalities of their use.

It should also be noted that agreements to mediate shall be subject to amendments in the course of mediation if they are needed.

While parties are free to include into the agreement to mediate what they see fit, the provisions shall not be contrary to the mandatory law. It is thus recommended to approve a model form for such an agreement. An example of a model form could also be found in the Mediation Development Toolkit[283] adopted by CEPEJ. Introducing a recommended model form, especially recognised internationally, can ease the agreeing on mediation for the parties and smooth the start of it. National legislators are, thus, encouraged to use Model Agreement to Mediate as a minimum standard.

5.2. Commencement

As a rule, parties in mediation are granted procedural guarantees such as confidentiality or suspension of prescription and limitation periods. Moreover, some countries set time limits for the mediation process (e.g., Cyprus, the Czech Republic, France, Italy, Serbia, Slovenia, Turkey). Thus, clarity with regards to when these guarantees start to apply, or terms begin to run is needed. It is, therefore, highly recommended to define the exact moment when mediation should be considered as started (and terminated, as will be discussed in chapter 5.5.).

Some national laws are in line with such recommendations (e.g., Croatia, Cyprus, the Czech Republic, Slovenia, Turkey), while others have taken a slightly different path and define the commencement of mediation only with regards to certain term or specific procedural guarantee. For example, in Ireland *'[i]n reckoning a period of time for the purposes of a limitation period specified by the Statutes of Limitations, the period beginning on the day on which an agreement to mediate is signed and ending on the day which is 30 days after either—(a) a mediation settlement is signed by the parties, and the mediator or (b) the mediation is terminated, whichever first occurs, shall be disregarded'[284];* in Italy: '*1. The mediation procedure will last no longer than three months. 2. The period referred to in paragraph 1 shall begin from the date of the filing of the application for mediation, or after the expiration of the date set by the court for the filing of the same <…>'[285].*

The commencement itself can be linked to several different moments. The following examples were found in the countries in scope of this research:

a) when the agreement to mediate was signed (e.g., the Czech Republic[286]);

[278] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 7 (2).
[279] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 29.
[280] The Federal Republic of Germany, Mediation Act. *Bundesgesetzblatt* I, p. 1577, 2012, Sec. 2 (4).
[281] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 8 (4).
[282] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 23.
[283] CEPEJ, Standard mediation forms. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 30 – 33.
[284] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 18.
[285] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 6.
[286] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 4.

b) the first meeting with a mediator where an agreement is reached to continue the mediation and it is documented through minutes (e.g., Turkey [287]);
c) the receival of a proposal for the commencement of mediation from the opposing party (e.g., Slovenia[288]);
d) the acceptance of a proposal for mediation (e.g., Croatia[289]);
e) the application to the mediation provider (e.g., Italy[290]) or mediator (e.g., Turkey);
f) the date of the issue of the decision, in the scope of court-related mediation (e.g., Cyprus[291]).

With regard to court-related mediation, the national provisions regulating the moment of commencement of mediation are relatively similar. The majority of them connect the day of commencement to the day when a judge issues and order or a decision indicating that parties have decided to attempt mediation or were referred to it. However, in this case national legislators shall ensure the actual implementation of such a decision. For example, a judge can indicate the time limits to start mediation in the decision. Sanctions can also be foreseen if mediation was not actually started to avoid abuse of the suspension of judicial proceedings or other procedural guarantees.

When it comes to an out of court mediation, the regulations and possibilities are more diverse in comparison to court-related mediation. Among the possible reference points listed above, it is recommended to use the date when the agreement to mediate was signed as a moment of the commencement of mediation. First, unlike the submission of a proposal or even acceptance of one, after the agreement to mediate is signed by both parties and the mediator, it is definite that the mediation will take place. Second, the exact date of the signature of agreement to mediate is easier to define than in the case of a proposal or an acceptance of mediation, especially if they were not made in writing. Third, an agreement to mediate indicates the mediator who is also subject to the procedural guarantees, such as confidentiality or dismissal from having to testify with regards to information acquired in the course of the mediation. Thus, it brings both clarity and certainty not only to the parties but also to a mediator.

It is recommended to use a consistent approach, obliging the parties to sign an agreement to mediate and anchoring the commencement of mediation to the day indicated in the agreement. However, if such model is not possible, other dates named above could also be used interchangeably, provided that this date is prior to the beginning of any discussions on the substance of the dispute and that the exact date of the commencement of a mediation can be easily and unambiguously defined by the parties and the mediator.

5.3. During mediation

The mediation process and the structure of it depends on the will of a mediator and the rules of a mediation provider. As long as procedural guarantees (which will be discussed in more detail in chapter 5.4.) are in place and mediators fulfil their duties while adhering to the standards of impartiality and neutrality (as discussed in chapter **Erreur ! Source du renvoi introuvable.**.), national legislators shall not interfere with the process too much. It is primarily recommended to allow mediators to arrange the process in the manner they deem appropriate for as much as the parties consent to it. However, there are several issues with regards to the mediation process itself that can and should be tackled in the national laws, namely the use of electronic means, the participation of lawyers and involvement of third parties.

a) Use of electronic means

Traditionally mediation is conducted face to face. Nonetheless, parties can benefit from the inclusion of electronic means to the process. Therefore, international documents encourage the use of electronic and

[287] In case the lawsuit is not yet filed, The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 16 (1).
[288] In case parties are bound by the mediation clause, The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008, Art. 6 (1).
[289] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 6 (2).
[290] With regards to compulsory mediation, the Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 6.
[291] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 17

online tools[292]. Several national laws also refer to the possibility of using them (e.g., Cyprus, Italy, Lithuania). In Spain, parties are even encouraged directly to apply electronic means (‘*Mediation as a matter of a claim of a quantity not exceeding EUR 600 shall be carried out preferably by electronic means unless the use of such a complaint is not possible for any of the parties*’[293]). The use of electronic means can increase the accessibility of the process. The reasons for that are the following: first, using various types of video and teleconferencing solutions reduces the need to travel and, subsequently, the costs of mediation; second, negotiation tools can help the mediator and the parties to prioritise and find better-adjusted solutions in a shorter period. Hence, it is considered a good practice.

However, mediation providers offering such possibility shall ensure that procedural requirements for mediation and the conduct of mediator are met regardless of the form of mediation chosen. A reference to that can be made in the rules of mediation provider (In Italy, for example, *‘[t]he mediation can be carried out using electronic methods as provided for in the regulation of the provider’*[294]) or in a legal act itself (in Spain mediation can only be carried out ‘*provided that the identity of the parties concerned is ensured and compliance with the principles of mediation laid down in this Law’*[295]). Moreover, not every person has access to the Internet and not all those who do are comfortable with using it. Hence, it shall not remain the sole way of settling disputes and parties shall remain free to choose which method to apply during mediation. It is especially important if parties are required to participate in the first meeting with a mediator as a condition precedent to judicial proceedings or if they are referred to it by a judge[296].

b) Participation of lawyers

Parties of the dispute shall be free to decide whether and to what extent they are willing to be represented by their lawyers. Nonetheless, the presence of the lawyers of the parties in the course of mediation is viewed in a positive light. Even though some practicing mediators notice that in certain instances lawyers are to blame for redirecting mediation to a deadlock while parties themselves would have been willing to settle, it cannot be disregarded that lawyers at the same time ensure that the interests of the parties are protected. This is particularly important when a power imbalance exists between the positions of the parties, as is, for example, in domestic violence cases. In Austria, for example, the mediator even has an obligation to ‘*refer the parties to counselling needs, particularly in respect of legal issues which result in the context of the Mediation*’[297].

Moreover, when assisting the parties, the lawyers[298] draft the mediation settlement agreement, ensuring that it is not contrary to mandatory law or public order and, consequently, increase the probability that it will be implemented or transformed into an enforceable title if need be. This can raise the overall quality of mediation and its outcome. On a different note, having first-hand experience in mediation and seeing satisfied clients can encourage lawyers to instruct subsequent clients to try mediation as well, which can also lead to bar associations joining the promotion of mediation.

While there is no question whether lawyers shall be allowed to participate in mediation, an obligation to be represented by a lawyer in mediation raises several concerns. First, the CJEU has issued a decision stating

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[292] See for example, the European Parliament and the Council of the European Union, Regulation on online dispute resolution for consumer disputes (EU) 524/201, OJ, L 165/1, 2013 (Regulation on consumer ODR); UNCITRAL Technical Notes on Online Dispute Resolution, New York: United Nations, 2017 [accessed: 2019-03-10], available at: http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

[293] The Kingdom of Spain, Law on Mediation in Civil and Commercial Matters. *Boletín Oficial del Estado*, No. 5/2012, Art. 24 (2).

[294] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 3 (4).

[295] The Kingdom of Spain, Law on Mediation in Civil and Commercial Matters. *Boletín Oficial del Estado*, No. 5/2012, Art. 24 (1).

[296] See, for example: CJEU judgement of 18 March 2010 in cases C 317/08 to C 320/08 Alassini and Others, para. 58, stating that ‘*the exercise of rights conferred by the Universal Service Directive might be rendered in practice impossible or excessively difficult for certain individuals – in particular, those without access to the Internet – if the settlement procedure could be accessed only by electronic means*’.

[297] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 16 (3).

[298] An extensive Guide to Mediation for Lawyers is also included in the Mediation Development Toolkit - CEPEJ, Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 58 – 73.

that '*national legislation may not require a consumer taking part in an ADR procedure to be assisted by a lawyer.*'[299] However, it has to be taken into account that such a conclusion was reached exclusively in the light of the European Union Directive on Consumer ADR[300] and compulsory mediation. Second, a mandatory requirement to be represented by a lawyer during mediation can give rise to additional costs and diminish accessibility.

Nonetheless, among all the national laws subject to this research, such obligation was found only in Italian legislation, which states that *'[a]t the first meeting and at subsequent meetings, until the conclusion of the proceedings, the parties must participate with the assistance of a lawyer.'*[301] Outside the scope of this research, Greece has introduced a similar requirement as well.[302] However, the Greek Supreme Court has also voiced criticism over it, mainly with regards to the increased costs of first meeting with a mediators, required as a condition precedent to legal proceedings[303]. Hence, it is recommended to encourage parties to be represented by lawyers during mediation while not to making it mandatory.

c) Participation of third parties

None of the national legal acts under consideration prohibit the participation of the third parties in mediation if the parties to a dispute request or consent to it. There is no necessity for such a prohibition, however, all the participants, regardless of their status in mediation, shall be bound by the obligation of confidentiality and shall not be required to testify in court or arbitration proceedings with regards to the information acquired during mediation. For example, in Croatia *'[u]nless otherwise agreed by the parties, the mediator and the persons participating in mediation proceedings in any capacity may not be forced to testify in arbitral, judicial or any other proceedings in relation to information and data resulting from mediation proceedings or connected therewith'*[304].

Moreover, mediations in the family law domain (and sometimes others) can directly or indirectly affect the interests of children. For example, in the Czech Republic, '*[t]he court may, if expedient, refer a person (a) who fails to comply voluntarily with a court decision or with a court-approved agreement on the care of a minor or, where applicable, with regard to contact with a minor, or a decision to return the child, to a first meeting with a mediator in extension of 3 hours*'[305]. Therefore, lawmakers are encouraged to ensure, when it is appropriate, the participation rights of children in family disputes and other cases where the dispute or the outcome can affect them, in order to better protect childrens' rights and interests.

