

Mandatory Mediation in Family Disputes – An Emerging Trend in the European Union?


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Abstract: The Mediation Directive (2008) obliged the Member States of the European Union to promote the use of mediation through their own means. A decade later, the results of several studies revealed that national efforts to foster mediation were not as effective as planned in most cases. Despite some scholars' concerns about restricting mediation voluntariness as means for increasing its application, Italy introduced a mandatory mediation scheme which proved that forcing parties to mediate results in high numbers of mediation procedures with favorable success rates. This led other Member States to reconsider the role of the State in fostering mediation. This article tackles the prevalence of mandatory mediation in family disputes, as an area widely recognized as most suitable for it. The co-authors raised the research question of whether the introduction of

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mandatory mediation in family disputes is an emerging trend in the European Union. A short overview of the mandatory mediation concept and the existing doctrinal models was presented as a theoretical background of this research. Based on the review of the scientific literature, four prevailing models were identified and briefly described. Secondly, the map of mandatory mediation within the European Union was updated with the latest data collected from the most recent legislative amendments and testimonies of the corresponding national mediation experts. Thirdly, a brief examination of the current mandatory mediation models in the Member States was conducted. The in-depth analysis of the obtained results shows that introducing mandatory mediation in family disputes is a prevailing trend in fostering mediation in the European Union. Consequently, it was identified that the variety of implemented models went far beyond the existing doctrinal classification, which needs to be reconsidered by future research in this field.

1. Introduction

Mediation has been part of Europe's policy on cooperation in civil and commercial matters since 2000. Starting with the Green paper on alternative dispute resolution in civil and commercial law,¹ the European Union (hereinafter: "EU") Commission has pledged its interest in promoting alternative dispute resolution as a tool for improving general access to justice in daily life. Various measures have been adopted to promote new quasi-judicial mechanisms for settling conflicts such as Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters² (hereinafter: "Mediation Directive") – the pillar that has led to the elevated status of mediation across the EU. Ten years after its adoption, the EU Commission³ and the EU

¹ "Commission Green paper on alternative dispute resolution in civil and commercial law (COM(2002)196), 19 April 2002," Publication Office of the European Union, accessed January 14, 2023, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A52002DC0196>.

² Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (OJ L136/3, 24 May, 2008), accessed January 10, 2023.

³ Commission report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of

Parliament⁴ recognized that the goals set out in the Directive were not achieved. This conclusion was based on the numerous studies conducted by the EU Commission and EU Parliament to evaluate the implementation of the Mediation Directive.⁵ It was found that, on average, less than 1% of cases that went to court⁶ were mediated, except for Italy, where a mandatory mediation model was introduced. Following up on the above, several measures and incentives were proposed as a means to promote more widespread use of mediation to reach *break-even points* where even low success rates

the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2016)0542); European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (2016/2066(INI)).

⁴ Giuseppe De Palo, “A Ten-Year-Long ‘EU Mediation Paradox’ When an EU Directive Needs to Be More... Directive,” *European Parliament Briefing* 1, no. 6 (2018), accessed January 26, 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI\(2018\)608847_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf).

⁵ The EU Commission’s conclusion that the Mediation Directive objectives were not met was based on the following: “Study for an evaluation and implementation of Directive 2008/52/EC, 24 May 2016,” Publication Office of the European Union, accessed January 10, 2023, <https://op.europa.eu/en/publication-detail/-/publication/bba3871d-223b-11e6-86d0-01aa75ed71a1/language-en?fbclid=IwAR0Wkx5aQpzwIZnJY1-3PHTyTXlZZm3qFNoFDAti3SLEQd905uDo91rhlTM>; “The implementation of the Mediation Directive. 29 November 2016. PE 571.395,” European Parliament, accessed January 10, 2023, https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf; Rebooting the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU, 15 January 2014, PE 493.042, accessed January 10, 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET\(2014\)493042](https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2014)493042); “European Implementation Assessment on the Mediation Directive by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS), December 2016, PE 593.789,” European Parliament, accessed January 10, 2023, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA\(2016\)593789_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA(2016)593789_EN.pdf); “Quantifying the cost of not using mediation – a data analysis, April 2011, PE 453.180,” European Parliament, accessed January 10, 2023, <https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>.