More elaborated provisions might also be needed with regard to the participation of experts. Firstly, experts, with certain exceptions, have to be remunerated. It is thus recommended to agree on the division and calculation methods of these costs in advance, when possible. For example, in Italy *'[t]he mediation provider's rules of procedure must include the methods for calculation and payment of fees of the experts'*[306]. Secondly, in some cases, experts have to adhere to professional standards or stricter liability for breach of obligations. For example, in Belgium, an expert might face the same sentence as a mediator for the breach of confidentiality – imprisonment from 1 to 3 years[307]. Nonetheless, these standards vastly depend on the status of an expert in the national law; therefore, it is impossible to establish common provisions concerning experts other than those applied to any third party participating in mediation.

5.4. Procedural guarantees

5.4.1. Confidentiality

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[299] The Court of Justice of the European Union, judgement of 14 June 2017 in case C 75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 61.
[300] European Parliament and the Council of the European Union, Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC., OJ, L 165/63, 2013, p. 63-79.
[301] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 8 (1).
[302] The Republic of Greece, Law 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programmes and Other Provisions.
[303] The Administrative Grand Chamber of the Supreme Court of the Republic of Greece, decision no 34/2018.
[304] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 14 (2).
[305] The Czech Republic, Act on Specific Court Proceedings, 2013, 292/2013 Coll., Sec. 503 (1-a)
[306] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 8 (4).
[307] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1728 (2) and Criminal Code, Art. 458.

Guidelines on Mediation[308] reiterate the importance of ensuring confidentiality in mediation and outlining clear exceptions of this principle. It cannot be stated that mediation is available if parties do not have confidence in the process and therefore are reluctant to use it. Confidentiality of mediation is an indispensable component for building parties' trust in mediation. It is thus critical to ensure that national laws establish the minimum standards for the implementation of the obligation of confidentiality, while parties are free to elaborate this obligation further in their agreement to mediate. The minimum standards should include requiring all participants and persons involved in mediation to adhere to this obligation, sanctioning those who breach it and limiting the exceptions of confidentiality to the cases of crucial importance. Mediators, as discussed in chapter **Erreur ! Source du renvoi introuvable.**. shall adhere to higher standards, which include the second layer of confidentiality in the private meetings (caucuses) with the parties. They shall also face stricter sanctions for the breach of their duty. Parties, on the other hand, shall be free to agree otherwise or waive such an obligation in writing in their agreement to mediate.

On the bright side, every country, which fell under the scope of this research, in one or another manner anchors the confidentiality of mediation in the national law. However, some still see it primarily as a duty of a mediator and not as a general obligation for participants of mediation (for example, in Finland the openness of court-related mediation is subject to the provisions of the Act on Publicity of Court Proceedings in General Courts while the confidentiality of mediation is only discussed with regard to mediator and his or her auxiliary[309]; the Mediation act of Czech Republic is also not making a reference to the obligation of the parties to maintain confidentiality – solely the duty of confidentiality of a mediator is established[310]). Others state in general terms that the process of mediation is confidential without identifying precisely to whom this obligation applies (e.g., Belgium, Ireland, Slovenia). Nonetheless, national legislators are encouraged to state clearly, that the obligation of confidentiality should apply to all the people involved in the proceedings, preferably, indicating that it includes a mediator, parties, any persons administering mediation and all third parties participating in mediation. Such an approach is implemented in Austria, Croatia, Germany, Lithuania, Poland, Serbia, Spain, Turkey.

Moreover, it is recommended to establish what forms the object of the obligation of confidentiality. As a general rule, only communication happening in the course of mediation shall benefit from confidentiality. It is, therefore, crucial to establish in a precise manner the moments of commencement and termination of mediation, as discussed in chapters 5.2 and 5.5. However, parties shall also be free to agree otherwise. For example, in Belgium *'[t]he parties may agree in writing to render confidential the communication and documentation established prior to the commencement of the mediation procedure*'[311]. When it comes to the confidential communication itself, some countries make a relatively vague reference to *information or facts* acquired in the course of mediation (e.g., Germany, Lithuania, Poland), while others make a more explicit reference to documentation, notes or data obtained or created in the course of mediation (e.g., Belgium, Croatia, Ireland, Turkey, Spain) or provide an exemplary non-exhaustive list of what fall under the scope of information that shall be held confidential (Azerbaijan[312]). The latter approach should be encouraged for the purpose of clarity. Moreover, in Belgium, for example, it is stated what documents should fall outside the scope of the obligation of confidentiality (unless, of course, parties agree otherwise). Namely, it is the agreement to mediate, the mediation settlement, and the final protocol prepared by a mediator stating that the mediation was not successful[313]. Such clarity is also encouraged.

As mentioned above, the exceptions to the principle of confidentiality, shall be clearly defined and based only on substantial grounds. These exceptions usually rely on two bases. The first one is related to the public order and mandatory law. These include threats to the physical or psychological integrity of a person, prevention of a crime and the interests of a child. The second regards implementation and enforcement of mediation settlement. Such an approach is applied in Croatia, Cyprus, France, Ireland, Lithuania, Serbia, Slovenia. Czech Republic has also included in their national law a provision, stating that '*[t]he Mediator is not bound by the obligation of confidentiality to the extent necessary for proceedings before a court or other relevant authority if the subject of the proceedings is a dispute arising from the activities performed by the Mediator between him*

[308] Guidelines on Mediation (family & civil: chapters para. 16.; penal: para. 17; administrative: para. 38).
[309] The Republic of Finland, Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, No. 394/2011, Art. 12 and 13.
[310] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 9.
[311] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1728 (1).
[312] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 8.2.
[313] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1728 (1).

and the Party of the Conflict or its legal representative and also to the extent necessary for his protection as part of the performance of supervision over the Mediator's activities or in disciplinary proceedings'[314]. A similar provision can also be found in the Irish Mediation Act[315]. While the exceptions enlisted above are indeed necessary, national legislators are encouraged not to overextend the list, as the principle of confidentiality might lose its purpose.

The last aspect worth mentioning with regard to confidentiality is the so-called second layer of it or insider-insider confidentiality in the separate sessions (caucus). In other words, it is mediator's duty not to disclose the information received during a private meeting with one party to the other party without explicit permission. There might be two different approaches to this duty – the first one is to hold that everything is confidential, unless party gives permission to disclose (for example, in Italy '*[w]ith respect to the statements made and information acquired during separate sessions, unless consent of the declarant or of the person from which the information originated is obtained, the mediator is also required to maintain confidentiality with respect to the other parties*'[316]); the second one is to hold that everything can be disclosed to another party unless said otherwise (such an approach is recommended in the UNCITRAL Model Law (2018)[317] and implemented in some countries; for example, in Slovenia *'[w]hen the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of the information to any other party to mediation, unless a party has disclosed the information to the mediator subject to a specific condition that it be kept confidential*'[318]). The first approach is preferred primarily because mediator is a professional; therefore, the burden of enquiring whether information can be shared or not should lay with him or her, instead of with the party. Moreover, parties might be more willing to open up knowing that nothing can be shared with the other party without their explicit permission.

5.4.2. Voluntariness

Many countries emphasise the voluntary nature of mediation (e.g., Austria, Azerbaijan, Belgium, Croatia, Cyprus, Germany, Ireland, Poland, Slovenia, Spain, Turkey). The principle of voluntariness is one of the main factors of what makes mediation exclusive in comparison to judicial proceedings and arbitration. First, parties shall be free to agree on the content of mediation settlement and to terminate mediation at any point. Second, parties shall also be free to choose a mediator or mediators and decide on other organisational details of the process of mediation or simply refer to the rules of mediation provider that they prefer. Giving the freedom to the parties to decide on the procedural aspects that fit their needs the most can increase the likelihood of a settlement. While national legislators shall define the basic lines of the procedure, as parties might not even be able to reach an agreement on procedural aspects, they are also encouraged to allow parties agree otherwise. For the sake of clarity, national legislators shall explicitly state which procedural provisions are not mandatory and can be subjected to the agreement of the parties. In order to prevent possible disputes in the future, agreements on the changes of non-mandatory provisions shall be concluded in writing.

While the principle of voluntariness is one of the core principles of mediation, it still raises some confusion and misunderstandings, especially in the light of a requirement for the parties to participate in the first meeting with a mediator as a condition precedent to the judicial proceedings or following the referral by a judge. However, it shall be noted that this question was put to rest by the CJEU in one of its decisions. The court has drawn a clear distinction between the voluntary nature of the process of mediation and referral to mediation. It stated that '*the voluntary nature of the mediation lies, therefore, not in the freedom of the parties to choose whether or not to use that process but in the fact that 'the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time*''[319]. Such an interpretation of the CJEU clarifies that respecting the principle of voluntariness shall not preclude national legislators from requiring parties to participate in the first meeting with a mediator; however, such a referral shall not affect the right of the parties to freely decide whether or not to settle their dispute in mediation or choose other means of dispute resolution, including courts.

[314] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 9 (3).
[315] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 10 (2).
[316] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 9 (2).
[317] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art. 9.
[318] The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008, Art. 10.
[319] The CJEU, judgement of 14 June 2017 in case C‑75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 50.

5.4.3. Evidence and testimonies

The primary purpose of the prohibition to introduce evidence acquired in the course of mediation to judicial, arbitral or similar proceedings is to prevent 'fishing expeditions' or, in other words, situations when parties are only interested in mediation as a possibility to acquire valuable information, and, later on, terminate the mediation without a settlement just to use that information in court. The same purpose can be attributed to the prohibition to force a mediator, parties or other participants involved in the mediation to testify in other proceedings. Very much like the effects of obligation of confidentiality, absence of the abovementioned prohibitions can also reduce the accessibility of mediation, as parties will be afraid that everything they say will be used against them in court and, thus, the full potential of mediation will be untapped. However, unlike confidentiality, introducing these prohibitions in an agreement to mediate might not suffice, as they may be subject to mandatory requirements of procedural law. Hence, it would not be for the parties to change them. National legislators are encouraged to introduce these prohibitions in the national laws on mediation or respective procedural codes.

Two main approaches can be found with regard to these prohibitions. Some countries (e.g., Azerbaijan, Belgium, France, Ireland, Spain, Switzerland) see this prohibition as an extension of the obligation of confidentiality (for example, in Belgium *'[t]he documents prepared and the communications taking place in the course of mediation and for the needs of it are confidential. They cannot be used in any other judicial, administrative or arbitral proceedings nor in any other dispute resolution procedure. They shall never be admissible as evidence or as an extra-judicial confession'*[320].) Others (e.g., Croatia, Lithuania, Slovenia, Turkey) introduce this prohibition as a separate procedural guarantee (for example, in Slovenia *'[t]he parties, mediators or third persons who participated in mediation shall not in arbitral, judicial or other similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following: a) an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings; b) views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute; c) statements or admissions made by parties in the course of mediation; d) proposals made by the mediator; e) the fact that a party had indicated its willingness to accept the mediator's proposal for amicable dispute settlement; f) documents drawn up solely for purposes of the mediation proceedings'*[321]). Both approaches can be effective and fit for purpose, provided that they are established in a detailed manner. The Slovenian model outlined above would, in that regard, be preferred over Belgian example.

On the other hand, an introduction of a prohibition to present information or documents acquired during mediation might give a way for parties to cheat, for they could bring various documents to mediation just to make sure, that they will become inadmissible in subsequent proceedings. Therefore, provision shall be introduced stating that, following the Slovenian example, '*evidence that is otherwise admissible in arbitral, judicial or similar proceedings does not become inadmissible solely because it has been used in a mediation proceeding.'*[322] This could be applied for documents which had already been public or had been acquired by the opposite party prior to the mediation. Moreover, parties shall also remain free to introduce their own pieces of evidence, regardless of whether or not they were used during mediation. However, it is not possible to tackle every situation *a priori* and some questions with regards to admissibility of evidence might be left in the grey zone. Thus, the question whether or not the document was public, acquired before mediation or should be admissible on other grounds in accordance with the national law might be left for the national jurisprudence to clarify on a case by case basis.

When it comes to testifying, not all countries make an explicit reference to such a prohibition. However, it is not self-evident that testifying falls under the scope of the prohibition to introduce evidence. It is thus recommended to include a direct reference to this prohibition as is the case in, for example, Belgium, Poland, Croatia, Italy, Lithuania, Slovenia, Switzerland, and Turkey. Some countries providing such procedural guarantee limits it to a mediator (e.g., Belgium, Lithuania, Poland, Switzerland), while others extend it to all the participants of mediation (e.g., Croatia, Slovenia, Turkey) or at least to the parties (for example, in Italy). National legislators are encouraged to resort on the broadest application of this procedural guarantee, namely, extend it to all participants of mediation.

5.4.4. Prescription and limitation periods

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[320] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1728 (1).
[321] The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008, Art. 12 (1).
[322] The Republic of Slovenia, Mediation in Civil and Commercial Matters Act. *Uradni list*, No. 56/2008, Art. 12 (5).

Parties to a dispute will not resort to a mediation knowing that in case they are unsuccessful, they might lose the possibility to defend their rights in court. However, such a situation is likely if prescription and limitation periods do not cease to run during mediation. Guidelines on mediation clearly states that parties should not be prevented from using mediation by the expiry of limitation terms[323]. National legislators are therefore encouraged to introduce such guarantees in order not to reduce the accessibility of mediation in both out of court and court-related mediations. This is of crucial importance when the first meeting with a mediator is a condition precedent to legal proceedings, as national legislators should be careful not to restrict the right to fair trial as guaranteed in the Art. 6 of the ECHR. It is also in line with the CJEU decision in the case C-75/16 *Menini and Rampanelli v. Banco Popolare Societŕ Cooperativa*[324].

The vast majority of the countries subject to this research makes a reference in respective national laws to the suspension of prescription or limitation periods during the course of mediation (i.e., Austria, Azerbaijan, Belgium, Croatia, Cyprus, Czech Republic, France, Ireland, Italy, Lithuania, Poland, Serbia, Slovenia, Spain, Switzerland (only in court-related mediation), Turkey). Most often these provisions define the exact moment of the suspension, declare the suspension itself and state from which moment the limitation or prescription period resume to run (for example, in Lithuania *'[u]pon commencement of mediation the limitation periods are suspended. The moment of commencement for the purpose of the suspension of limitation period shall be the day when a party to a dispute directly or through another person (a representative, a mediator, a person administering the provision of mediation or another entitled person) sends out a written proposal to solve the dispute through mediation. If parties do not settle, the limitation periods resume to run'*[325]).

However, some countries add certain modalities. For example, in Serbia limitation periods are only suspended for 60 days[326], while in Croatia, *'[i]f mediation terminates without settlement, it is considered that no suspension of limitation occurred'*[327], unless '*parties file a claim, or undertake other procedural activity before the court or other competent authority in order to determine, secure or assert a claim*' in no more than 15 days after the termination of mediation'[328]. On the one hand, such provisions encourage parties to act quicker; on the other hand, especially concerning complex disputes, such periods might be too short. Moreover, parties shall not be punished for not being able to settle. For example, Austria, allows parties to broaden the scope of provisions on limitation periods and to agree in writing that '*the suspension also includes other claims which exist between them and which are not affected by the mediation'*[329].

For the sake of clarity, it is essential to establish the exact moments when the limitation period was suspended and resumed. One way to define it is to link these to the moments of commencement and termination of mediation, as provided in chapters 5.2. and 5.5. However, some countries suspend the limitation periods from the date one party proposes to another (usually in writing) to resort their dispute to mediation (e.g., Lithuania) or files an application to a mediation provider (e.g., Italy), while other resume the limitation period only after a certain period of time have passed after termination (for example, a month in Belgium[330] or 30 days in Ireland[331]). All of the approaches outlined above can be used as long as the exact date can be easily defined.

5.4.5. Interim measures

Allowing parties to request interim measures in the course of mediation is not a standard provision among national laws in consideration (an explicit reference to such guarantee was only found in Belgian[332], Italian[333],

[323] Guidelines on Mediation (family & civil: para. 36; penal: para. 35, administrative: para. 43).
[324] The Court of Justice of the European Union, judgement of 14 June 2017 in case C 75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 61.
[325] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 18 (1 to 3).
[326] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 25.
[327] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 17 (3).
[328] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 17 (4).
[329] The Republic of Austria, Law on Mediation in Civil Law Matters. *Bundesgesetzblatt* I Nr. 29/2003, Art. 22 (2).
[330] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1731 (4).
[331] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 18 (1).
[332] The Kingdom of Belgium, Judicial Code. *Moniteur Belge*, 1967, Art. 1725 (3).
[333] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 5 (3).

and Lithuanian[334] legal acts). However, the CJEU has emphasised in several judgements the importance of granting the possibility for the parties to request interim measures in the light of the methods of alternative dispute resolution requested as a condition precedent to the judicial proceedings[335]. It stated that '*the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that <…> interim measures are possible in exceptional cases where the urgency of the situation so requires'*[336]. While the members of the European Union are obliged to adhere to the decision of the CJEU, national legislators in other countries are also encouraged to introduce the application of interim measures in the course of the mediation process, especially, when the first meeting with a mediator is a condition precedent to the judicial proceedings or when such a referral is made by a judge.

5.5. Termination

To begin with, setting clear rules which define when mediation should be considered terminated puts the finishing touch on the structured, clear-cut and, therefore, easy to comprehend and rely on process of mediation. The moment of termination is also critical with regard to the procedural guarantees, as participants of mediation shall be able to define precisely from which moment, for example, communication between the parties is no longer confidential or the condition precedent to the judicial proceedings is fulfilled. Therefore, national legislators are expected to specify in the law when mediation is terminated.

Majority of the national laws subject to the research outline grounds for termination of mediation (e.g., Azerbaijan, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Lithuania, Poland, Serbia, Slovenia, Spain, Turkey). Three of these grounds could be called general, as they are echoed in a similar phrasing throughout every national law on mediation in the countries mentioned above. It is, namely, (1) conclusion of a mediation settlement; (2) declaration by a mediator terminating mediation, usually, when he or she deems the settlement between the parties highly unlikely; (3) declaration by the parties or one party (provided that there are only two parties to mediation) announcing their withdrawal from mediation. Corresponding grounds are also foreseen in the UNCITRAL Model Law (2018)[337]. The fourth ground not so frequently indicated, however, logical, is the expiration of the time allocated to mediation if it was defined in a prior agreement or prescribed by law.

Some countries provide more specific grounds. For example, in the Czech Republic grounds related to the mediator's ability to serve are extensively described. There '*(1) The Mediator shall end the initiated mediation if a) a reason arises under Section 5 (1) of his impartiality, or b) the Parties of the Conflict have not met with the Mediator for more than 1 year.*

(2) The Mediator may end the already initiated mediation for the reason stated in Section 5 (2)[338]*, or if one of the Parties of the Conflict has not made the negotiated advance payment.*

(4) *Mediation ends with <…> f) suspending authorisation to perform the activities of Mediator or striking the Mediator off the Register; g) death, declaration of death or termination of one of the Parties of the Conflict; or h) death of the Mediator or his declaration of death'*[339]; in Cyprus it is explicitly stated that *'[t]he mediation process ends <…> if a settlement is being reached that for the mediator appears illegal; if the mediator considers that the settlement of the dispute may not be admitted to Court.*[340]' As long as the general

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[334] The Republic of Lithuania, Code of Civil Procedure, Art. 147.

[335] See for example: The Court of Justice of the European Union, judgement of 18 March 2010 in cases C 317/08 to C 320/08 *Alassini and Others*, para. 67; The Court of Justice of the European Union, judgement of 14 June 2017 in case C 75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 61.

[336] The Court of Justice of the European Union, judgement of 14 June 2017 in case C 75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*, para. 61.

[337] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art. 12.

[338] *The Mediator may reject the conclusion of a contract on the performance of mediation if the necessary trust is broken between him and any of the Parties of the Conflict.* - The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 5 (2).

[339] The Czech Republic, Act on Mediation and Change of Some Laws, 2012, No. 202/2012 Coll., Sec. 6.

[340] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 28 (1).

grounds of termination are ensured in the legislation, such clarifications are not viewed negatively, yet again, provided that the moment of termination can be easily defined.

After the termination of the mediation, some countries oblige mediators to prepare a note to briefly indicate the outcome of mediation. The list of such countries is not long (an explicit reference was only found in Austria (only upon request of the parties), Azerbaijan[341], Cyprus, Ireland, Lithuania, Poland, Spain, Turkey, while the name of such a note varies from 'a minute' to 'a report'[342]. In practice, it serves different purposes. It can be used as:

a) a proof indicating when the mediation was terminated for it to be easier to define the exact date for the continuation of the suspended limitation periods. For example, in Cyprus '*[w]here no agreement is reached during the mediation process, the mediator shall prepare a minute, stating that no agreement is reached, and which is signed by himself and if they desire so, by the parties*[343]'.

b) a justification that the parties have resorted to mediation in cases where mediation is a condition precedent to the judicial proceedings; where mediation clause was included in a contract; where parties can benefit from reduced registration duty for trying to mediate their dispute before resorting to the court; where parties are subject to other monetary incentives as well as in other cases when parties so request. For example, in Lithuania in order for the court registration duty to be reduced, parties are obliged to provide written evidence proving that mediation took place[344]. In such a case, a note of termination of mediation could serve as a written evidence.

c) as a report for the court in the course of court-related mediation, or mediation in penal and administrative matters, as well as in other cases where authorities have to be informed. In Ireland, for example, '*when the parties to the proceedings concerned engage in mediation and subsequently apply to the court to re-enter the proceedings, the mediator shall prepare and submit to the court a written report which shall set out — (a) where the mediation did not take place, a statement of the reasons as to why it did not take place, or (b) where the mediation took place— (i) a statement as to whether or not a mediation settlement has been reached between the parties in respect of the dispute the subject of the proceedings, and (ii) if a mediation settlement has been reached on all or some only of the matters concerning that dispute, a statement of the terms of the mediation settlement.*'[345]

As explained above, a note of termination of the mediation might serve as a sort of proof and, thus, is likely to be disclosed to the third parties. It is, therefore, of crucial importance not to infringe the principle of confidentiality and other obligations of the mediator as stated in the respective national law and the code of conduct. Hence, it is not recommended to require including information that could be considered confidential. While information on the parties, mediator and mediation provider (where applicable) along with the date and place shall not raise concerns with regard to the principle of confidentiality, requiring to '*reflect the agreements reached in a clear and understandable way*[346]', as is the case in Spain, might raise some doubts. National legislators are, thus, encouraged to limit information indicated in the note of termination to a general description of the dispute and an indication whether the mediation was successful or not.