⁶ Giuseppe De Palo and Ashley E. Oleson, “Regulation of dispute resolution in Italy: The bumps in the road to successful ADR,” in *Regulating Dispute Resolution: ADR and Access to Justice at the crossroads*, eds. Felix Steffek and Hannes Unberath (UK: Hart Publishing, 2013), 239–268.

can increase the efficiency of the judiciary and generate consistent savings. At the same time, a preliminary ruling was issued by the Court of Justice of the European Union (CJEU) in the joined cases of *Rosalba Alassini and Others* which confirmed that subjecting a dispute to an out-of-court settlement procedure before trial was not precluded by the EU law.⁷ This landmark decision then served to pave the way for the EU to adopt a wide range of different mandatory mediation models to promote amicable dispute resolution⁸ and thus achieve the high-level objectives set out in the Mediation Directive.

Encouraged by CJEU's approval, some Member States have started implementing certain models of mandatory mediation as a means for increasing the annual number of mediations and advocating for their use,⁹ especially in the field of family disputes.¹⁰ This trend is likely to have been encouraged by the successful example of non-EU countries and the efforts to respond to the European Parliament's call on the Commission, which was encouraged to carry out a "review of the rules, to find solutions in order to extend effectively the scope of mediation (...) however, that special attention must be paid to the implications that mediation could have on certain social issues, such as family law."¹¹ This article argues that the adoption of mandatory models of family mediation is a new trend in fostering mediation – a method particularly valid in the field of family disputes

⁷ CJEU Judgment of 18 March 2010, Joined cases *Rosalba Alassini v Telecom Italia SpA*, Case C-317/08, *Filomena Califano v Wind SpA*, Case C-318/08, *Lucia Anna Giorgia Iacono v Telecom Italia SpA* Case C-319/08) and *Multiservice Srl v Telecom Italia SpA* Case C-320/08, ECLI:EU:C:2010:146.

⁸ Machteld W. de Hoom, "Making Mediation Work in Europe: What's Needed Is a New Balance between Mediation and Court Proceedings," *Journal of Dispute Resolution Magazine* 20, no. 2 (Spring 2014): 22–27.

⁹ Roman Rewald, "Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution," *The Wail World Arbitration Report*, (2014).

¹⁰ Celine Jaspers, "Mandatory Mediation from a European and Comparative Law Perspective," in *Plurality and Diversity of Family Relations in Europe*, eds. Katharina Boele-Woelki and Dieter Martiny (UK: Intersentia, 2019), 341–369, <http://hdl.handle.net/1942/30415>.

¹¹ EU (2017) Resolution of the European Parliament resolution on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (2016/2066(INI)) 12 September 2017.

in the EU. The co-authors justify their proposition through an analysis of the different regulations on mandatory mediation in family disputes across the EU.

This article aims to provide a high-level overview of the EU Member States' regulation concerning mandatory mediation. To achieve this, the co-authors carried out theoretical research on the mandatory mediation concept and its models, accompanied by a scientific literature review. Afterward, empirical research was conducted to update the officially available data on the use of mandatory mediation in the EU and to map the relevant mandatory family mediation schemes, followed by a systematic analysis of mandatory mediation models currently in place in some EU Member States.

2. Theoretical Background: Concept and Models of Mandatory Mediation

Mediation, as defined in the Mediation Directive, is a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement to settle their dispute with the assistance of a mediator. This process may be initiated by the parties, suggested or ordered by a court, or prescribed by the law of a Member State¹² or the contract concluded by and between parties. Therefore, one of its key principles is the voluntary nature of mediation regardless of how it was initiated. Notwithstanding the above, there is an increase in the adoption of national legislation introducing mandatory mediation,¹³ i.e., a tendency for the process to be imposed upon the parties as a requirement for initiating a trial or continuing with litigation. This is visible both in the EU Member States¹⁴ and across the Atlantic. However, there is no uniform definition of

¹² All of the above options for initiating the mediation process are provided for in the Mediation Directive.

¹³ Neil Andrews, "Mediation: International Experience and Global Trends," *Journal of International and Comparative Law* 4, no. 2 (December 2017): 217–252.

¹⁴ See generally, P.C.H. Klaus J. Hopt Chan and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013), <https://doi-org.skaitykla.mruni.eu/10.1017/S1566752912001322>; see also: International Comparative mediation: legal perspectives, 2009. Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2009).

mandatory mediation as the term varies from one jurisdiction to another,¹⁵ highly depending on the specific model adopted.¹⁶ While the procedure may be defined differently in individual schemes, its common characteristic is to compel parties to participate without mandating a specific outcome. Such participation can be limited to the requirement to take part in a short mediation information and assessment meeting to learn about the positive aspects of mediation in the given case.¹⁷ Even though most mandatory mediation schemes do not explicitly provide for their proactive participation, participants are expected to conduct themselves in good faith and to be cooperative.¹⁸ Failure to comply with such expectations may result in the non-cooperative party being charged adverse costs – yet another measure that has triggered heated discussions on the admissibility of mandatory mediation, which, however, is excluded from the current study.