6. Mediation settlement

6.1. Form and content

[341] Only when mediation is terminated by a mediator or due to reasons concerning mediation provider.
[342] In order not to mislead with regard to what shall be included in such a document, 'a note of termination' is the preferred way to name it.
[343] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 31 (1).
[344] The Republic of Lithuania, the Code of Civil Procedure, *Valstybės žinios*, 2002, No. 36-1340, Art. 80 (8).
[345] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 17 (1).
[346] The Kingdom of Spain, Law on Mediation in Civil and Commercial Matters. *Boletín Oficial del Estado*, No. 5/2012, Art. 22 (3).

With rare exceptions[347], mediation settlement, unless homologated in court or transformed into a notarial deed, has a status of a contract. Hence, the parties are free to agree on everything they deem fit as long as the subject matter of the dispute is capable of settlement under the national law (in France, for example *'[t]he agreement reached by the parties shall not affect the rights, which parties cannot freely dispose'*[348]). However, the scope of the agreement can raise more questions after the judicial proceedings concerning the dispute in question have already been initiated. First, agreement on only a part of a dispute can also alleviate the burden on the court and reduce the duration of the court proceedings and should, therefore, be allowed. Second, following the same line of thought, an agreement on more issues than were introduced in a claim or a counter-claim should be encouraged to avoid litigation in the future. It is recommended for the national legislators to directly address the scope of a mediation settlement, especially emerging from court-related mediation, in their national laws as is the case in, for example, Belgium, Finland, France, or Spain.

As long as mediation settlement has a status of a contract, national provisions regulating the form of a contract apply. However, in order to accommodate international standards, basic requirements shall be met. The Singapore Mediation Convention[349], UNCITRAL Model Law (2018)[350] and the Mediation Directive[351] all require mediation settlement to be concluded in writing with regard to rendering such agreement enforceable. UNCITRAL documents also require the mediation settlement to be signed by the parties and, preferably, by the mediator. Majority of the countries in this research already adhere to these standards, requiring the mediation settlement to be signed by the parties and the mediator and, hence, to be concluded in writing (e.g., Azerbaijan, Belgium, Cyprus, the Czech Republic, Finland, Italy, Serbia, Spain). In Serbia[352] and Italy[353] in some instances, mediation settlement shall be signed by the attorneys as well. A model mediation settlement can be found in the Mediation Development Toolkit[354] adopted by CEPEJ. Stricter standards can be foreseen under respective national law.

6.2. Enforcement

As a rule, parties to mediation reach a consensus on every provision that they include in the mediation settlement. Hence, voluntary adherence to the obligations foreseen therein is more likely than in cases where a decision is imposed on the parties. However, even in such circumstances, people tend to change their minds and become reluctant to abide by their promises. Thus, national legislators shall ensure that parties, who have participated in mediation in good faith and spent their money and time to resolve the dispute, would not be left empty handed. Otherwise, the credibility of mediation in the eyes of the general public and, subsequently, its availability would be diminished.

The member states of the EU are obliged by the Mediation Directive[355] to have a mechanism for the enforcement of cross-border disputes in place. Other countries willing to become a part of international enforcement regime shall also implement a national enforcement mechanism as the recent international documents, such as the Singapore Mediation Convention[356], are also based on national provisions. Not surprisingly, all the countries subject to this research provide a way to render mediation settlements enforceable. While the majority of countries offer a solution for enforcement of both out of court and court-related mediation

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[347] In Croatia, for example, '*[a] settlement agreement concluded in the course of mediation proceedings shall be an enforcement title if it contains an obligation to perform an act over which the parties may reach a settlement and if it contains the obligor's statement on immediate authorisation of enforcement (an enforcement clause)*' - The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 13 (2). It is, hence, cannot be stated that a mediation settlement agreement, including an enforcement clause, has the same legal value as a simple contract.
[348] The French Republic, Code of Administrative Justice, Art. L213-3.
[349] United Nations Convention on International Settlement Agreements Resulting from Mediation, Art. 1.
[350] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art. 16 (1).
[351] European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008, p. 3–8, art. 6.
[352] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 27.
[353] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 12 (1).
[354] CEPEJ, Standard mediation forms. From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV [accessed 2019-03-10], available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 34-36.
[355] European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008, p. 3–8, art. 6.
[356] United Nations Convention on International Settlement Agreements Resulting from Mediation.

settlements, some (for example, Switzerland) limits the possibility of enforcement to court-related mediation. The former approach is recommended.

A mediation settlements can be made enforceable by submitting it to a court for summary proceedings (e.g., Azerbaijan, Belgium, Croatia, Cyprus, the Czech Republic, Finland, France, Ireland, Italy, Lithuania, Poland in civil proceedings, Serbia, Spain, and Switzerland for court-related mediation); submitting it for homologation to other public body (e.g., Poland in administrative proceedings); enacting it as a notarial deed (e.g., Azerbaijan, Croatia, Serbia, Spain); transferring its provisions to an arbitral award (e.g., Croatia, Germany), or making a mediation settlement directly enforceable (e.g., Croatia, Italy). In some countries these methods can be used interchangeably.

Homologation trough a court is the preferred method for two reasons. First, parties are rarely obliged to be represented by lawyers during mediation (as explained in chapter 5.3., it is only true in Italy). Mediators are not necessarily required to be lawyers as well (such a requirement was only found in Turkey's national law). Hence, the court can ensure that the provisions of a mediation settlement go in accordance with the national mandatory law and public order, including the best interests of a child. The court is also the most suitable to verify that there are no other grounds based on which enforcement should be rejected. Second, mediation settlement, when made enforceable via a court order, can obtain the same legal value as a court decision, including *res judicata*, and help prevent future litigation. For example, in Lithuania, *'[a] settlement agreement, confirmed by final court order, has a power of a final court decision to the parties (res judicata) and can be enforced.'*[357]

Homologation by a notary or other public authority can also ensure compliance with the national mandatory law and public order and, therefore, can be used as well. Direct enforcement, on the other hand, shall only be possible provided that the compliance with the mandatory law is guaranteed in other ways during the process of drafting (in Italy, for example, *'[i]n signing the agreement, the lawyers attest and certify that the agreement complies with the mandatory rules and public order'*[358]).

In many countries rendering a mediation settlement enforceable is only possible upon request of both parties or upon request by one party with the explicit consent of the other (e.g., Cyprus, Finland, France, Lithuania). It is also the wording of Article 6 of the Mediation Directive. However, to protect the interests of a party acting in good faith and overall credibility of the outcome of mediation process, it is recommended to encourage the parties to include an enforceability clause in their mediation settlements (for example, in Poland '*[b]y signing the settlement agreement, the parties agree to move the court to approve the same, of which the mediator shall advise the parties*'[359]; in Croatia '*[a] settlement reached by way of mediation is an enforceable document if it contains an obligation due for performance in respect of which the parties may reach a compromise, and if it contains a statement of direct permission to enforce (enforceability clause)*'[360]). Requiring including information on possible enforcement of the mediation settlement is a good practice as it can foster the process of homologation and help avoid future disputes.

7. Means to incentivise

Three main channels of motivation were found in the national laws used to incentivise potential users of mediation to actually resort to it. First, people can be motivated by receiving information on mediation and its benefits when they are already facing a dispute, which makes them more attentive to proposals; second, people can be positively or negatively motivated through monetary subsidies or sanctions; and third, they can be required to attend the first meeting with a mediator, instead of making an uninformed decision not to try mediation. While the latter was already extensively discussed in chapter 4.2., only the former two will be addressed in more detail in this chapter.

7.1. Obligation to inform

[357] The Republic of Lithuania, Law on Mediation, *Valstybės žinios*, 2008, No. 87-3462; *Teisės aktų registras*, No. 2017-12053, Art. 16 (3).
[358] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 12 (1).
[359] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Art. 183^{12} (2^1).
[360] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 13 (2).

Guidelines on mediation clearly emphasise the importance of the role of judges and lawyers when it comes to the availability of mediation[361]. The obligation to inform potential users of mediation, such as clients of lawyers or parties to a dispute at court, cannot alone result in significantly raised numbers of mediation[362]. However, as rightly stated in the Guidelines[363], information disseminated by various officials can help educate the general public and raise awareness, while judges and lawyers can help potential users to make early informed decisions on preferred dispute resolution method. Therefore, national legislators are encouraged to introduce such an obligation. While it is not very common across countries, there are several examples of good practice in this regard.

7.1.1.Lawyers

Explicit requirements for lawyers to inform their clients about the possibility of using mediation was only found in Cyprus, Ireland, and Italy. While Cypriot legislators have chosen to introduce only a general obligation for lawyers to '*inform their clients of the possibility of mediation, as provided in the present Law, for the settlement of their disputes that fall within the scope of this Law[364]*', Ireland and Italy have introduce more elaborated provisions, tackling not only what information should be provided and how but as well the possible consequences of not complying with the obligation. In Ireland, for example, '*[a] A practising solicitor shall, prior to issuing proceedings on behalf of a client—*
(a) advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings,
(b) provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services,
(c) provide the client with information about—
(i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and
(ii) the benefits of mediation,
(d) advise the client that mediation is voluntary and may not be an appropriate means of resolving the dispute where the safety of the client and/or their children is at risk, and
(e) inform the client of the matters referred to in subsections (2) and (3) and sections 10 and 11.'[365]

Both Ireland and Italy require to provide a proof that the obligation has been met when instituting judicial proceedings. In Ireland, a statutory declaration by the solicitor suffices[366]. Italian legislators require a document undersigned by the parties, which would contain the information on mediation[367]. The latter is considered to be a better practice, as requiring proactive behaviour from the client is more likely to bring awareness to his or her actions.

Moreover, both countries have also foreseen the aftermath of ignoring the obligation. In Ireland, for example, '*the court concerned shall adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the practising solicitor concerned to comply with subsection (1) and provide the court with such declaration or, if the solicitor has already complied with subsection (1), provide the court with such declaration[368]*'. In Italy, the sanctions are stricter. In case of absence of a written document undersigned by the parties not only will the court '*inform the party of the right to request a mediation[369]*', but also such an absence will make the contract between the lawyer and the client void.

[361] Guidelines on Mediation (family & civil: chapters 1.2. and 1.3. penal: chapters 1.2. and 1.4.; administrative: chapters 1.4. and 1.5.).
[362] The European Union, Directorate General for Internal Policies, *'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: study* [interactive], 2014. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf, p. 136.
[363] Guidelines on Mediation (family & civil: chapters 3.1. and 3.2. penal: chapter 3.2.; administrative: para. 54).
[364] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 13 (2).
[365] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 14 (1).
[366] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 14 (2).
[367] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 4 (3).
[368] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 14 (3).
[369] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 4 (3).

Models of implementing the obligation for lawyers to inform their clients offered by Irish and Italian legislators slightly differ as the former is softer on the lawyers. However, both are elaborated enough and clearly define what information should be conveyed, the type of proof to be provided for the court and the consequences of not acting that way. Hence, both can be recommended as a good practice.

7.1.2.Judges and other officials

Judges are rarely obliged to inform parties about mediation (only in Serbia a reference to a requirement is made: *'[t]he court or other authority that is required by a special statute to instruct the parties about the possibility of using mediation shall provide all necessary information to the parties with a view to fully informing them about the possibility of using mediation*[370]*'*). More frequently national laws on mediation provide a possibility for judges to inform disputants (e.g., Croatia, Cyprus, the Czech Republic, Ireland, Poland, Turkey). It is usually applied along with their right to recommend mediation to the parties, as discussed in chapter 4.1. (for example, in Ireland '*[a] court may, on the application of a party involved in proceedings, or of its own motion where it considers it appropriate having regard to all the circumstances of the case: (a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings; (b) provide the parties to the proceedings with information about the benefits of mediation to settle the dispute the subject of the proceedings*[371]*'*).

After the legal proceedings have started, judges have a more detailed view of the situation and are able to make better-informed decisions on the possibility of an amicable resolution between the parties. Hence, an obligation for judges to inform parties to every dispute is not necessary, especially, if such a blanket obligation is already laid on the lawyers. However, national legislators are encouraged to make a direct reference giving judges a possibility to provide information on mediation when they deem necessary, preferably, stating what information should be conveyed (see examples provided in chapter **Erreur ! Source du renvoi introuvable.**.). It is also recommended to allow judges to redirect parties to another person or persons who could provide that information to save the time of the judiciary. For example, in Poland *'[t]he presiding judge may invite the parties to attend an information meeting about amicable dispute resolution methods, in particular, mediation. Such information meeting may be conducted by a judge, judicial clerk, judicial officer, assistant judge or permanent mediator*[372]'. However, for judges to be able to make informed decisions on the suitability of a case for mediation, it is recommended to ensure that the members of the judiciary undergo an initial and continuous mediation awareness training[373].

The same rules outlined above shall apply to officials (not necessarily judges) who conduct other proceedings, as they also have a dispute in front of them. In Croatia, for example, *'[d]uring judicial, administrative or other proceedings, the body conducting the proceedings may, in disputes referred to in Article 1 of this Act, recommend to the parties to resolve their dispute in mediation proceedings in accordance with the provisions of this Act if it assesses that there exists the possibility of resolving the dispute by mediation. The body referred to in paragraph 1 of this Article may invite the parties to an informative meeting to acquaint them with the use of mediation*[374]. National legislators are also encouraged to look for other possibilities in line with their national law to encourage officials who deal with disputes (however, not necessarily resolve them) to disseminate information on mediation to applicants. In penal matters, obligation to inform is relevant to the police, prosecutors and probation officers. The information on cases suitable for mediation shall also be exchanged between these authorities. In the Czech Republic, for example, '*[t]he police body and state prosecutor notify the office of matters suitable for mediation, mainly in criminal matters of juveniles it proceeds in such a way so that mediation is used just as charges are brought against them, or instead of it'*[375]. However, it can also be applied to other public bodies. For example, in Lithuania, following the recommendations in the Guidelines on Mediation[376], officials providing legal aid face such an obligation[377]. While the general public remains widely uninformed of the benefits of mediation, seizing an opportunity to raise awareness using different channels is highly recommended.

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[370] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Article 9.
[371] The Republic of Ireland, Mediation Act, 2017, No. 27, Art. 16 (1).
[372] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Article 183[8] (4).
[373] Mediation awareness of Judges Programme is currently under preparation in the CEPEJ-GT-MED.
[374] The Republic of Croatia, Mediation Act. *Narodne Novine*, 2011, No. 18/11, Art. 19 (1 and 2).
[375] The Czech Republic, Probation and Mediation Service Act, 2000, No. 257/2000 Coll., Sec. 4 (9).
[376] Guidelines on Mediation (family & civil: para. 48, administraticve: para. 56).
[377] The Republic of Lithuania, Law on the Legal Aid Guaranteed by the State, *Valstybės žinios*, 2000, No. 30-827, Art. 15 (6).

7.2. Monetary incentives

As mentioned above, the general public is not well aware of mediation and its benefits. Therefore, national legislators are encouraged to introduce monetary incentives and sanctions to foster the use of mediation. Moreover, national legislators shall guarantee the accessibility of mediation by ensuring that members of the public with limited financial means can benefit from mediation by offering it free of charge or with reasonable reductions in costs[378]. Three main types of monetary incentives can be found in national laws: (1) sanctions (e.g., Ireland, Italy, Lithuania, Poland, Slovenia); (2) reductions or waivers of stamp duties and other court fees (e.g., Lithuania, Poland, Serbia); (3) subsidies to use mediation (e.g., Italy, Lithuania, Switzerland).

7.2.1. Sanctions

Guidelines on Mediation state that '*[p]arties could be sanctioned if they fail to actively consider the use of amicable dispute resolution*'[379]. National legislators are, thus, encouraged to introduce such incentives, provided that the conditions of applications are established. When considering implementing sanctions for the parties with regard to mediation, it is essential to decide (a) what type of sanctions can be introduced and (b) for what kind of behaviour. Possible answers to these questions are provided below.

a) Type of sanctions

The sanctions that parties may be facing with regard to mediation can take the form of a fine or be implemented through distribution of procedural costs. The former type was only found in Italy, where '*[f]rom the failure to participate in the mediation proceedings, the court may infer that the party who did not participate in the proceedings, did not have a justifiable reason, unless that party successfully proves a justifiable reason in subsequent proceedings <…>. The judge would then sanction the party who in the cases provided for in Article 5, has not participated in the mediation proceedings without a justifiable reason, to pay into the state budget an amount corresponding to the amount of court fees due for trial*'[380]. The latter type is more common and can be found in Ireland, Slovenia, Lithuania, Poland, and Turkey.

However, regulations in these countries also differ with regard to the costs that are incurred. In Slovenia, for example, in cases concerning referral to mediation, these are the costs of the judicial proceedings ('*[r]egardless of the result of the judicial procedure, the court may, upon request by the other party, order the party that has submitted a clearly unreasonable objection to the mediation referral to reimburse the other party for all or part of the expenses that were required for the judicial procedure and that arose from the clearly unreasonable objection*[381]'). Similar provisions exist in Ireland, Lithuania, and Turkey. In Poland, however, only the cost concerning mediation can be incurred by the absent party (*'[t]he presiding judge shall determine, before the first meeting scheduled for trial, whether or not the parties should be referred to mediation. To this end, the presiding judge may summon the parties to attend an in-camera hearing in person if it is necessary to hear them. If a party fails to attend a meeting or an in-camera hearing without good cause, the court may order it to pay the costs of compulsory attendance incurred by the opposing party*[382]*').*

Both types of sanctions can reach the same goal of deterring parties from acting in bad faith towards mediation. However, diverging from the 'loser pays' principle and requiring the party acting in bad faith to cover the costs regardless of him or her winning the case, can be easier to communicate to the general public as in case of a successful mediation such costs would not have been incurred at all. With the same reasoning behind it, national legislators should consider subjecting costs of judicial proceedings to such sanctioning, not only the costs of mediation.

b) Behaviour

[378] Guidelines on Mediation (family & civil: para. 34).
[379] Guidelines on Mediation (family & civil: para. 49).
[380] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 8 (4bis).
[381] The Republic of Slovenia, Alternative Dispute Settlement Act. *Uradni list*, No. 97/2009, Art. 19 (5).
[382] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Article 183^8 (5 and 6).

The most apparent behaviour to sanction is not attending the mandatory mediation session or rejecting the invitation by the court or another party to try mediating the dispute without a good reason. Such behaviour is sanctioned in Ireland, Italy, Poland, and Slovenia. Lithuania went even further and allows sanctioning a party who behaved in bad faith during mediation. While it is not explained further what shall be constituted as a bad faith, it is rightly left for the judge to decide on the case by case basis. Such a provision allows parties acting in good faith feel safer during the process of mediation and sure that their procedural guarantees will be respected.

Italy has a rather uncommon approach towards the behaviour that can be sanctioned. It is related to permission for the mediator to make a settlement proposal at the end of mediation, when it was not successful, as briefly discussed in chapter 2. There *‘[w]hen the judgement is entirely equivalent to the content of the settlement proposal, the judge shall exclude the recovery of costs incurred by the winning party if that party has rejected the original settlement proposal. The costs are those incurred in the period after the formulation of the proposal. In that case, the court shall order the winning party to reimburse the expenses incurred by the losing party in the same period, as well as require a payment into the State Budget of a sum equal to the amount of court fees due. <...> The provisions referred to in this paragraph shall also apply to the compensation paid to the Mediator and the remuneration payable to the expert referred to in Article 8, paragraph 4*’[383].

Italy is the only one offering such a model and it undoubtedly encourages parties to think twice before withdrawing from mediation when a reasonable proposal is on the table, without making that proposal obligatory to the parties. However, such a provision can amount to parties feeling forced to accept the proposal out of the fear that they will be required to pay a fine afterwards. Thus, if considering introducing such a provision in the respective national law, national legislators shall be careful not to go against the voluntary nature of mediation, which lays in the right of the parties to freely choose whether to settle or not and, if yes, on what terms.

7.2.2.Stamp duties and court fees

Potential users can be attracted to try mediation through positive incentives as well, for example through reduced or waived stamp duties or other fees. Guidelines on Mediation also suggest that national legislators may wish ‘*to consider diminishing, abolishing or reimbursing court fees in specific cases if alternatives to litigation are used to try to settle the dispute either before going to court or during court proceedings*’[384]. While it might cause an additional monetary burden to the state budget at a short term, in the long term reduced number of court proceedings pertaining from the raised popularity of mediation can even out or outweigh the loss incurred. Moreover, such reductions raise awareness of mediation and its accessibility. Two models can be found in this regard. First, stamp duties can be reduced to a certain percentage if parties are able to provide proof that they have attempted mediation before submission of a claim. In this case, a note of termination of the mediation yet again comes in handy. Such an incentive is foreseen in, for example, Lithuania. Second, if parties settle during the judicial proceedings, their registration duty can also be reimbursed in full or in part (it is the case in, for example, Lithuania[385], Poland[386], and Serbia[387]). National legislators are encouraged to introduce both models and apply them also to the proceedings in the appellate instance or cassation.

The scope of the reimbursement might differ with regard to the timing of the settlement agreement. For example, in Lithuania, if a case in the appellate instance or cassation is terminated by a settlement agreement before going into the substance of the case, 100 percent of the stamp duty is reimbursed. However, if the settlement agreement was concluded at a later stage, only 75 percent will be refunded[388]. National legislators shall decide on the size of the reduction taking into account their national provisions and the size of the stamp duty itself.

7.2.3.Subsidies

[383] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 13 (1).
[384] Guidelines on Mediation (family & civil: para. 47; administrative: para. 55).
[385] The Republic of Lithuania, the Code of Civil Procedure, *Valstybės žinios*, 2002, No. 36-1340, Art. 87 (2).
[386] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Article 104.
[387] The Republic of Serbia, Act on Mediation in Dispute Resolution, *Службеном гласнику*, No. 55/2014, Art. 31.
[388] The Republic of Lithuania, the Code of Civil Procedure, *Valstybės žinios*, 2002, No. 36-1340, Art. 87 (2).

Mediation is not accessible if potential users cannot afford it. Therefore, the primary aim of national legislators should be ensuring that persons from low-income levels are able to resort to mediation. Such an approach is in line with the Guidelines on Mediation as they clearly state that *'it is unacceptable for some categories of the population to be excluded from a service on financial grounds'*[389]. Moreover, it also emphasised that *'[a] costly mediation procedure not covered by legal aid might be an obstacle to mediation'*[390]. Even though countries subject to this research foresee such an aid, the modalities differ. First, mediation can either be provided entirely free of charge or subject to specific requirements (for example, in Poland, *'[u]nless otherwise agreed upon by the parties, the costs of court-referred mediation which ended in a settlement shall be set off'*[391]). Second, it can also be provided free of charge to all persons on low income (for example, in Azerbaijan[392], Turkey[393] and Lithuania[394] mediation forms a part of legal aid scheme and is provided free of charge for those who cannot afford it; in Italy *'[w]hen mediation is a condition precedent to legal proceedings under Article 5, paragraph 1- bis, or is ordered by the court under Article 5, paragraph 2, of this decree, the mediation provider is not due any compensation from a party who meets the conditions for legal aid'*[395]). Third, it can be provided free of charge only in certain types of dispute (for example, in Switzerland '*[i]n matters of child law, the parties are entitled to cost-free mediation if: a. they do not have the necessary financial resources; and b. the court recommends mediation'*[396]*).*

Moreover, instances can be found where subsidies are not based on the low-income level. For example, in Italy parties can receive a tax credit reimbursing in full the fee paid to mediation provider if their settlement was successful, or partial reimbursement if mediation settlement was not reached[397]. Various types of subsidies are able to promote the use of mediation and are of course encouraged. However, if priorities have to be set, national legislators shall primarily ensure that persons who objectively cannot afford mediation would be subsidised by the state and could access mediation. Preferably, in all types of disputes, in court-related as well as out of court mediation.

8. Information on mediation

8.1. Dissemination and promotion

Several international documents concerning mediation, including Guidelines on Mediation[398] and the Mediation Directive[399], emphasise the need of raising awareness of the general public about mediation through, most importantly, the Internet, as well as the media, information centres, seminars and other means of communication. Many experts coming from different European countries have also expressed concern that education for the general public is lacking[400]. With this in mind, national legislators are encouraged to introduce legislative measures obliging authorities or public bodies to disseminate information on mediation and promote mediation.

First and foremost, public bodies or authorities shall disseminate general information about mediation, which would be easily comprehensible and accessible to the general public. Along with such information, details of mediators or mediation providers and their contacts should also be outlined and easily accessible, preferably on the Internet. For example, in Cyprus the Ministry of Justice and Public Order is responsible for ensuring '*by*

[389] Guidelines on mediation (family & civil: para: 34; administrative: para. 42).
[390] Guidelines on mediation (penal: para: 34).
[391] The Republic of Poland, the Code of Civil Procedure, *Dziennik Ustaw*, 1964, item 1595 of 2015, Article 104[1].
[392] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art. 37.7.
[393] The Republic of Turkey, Ordinance on the Application of Mediation over the Legal Disputes. *Resmî Gazete*, 2018, No. 30439, Art. 15 (3).
[394] The Republic of Lithuania, Law on the Legal Aid Guaranteed by the State, *Valstybės žinios*, 2000, No. 30-827, Art. 2 (11) and 14 (3 and 4).
[395] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 17 (5bis).
[396] The Swiss Confederation, the Code of Civil Procedure, 2008, Art. 218 (2 and 3).
[397] The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 20 (1).
[398] Guidelines on Mediation (family & civil, para. 40 – 42; penal, 39-40; administrative, 48-50).
[399] European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008, p. 3–8, art. 9.
[400] The European Union, Directorate General for Internal Policies, 'Rebooting' the Mediation Directive:
Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: study [interactive], 2014. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf, p. 157.

any means, to provide information to the general public, in particular through the Internet, on how to contact mediators'[401]. Secondly, public bodies or authorities should organise promotion of mediation. For example, in Turkey, one of the functions of the Department of Mediation is '*[p]ublicizing the mediation institution, informing the public on this matter, organizing or supporting the scientific organizations such as national and international congresses, symposiums and seminars*'[402]. Nonetheless, there is no need to provide an exhaustive list of the means of promotion in order not to limit the creativity and overall effectiveness of the publicity campaigns.

The functions of the authorities in charge of mediation or public bodies operating in the field of mediation are usually outlined in the national laws (see, for example, national legal acts of Belgium, Croatia, the Czech Republic, Ireland, Lithuania, Poland, Turkey). Therefore, the easiest way to incorporate such an obligation to the national law is including it among the functions of a specific public body. The function of promoting mediation and disseminating information on mediation is usually assigned to the ministries (e.g., Cyprus, Italy, Lithuania, Slovenia) or other authorities in charge (in Turkey, for example, it is the function of the Department of Mediation, in Belgium – Federal Commission for Mediation). National legislators can also encourage mediation providers to promote mediation themselves, as long as their advertisements are not misleading. For example, in Spain it is stated that '*[m]ediation institutions may organise open information sessions for persons who may be interested in dealing with this dispute settlement system*'[403]; in Azerbaijan mediation providers '*in order to facilitate development and improvement of mediation, implements marketing of mediation services*'[404].

However, the most sustainable way to promote mediation stems from education. Such a conclusion is twofold. First, it is important to teach mediation to children through the introduction of peer school mediation programmes. Such programmes can bring important advantages in both the short and long term. In the short term, peer mediation programmes at schools can reduce the use of violence in and around the school[405]. In the long term, it can create the "mediation reflex" for each future citizen in situation of misunderstanding, problem and conflict, and also to teach the people to accept the difference between individuals. Second, raising awareness of mediation is also important in the education and preparation of future judges, lawyers, and representatives of other legal professions. As indicated in the Road Map of the CEPEJ-GT-MED, '[w]*ithout a compulsory mediation awareness/training of judges during their education or in the first year of their judiciary practice the number of cases referred to mediation in civil, family, penal (adults and juveniles) and administrative matters will remain unchanged at the actual insignificant number compared with the number of judicial proceedings in the same matters. Similarly, without compulsory ADR teaching and training for lawyers/ barristers in the law faculties and Barristers' schools, the ancient habit to recourse - systematically, automatically and without conflict management thinking - to the adjudication systems (State and arbitration proceedings) will remain*'[406]. Therefore, it is recommended to allow and encourage including mediation to schools' and universities' curriculum.

8.2. Statistical data

The study[407] on the effectiveness of the Mediation Directive revealed that, back in 2014, national official statistics on the number of mediations were not available in any of the 28 member states of the EU, except for Italy. Some of the member states were able to provide partial statistics with regard to court-related mediation, government funded mediation, or a specific project. However, partial data does not represent the actual numbers of mediation. A mediation survey conducted in 2017 by the CEPEJ revealed similar results: '*there are substantial differences between the Council of Europe Member states in keeping records and measuring key performance*

[401] The Republic of Cyprus, The Certain Aspects of Mediation in Civil Matters Law, *Official Gazette*, Supplement 1(I): 16.11.2012, No. 4365, 2012, No. L.159 (I)/ 2012, Art. 13 (1).
[402] The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). *Resmî Gazete*, 2012, No. 6325, Art. 30 (1ç).
[403] The Kingdom of Spain, Law on Mediation in Civil and Commercial Matters. *Boletín Oficial del Estado*, No. 5/2012, Art. 17 (2).
[404] The Republic of Azerbaijan, Law of Republic of Azerbaijan on Mediation, 2019, art.11.1.
[405] MIRIMANOFF, J. *Médiation et Jeunesse, Partie II: Médiation en milieu scolaire*. Bruxelles: Larcier, 2013.
[406] CEPEJ, Road Map of the CEPEJ-GT-MED, based on the CEPEJ-GT-MED report on "The Impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation", CEPEJ-GT-MED(2018)8, p. 4.
[407] The European Union, Directorate General for Internal Policies, 'Rebooting' the Mediation Directive:
Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: study [interactive], 2014. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf.

indicators of mediation systems. In some Members States such statistics are not collected at all at national level'[408]. The research at hand cannot provide much more positive results regarding this question either. The only countries which make a direct reference to gathering or publishing statistical data in their national law on mediation are Azerbaijan, Italy, Lithuania, Serbia and Turkey[409].

Gathering statistical data and providing systemised reports are important for the following reasons. First, it allows evaluating the effectiveness of the legislation in place and indicates if certain parts require amendments '*enabling progress to be made in future policy-making*'[410]. As established in the Guidelines on Mediation, developing quantitative criteria also enables the comparison of mediation schemes applied[411]. Second, monitoring the statistics of mediation can ensure higher quality of mediations as low success rates might signal poor training. Hence, problems can be tackled in a relatively early phase. Third, it helps promote mediation as the general public can assure themselves of its effectiveness. Fourth, it opens the doors for high quality research, which can help to further improve the legislation on mediation. Therefore, gathering nationwide statistics is highly recommended. However, attention should be paid not to infringe the principle of confidentiality. For example, when providing the data as outlined in the Baseline Grid for Mediation Key Performance Indicators (Baseline Mediation Statistics)[412], such as the number of mediations conducted broken down by the types of disputes mediated and indicating how many of them were partially or totally settled, it is important to aggregate the figures sufficiently to avoid putting confidentiality under threat. Moreover, as indicated above, a regular collection of harmonised and precise statistical data can furnish elements able to measure the efficiency of the judicial referral to mediation on the one hand and of the mediation process in a general sense on the other.

The approach towards gathering the data should be systematic. The information can be easily obtained directly from the mediators if a nationwide register of mediators is maintained and the mediators are required to conduct a certain number of mediations to stay on it, as explained in chapter 3.1. The obligation to prepare a note of termination of mediation indicating whether the mediation in question was successful or not, as discussed in chapter 5.5., can also come handy as a proof that the mediation was indeed conducted. In Turkey, for example, mediators are obliged to send the note of termination to the authority in charge within one month of the completion of mediation[413]. Alternatively, already aggregated data can be obtained from mediation providers, yet again, if a registry of mediation providers is established or their activities are regulated in any other way, as discussed in chapter 3.3. Lastly, in a similar manner, the authorities in charge shall be instructed to gather and provide the information if separate schemes exist for court-related mediation (as is the case in, for example, Finland, Lithuania, Slovenia) or different types of disputes (for example, criminal in the Czech Republic or labour disputes in Spain).

9. Transitional provisions

National authorities are encouraged to take a step-by-step approach before introducing new ideas on mediation to the society and to test them on a smaller scale before implementing them on a wider level. Pilot projects can be used before adopting a law on mediation, as well as when such a law is already in place and new concepts are to be introduced. Pilot projects can be beneficial for a number of reasons. First, implementation and execution of new ideas can be monitored to identify potential pitfalls and indicate where amendments might be necessary. This can help establish a method which is the most suitable in the national context. Second, it can prove the effectiveness of certain ideas and reduce reluctance to use it if there was some

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[408] CEPEJ, Baseline Grid for Mediation Key Performance Indicators (Baseline Mediation Statistics). From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 40 – 49.

[409] The possibility remains that such a requirement is foreseen in other legal acts or regulations, which were not the object of this research.

[410] CEPEJ, Baseline Grid for Mediation Key Performance Indicators (Baseline Mediation Statistics). From *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation*, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 41.

[411] Guidelines on Mediation (family & civil: para. 15.; penal: para. 15).

[412] CEPEJ, Baseline Grid for Mediation Key Performance Indicators (Baseline Mediation Statistics). From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 40 – 49.

[413] The Republic of Turkey, Ordinance on the Application of Mediation over the Legal Disputes. *Resmî Gazete*, 2018, No. 30439, Art. 20 (4).

unwillingness in the first place. Third, executors of a successful pilot project can transfer the knowledge obtained and lessons learned during the administration of the project.

Pilot projects can take various forms and scope and national legislators should choose a model depending on the idea they are willing to test and the results they want to achieve. Providing a comprehensive analysis of pilot projects and their implementation is not the aim of this document. Instead, several successful pilot projects and development paths of certain mediation schemes will be introduced to illustrate the models and give a rough idea how these projects can be carried out.

a) Developments of judicial referral to mediation and court-related mediation

Instead of implementing judicial referral to mediation in one go, the Netherlands has chosen a gradual approach[414]. Even though it took 10 years to finalise, the scheme proved to be successful. The introduction was divided into three phases, namely pilot phase, implementation phase and consolidation phase. The first phase was carried out in five courts of the first tier and one appellate court under the guidance of the Netherlands Court-Connected Mediation Agency set up for this reason. The goal of the first phase was to indicate '*whether a structural facility for referral to mediation within the judicial organization was justified and if so, how this could be organized most effectively and efficiently*'[415]. The six pilot projects were followed by an evaluation, an exploration of the possibilities of a nationwide implementation and a forecast study. After pilot projects proved to be successful, time came for the second phase – implementation of the judicial referral to mediation on the national level. During the second phase the courts received manuals, training courses, information brochures, information meetings and advisory service from the Agency. The third phase, consolidation, was carried out after the referral programme was implemented in every court. It was focused on '*embedding its organization, strengthening the support base and developing best practises*'[416]. It was also used to train the judges and court staff to help parties choose the most suitable method of dispute resolution. While the full implementation took a long period of time and a great deal of organisational and coordination effort from the Agency, the project lead emphasised that it not only helped to introduce a successful referral scheme but also added to a change of how the role of a judge was perceived[417].

However, a pilot project does not necessarily have to be so long or to have such a big scale to bring positive results. For example, a pilot scheme regarding referral to mediation was carried out for a year in first instance courts in Lausanne, Switzerland. It was afterwards implemented throughout all the courts of the first instance in the canton. In Slovak Republic, a pilot project in family disputes is also carried out in 4 courts. There a specialised employee of a court, having university degree and background training in psychology meets the parties and attempts to redirect them to a mediator or a psychologist if expedient. The pilot, introduced in September 2018, seems to be bringing positive preliminary results. In Lithuania, court-related mediation model was first introduced in one district court, only in 2 years extended to fourteen other courts and finally implemented on a national level afterwards

b) Pilot projects for mandatory attempt to mediate

[414] For more information on the project see: PEL, M. and COMBRINK, L. Referral to mediation by the Netherlands judiciary. *The Judiciary Quarterly. Customized conflict resolution: Court-connected Mediation in The Netherlands 1999-2009*. The Hague: Sdu Publishers BV, 2011. Available at: https://www.rechtspraak.nl/SiteCollectionDocuments/Customized-conflict-resolution-Court-connected-Mediation-in-The-Netherlands-1999-2009.pdf, p. 25-52.

[415] PEL, M. and COMBRINK, L. Referral to mediation by the Netherlands judiciary. *The Judiciary Quarterly. Customized conflict resolution: Court-connected Mediation in The Netherlands 1999-2009*. The Hague: Sdu Publishers BV, 2011. Available at: https://www.rechtspraak.nl/SiteCollectionDocuments/Customized-conflict-resolution-Court-connected-Mediation-in-The-Netherlands-1999-2009.pdf, p. 25.

[416] Ibid., p. 27.

[417] PEL, M. Foreword. The Judiciary Quarterly. Customized conflict resolution: Court-connected Mediation in The Netherlands 1999-2009. The Hague: Sdu Publishers BV, 2011. Available at: https://www.rechtspraak.nl/SiteCollectionDocuments/Customized-conflict-resolution-Court-connected-Mediation-in-The-Netherlands-1999-2009.pdf, p. 4.

In 2016 the Law on modernisation of justice in 21st century[418] was passed in France. Article 7 of the law introduced on experimental basis mandatory mediation in certain family disputes as condition precedent to legal proceedings[419]. The article stipulates that the provision will be applicable for three years in jurisdictions of certain High Courts, which had to be specified by the Minister of Justice. Eleven High Courts were included in the experiment, which is supposed to last until December 31, 2019. The implementation of the model on a national level would only be considered if positive results were identified during the pilot project. The representatives of the participating High Courts and the officials of the institutions involved are meeting to discuss the progress and share the good practices as well as problems encountered.

The project is also monitored and evaluated on different levels even during its implementation. The statistics department of the Ministry of Justice collects statistical data to be able to measure the impact of the mandatory mediation. An external research is being conducted by the IDHES[420] laboratory in the Paris Nanterre University on the pilot in the High Court of Pontoise, which will later be compared with the outcomes in one other participating High Court. It takes into account not only the statistical indicators, but also, through the questioners distributed, evaluates the experiences of the main characters participating in the experiment – professionals (judges, mediators, lawyers) and litigants. The conclusive results will be presented in the end of 2020; however, interim report will also be prepared. While the final outcomes of the pilot are yet to be seen, such a model is an example of how new ideas can be tested on a limited time and only in a targeted territory before making further decisions whether they should or should not be implemented on a national level and if yes, what amendments are necessary for it to be successful.

Other countries that implemented mandatory mediation have also done it with certain experimentation. For example, in Italy the provision on mandatory attempt to mediate was first introduced for four years, while after two years the monitoring of the results was supposed to begin. The model introduced through this temporary provision is now in place on permanent basis and brings positive results[421]. In Turkey the implementation of mandatory attempt to mediate is still being introduced gradually. Starting with employment disputes in 2018 and seeing the results, the scope of application was extended to certain commercial disputes in 2019. Another extension is planned to family disputes in 2020.

These are only a few examples of possible pilot projects that could be implemented to test new ideas on mediation or ameliorate the laws already in force. National authorities are encouraged to contact foreign representatives that carried out the pilot projects to seek for guidance and good practice before adopting it to the national needs and implementing in practice. A management checklist for establishing a court mediation pilot[422] and a mediation pilot monitoring checklist[423] were also adopted by the CEPEJ to help set up and implement the scheme effectively. Regardless of the form chosen, leaders of a pilot project shall not forget the importance of statistical data, monitoring and evaluation of the project, as well as continuous education for the direct participants and those who will have to transform the pilot project into a generally used scheme. Depending on the scheme chosen these pilots can be either included in the new (or amended) legislation on mediation as transitional provisions limiting the scope, the territory or the period of application of certain parts of the law that introduce the new ideas, or implemented on a smaller scale without even having to make changes in legislation before the experimental period is over. National legislators are encouraged to take into consideration the possible use of pilot projects and gradual introduction of novelties regarding mediation to increase the likelihood of successful implementation and tangible results of the new legislation on mediation.

[418] The French Republic, the Law on modernisation of justice in 21st century, 2016, No 2016-1547.
[419] For more information see: https://www.justice.fr/tentative-m%C3%A9diation-familiale-pr%C3%A9alable-obligatoire.
[420] Le laboratoire Institutions et Dynamiques Historiques de l'Économie et de la Société.
[421] For more information, see: DE PALO, G. A Ten-Year-Long “EU Mediation Paradox” When an EU Directive Needs to Be More … Directive: Briefing requested by the JURI committee, European Parliament [interactive], 2018. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf;
[422] CEPEJ, Establishing a Court Mediation Pilot: management checklist. From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 4-6.
[423] CEPEJ, Mediation Pilot Monitoring Checklist. From Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation, CEPEJ(2018)7REV, available at: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52, p. 7-13.

Checklist

Erreur ! Source du renvoi introuvable.	SCOPE	Disputes where settlement is legally possible
		Consolidated: including national and international disputes, out of court and court-related mediation, mediation in different fields of law
		Does not exclude sensitive disputes – introduces safeguards instead
1.1	OUT OF COURT AND COURT-RELATED MEDIATION	A separate chapter on court-related mediation in a consolidated law
		Referral to mediation at any time of the judicial proceedings before the decision is adopted
		Trained judges and accredited mediators are allowed to conduct court-related mediations
		The fee for the first 2-4 hours of mediation is reimbursed by the state / court
		Procedure of the initiation and referral of the case to mediation is defined
		Maximum duration of mediation is set to 3 months with a possibility to prolong
		Procedure of termination of mediation and continuation of judicial proceedings is foreseen
		A note of termination to the judiciary from a mediator is required; the requirements for its content are defined
1.2	MEDIATION IN INTERNATIONAL DISPUTES	Disputes with international element falls under the scope of the law
		National law adheres to the international standards
1.3	DIFFERENT FIELDS OF LAW	The law is applicable to disputes arising from civil law (including family, labour, commercial, consumer, others); administrative law (between administrative authority and private party); criminal law (victim-offender)
	ADMINISTRATIVE	Regulation provides which administrative disputes can be settled
		Limits of the discretion of the administrative authority to settle the disputes are defined
		Mediators are certified and properly trained; they are not employees of the administrative authority
		Necessary procedural steps before and after mediation are established
	PENAL MATTERS	Procedure for selection of cases prevents secondary victimisation and participation of aggressive or dangerous offenders
		Mediators are obliged to undergo specialised training
		Mediation can only take place with a consent of both parties
		Additional safeguards are introduced in domestic violence cases
		Minors can be accompanied by their parents or legal representatives; social workers are available
		Mediation can be conducted without parties meeting each other
		Exchange of information is ensured between various actors, including the police, prosecutors, courts, probation authorities, social community organisations
		Social community organisations are involved in the procedure
2	DEFINITIONS	Definition of mediation does not prevent various types of mediation from being applied (facilitative, evaluative, transformative, narrative

		and others)
3	MEDIATOR	
3.1	REQUIREMENTS FOR MEDIATORS / LIST	Mediators shall enter the list in order to practice
		Authority or public body is in charge of the administration of the list, having the power to suspend or remove mediators from the list
		Requirements to enter and stay on the list, including education, good repute, adherence to code of conduct, training, examination, CPD, are set
		Persons are subject to sanctions for acting as mediators while not on the list
	TRAINING	Minimum requirements for training curriculum are set along with the minimum duration
		Training and examination are basic and specialised, theoretical and practical;
		Training providers are accredited, register of training providers is established, the performance of the providers is monitored
		Continuous professional development is required
3.2	OBLIGATIONS, PERMISSIONS, LIABILITY	
Erreur ! Source du renvoi introuvable.	OBLIGATIONS	Mediators are obliged to adhere to code of conducts
		Mediators are required to adhere to principles of confidentiality, impartiality, neutrality, independence
		Mediators are obliged to disclose any concerns with regard to impartiality, neutrality or independence
		Mediators are obliged to disclose information with regard to their experience, training, professional background, as well as information concerning procedural aspects of mediation, legal effects of settling and not settling
		Mediators are required to sign mediation settlement, prepare a note of termination of mediation, provide statistical data to the authorities or mediation providers
Erreur ! Source du renvoi introuvable.	PERMISSIONS	Mediator is entitled to a fee and compensation of costs
		Mediators are allowed to meet parties individually; make proposals upon request of the parties; help draft mediation settlement
		Mediators are allowed to terminate the mediation when the settlement is not likely
		Mediators can refuse to give testimony in court with regard to information
		Mediators are allowed to access the case file in court-related mediation and mediation in penal matters
3.2.3	LIABILITY	Mediators are subjected to civil, as well as administrative and disciplinary liability for their misconduct
		Sanctions are defined, including warning, suspension and removal from the list
		The decision imposing the sanction can be appealed
		Depersonalised decisions of the disciplinary bodies are made public
		Mediators are required to acquire indemnity insurance

3.3	MEDIATION PROVIDERS	Register for mediation providers is established; criteria for enrolment, suspension and removal from the register are set
		The administration of the mediation provider is also subjected to the principles of confidentiality
		Mediation providers are required to adhere to the code of conduct, provide rules of procedure
		Mediation providers are required to maintain quality with regard to the mediators and administration
		Mediation providers are obliged to gather statistical data
3.4	OTHER LEGAL PROFESSIONS	Representatives of other legal professions are allowed to act as mediators, provided that they have received proper training, unless prohibited by mandatory law
		Public bodies in charge of the legal profession are allowed to organise training and examination
		Representatives of other legal professions are not allowed to act in their official capacity in disputes including the same party (-ies) after acting as mediators without explicit consent of the parties
4	INITIATION OF MEDIATION	Different types of initiation are established, including voluntary and mandatory recourse to mediation
4.1	VOLUNTARY BASIS	Parties can resort to mediation before and after the dispute arise
		Parties are allowed to introduce a mediation clause in their contract
		Judicial and arbitration institutions respect mediation clause and declares the claim inadmissible, unless mediation was attempted
		Procedure of initiation of mediation by one party is established, including the form of proposal and standard duration for acceptance or rejection
		During court-related mediation and other proceedings judges and officials in charge can recommend parties resort to mediation
0	MANDATORY BASIS	Parties can be required to participate in the first meeting with a mediator as a condition precedent to judicial proceedings; judges can also refer parties to such a meeting
	CONDITION PRECEDENT	Parties can be required to participate in the first meeting with a mediator with the possibility to continue with mediation before submitting a claim in certain types of disputes;
		Parties are free to opt out from mediation after the first meeting with a mediator without providing justification for their decision
		Procedural guarantees, including the confidentiality of the process, suspension of limitation and prescription periods, application of interim measures, are in place
		Mediation process does not give rise to significant costs
	REFERRAL BY A JUDGE	Judges are allowed to refer parties to the first meeting with a mediator when they consider that the settlement is likely; consent of the parties is not required
		Procedure of such a referral is set, which describes the appointment of a mediator, the possibility to access the file and the preparation of a note of termination of mediation
		Judges are required to set time limits for mediation and foresee the date of next hearing in the order referring parties to the first meeting with a mediator
5	MEDIATION PROCESS	Mediation process is defined systematically from the commencement to termination, procedural guarantees are ensured
5.1	BEFORE MEDIATION	Parties and the mediator are obliged to sign the agreement to mediate before commencement of mediation;
		The minimum information to be included in the agreement to mediate is foreseen; it includes at least the details of the parties, mediator and mediation provider; brief description of the contract,

		the mediator's fee and the method of payment; division of the costs of mediation; and duration if applicable
		Procedure for appointment of a mediator or mediators by a neutral party is set for situations when parties cannot reach a mutual agreement themselves
		Parties can agree on the division of costs themselves together with the mediator; they bare their own costs and share the costs of mediation equally, in the absence of such an agreement
0	COMMENCEMENT	The day of commencement of mediation can be unambiguously defined
		The day of commencement is linked to the day of signature of the mediation settlement; day of court order referring parties to mediation; other easily definable day if none of the above applies
5.3	DURING MEDIATION	Mediation can be conducted using electronic means, provided that procedural guarantees are ensured, and parties consent to it
		Participation of lawyers is encouraged but not mandatory
		Participation of the third persons and experts is allowed subject to consent of the parties; the principle of confidentiality, prohibition of testifying apply to the third parties as well
5.4	PROCEDURAL GUARANTEES	Procedural guarantees are in place throughout all of the mediation process as well as after its termination
5.4.1	CONFIDENTIALITY	All participants of mediation are bound by the obligation of confidentiality, applicable to all information acquired and documents introduced or prepared during or with regard to mediation, and are subject to liability for breach of obligation
		Parties are allowed to waive obligation of confidentiality by mutual written consent
		Exceptions to the obligation of confidentiality are defined concisely; the list includes the implementation and enforcement of mediation settlement; best interests of the child, disclosure or prevention of a crime, threat to a physical or psychological integrity of a person; proceedings against mediator for misconduct
		Second layer of confidentiality for individual meetings between a mediator and a party is foreseen
0	VOLUNTARINESS	Mediation process is defined as voluntary, without prejudice to the requirement to participate in the first meeting with a mediator
		Law clearly establishes which provisions are non-mandatory and can be derogated from by a written agreement of the parties
5.4.3	EVIDENCE AND TESTIMONIES	Evidence acquired during the course of mediation are inadmissible during judicial, arbitral and other proceedings;
		If a piece of evidence was admissible on other grounds, the sole use of it during mediation would not make that piece inadmissible; parties are always free to provide their own pieces of evidence
		Participants of mediation cannot be obliged to testify in judicial, arbitral and other proceedings with regard to the information acquired in the course of mediation
		Exceptions for this guarantee are enlisted; the same exceptions concerning the principle of confidentiality apply
0	PRESCRIPTION AND LIMITATION PERIODS	Prescription and limitation periods are suspended during the course of mediation
		Court proceedings are suspended during the course of court-related mediation
		The dates when the suspension commences and terminates can be defined; they are linked to the days of commencement and termination of the mediation or another day, which is easily definable
5.4.5	INTERIM MEASURES	Parties are allowed to request granting interim measures during the

		course of mediation if the urgency of situation so requires
Erreur ! Source du renvoi introuvable.	TERMINATION	Grounds of termination are set
		Mediation is terminated upon signature of mediation settlement; written declaration by a party, both parties or a mediator, terminating mediation; expiration of time limit allocated for mediation, whichever occurs first; all declarations are concluded in writing
		Mediators prepare a note of termination of mediation when official authorities or the court has to be informed about the outcome of mediation
0	MEDIATION SETTLEMENT	Minimum standards are foreseen for the form and content of mediation settlement; mediation settlements can be made enforceable
6.1	FORM AND CONTENT	Mediation settlements are required to be drawn up in writing, signed by the parties and attested by the signature of a mediator, indicating if parties consent that agreement would be enforced, as well as the date and place of the signature
		In court-related mediation, settlements can be narrower as well as wider than the scope of the claim or counter-claim
6.1	ENFORCEMENT	The content of mediation settlement can be made enforceable through homologation in court or by a notary on the request of both of the parties or one of them with an explicit consent of the other; legal effects of homologation are identified
		Parties are required to indicate if they consent to rendering the mediation settlement enforceable in the agreement
		Concise list of grounds for refusal to enforce is provided, including at least being contrary to mandatory law or public order
		Direct enforceability is allowed only provided that compliance with mandatory law and public order is ensured during the process of drafting
Erreur ! Source du renvoi introuvable.	MEANS TO INCENTIVISE	Various means to incentivise potential users to resort to mediation are in place. They include at least obligation to inform, monetary incentives, compulsory mediation
7.1	OBLIGATION TO INFORM	Lawyers, judges, and other officials are required to inform parties about the procedure and benefits of mediation
Erreur ! Source du renvoi introuvable.	LAWYERS	Lawyers are required to provide the information about mediation for their clients in writing; clients are required to confirm by signature that they have received and understood the information
		The information provided includes at least explanation of the mediation process, procedural guarantees applied during mediation, cost incentives (if applicable), requirements of compulsory mediation (if applicable)
		Written declaration signed by the client is required by the court when instituting legal proceedings
		The consequences of not acting in line with the obligation are established
7.1.2	JUDGES AND OTHER OFFICIALS	Judges are recommended to inform parties about mediation when they deem it fit or refer parties to information session with other official
		Other officials, such as legal aid officers or the police, are required to inform parties about mediation when they are facing a dispute
Erreur !	MONETARY	Parties to a dispute can receive negative (sanctions) and positive

Source du renvoi introuvable..	INCENTIVES	(subsidies and reduction of court fees and stamp duties) monetary incentives to choose mediation
7.2.1	SANCTIONS	Judges can disregard the 'loser pays' principle when distributing costs of the proceedings or fine party for the behaviour in bad faith towards mediation
		Behaviour in bad faith involves rejecting a recommendation or invitation to try mediation without a good reason; not being present at the required first meeting with a mediator; dishonest behaviour during mediation; the final evaluation is left for the discretion of a judge
7.2.2	STAMP DUTIES AND COURT FEES	Stamp duties or court fees are reduced or waived for the parties who tried mediating their dispute before resorting to judicial proceedings
		Stamp duties or court fees are reduced or waived for the parties who settled their dispute during the judicial proceedings
Erreur ! Source du renvoi introuvable.	SUBSIDIES	Potential users of mediation from lower income levels are not discouraged from using mediation due to its costs as mediation forms part of legal aid scheme or is provided free of charge for the users
		Other types of subsidies or tax exemptions are introduced for those resorting to mediation
8	INFORMATION ON MEDIATION	
8.1	DISSEMINATION AND PROMOTION	Public bodies or authorities in charge of mediation are obliged to disseminate information on mediation, including details of mediators and mediation providers as well as general practical and legal information on mediation
		Public bodies or authorities in charge of mediation are obliged to promote mediation through various means, including the Internet
		Mediators and mediation providers are allowed to promote their services, provided that the advertisements are not misleading
8.2	STATISTICAL DATA	Statistical data is collected on the national level and available publicly; the principle of confidentiality is respected
		Baseline Grid for Mediation Key Performance Indicators (Baseline Mediation Statistics) is integrated in national statistics system
		Public bodies or authorities in charge of mediation are obliged to gather statistical information
		Mediators and mediation providers are obliged to provide statistical data as a condition of staying of the list; the same obligation applies to the authorities in charge of separate mediation schemes
9.	TRANSITIONAL PROVISIONS	New ideas on mediation are introduces step-by-step and tested through pilot-projects

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