All in all, the idea of mandatory mediation has been the subject of diverging assessments and opinions for some time, both from the academic community and legal practitioners. It was first introduced in 1976 by Professor Frank Sander from the University of Harvard during the famous R. Pound Memorial Conference, held to commemorate the dean of the Harvard University Law School, and dedicated to the future development of justice.¹⁹ The vision developed by Sander hinges on different approaches to justice. This is reflected in his metaphor of justice as a building that can be entered through many doors, one of which is mediation. His principal understanding is the need for a preliminary assessment to define the resolution method that should apply to a specific dispute without necessarily

¹⁵ Anna Shtefan and Yurii Prytyka, “Mediation in the EU: Common Characteristics and Advantages over Litigation,” *InterEULawEast: Journal for the International and European law, economics and market integrations* 8, no. 2 (2021): 175–190.

¹⁶ C.H. van Rhee, “Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective,” *Access to Justice in Eastern Europe*, no. 4 (November 2021): 7–24.

¹⁷ Giuseppe De Palo and Romina Canessa, “Sleeping – Comatose – Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union,” *Cardozo Journal of Conflict Resolution* 16, no. 3 (2014–2015): [xii]–[xiv].

¹⁸ Ulrich Boettger, “Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation,” *Review of Litigation* 23, (2004): [vii]–[viii].

¹⁹ Art Hinshaw, Andrea Kupfer Schneider and Sarah Rudolph Cole, “Frank Sander: Father of Court-based Dispute Resolution,” in *Discussions in Dispute Resolution: The Foundational Articles* (Oxford: Oxford University Press, 2021), 337.

referring it to the court in all cases. This leads to the so-called “privatizing” of judicial justice, a trend that involves directing matters to judicial intervention only in cases where the parties cannot reach an out-of-court settlement.²⁰ The concept of obligatory referral of a dispute to mediation has spread across several US states, which have established some forms of mandatory court mediation.²¹ The specifics of such court-mandated approaches are rooted in the different legal traditions and the goals they are to achieve. Because of the latter, even if court-mandated mediation started as a purely US idea, it has already spread across various jurisdictions that have adopted and modified it to match their specific needs.²²

The development of mandatory mediation in the EU has its origins in Art. 5 of the Mediation Directive and *Rosalba Alassini and Others* (C-317/08 and C-320/08),²³ which, upon joint interpretation reaffirms the notion that mandatory mediation in no way contradicts EU law and which has encouraged Member States to adopt various mandatory mediation schemes.²⁴

Though it is classified into certain models depending on the degree and source of its mandatory nature, mandatory mediation may take the following forms in the legal doctrine²⁵: categorical mandatory mediation,

²⁰ Arlin R. Thrush, “Public Health and Safety Hazards versus Confidentiality: Expanding the Mediation Door of the Multi-Door Courthouse,” *Journal of Dispute Resolution*, no. 2 (1994): 235–258.

²¹ Nadja Alexander, *Global trends in mediation: riding the third wave*, 2nd ed. (Kluwer Law International, 2006).

²² Leonardo D’Urso, “Italy’s ‘Required Initial Mediation Session’: Bridging the Gap between Mandatory and Voluntary Mediation,” *Alternatives to the High Cost of Litigation. The Newsletter of the International Institute for Conflict Prevention prozę zrobić normalne & Resolution*, no. 36 (April 2018): 57–58, <https://doi.org/10.1002/alt.21731>.

²³ CJEU Judgment of 18 March 2010, Joined cases *Rosalba Alassini v Telecom Italia SpA*, Case C-317/08, *Filomena Califano v Wind SpA*, Case C-318/08, *Lucia Anna Giorgia Iacono v Telecom Italia SpA* Case C-319/08) and *Multiservice Srl v Telecom Italia SpA* Case C-320/08, ECLI:EU:C:2010:146.

²⁴ Michal Malacka, “Multi-Door Courthouse established through the European Mediation Directive?,” *International and Comparative Law Review* 16, no. 1 (2016): 127–142.

²⁵ Daniel Kaufman Schaffer, “An Examination of Mandatory Court-Based Mediation,” *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 84, no. 3 (May 2018): 229–238.

discretionary mandatory mediation, quasi-mandatory mediation, and contractual mandatory mediation.²⁶

2.1. Categorical Mandatory Mediation

Categorical mediation is a type of mandatory mediation where the disputed parties are forced to participate in out-of-court mediation and try to reach any settlement before the trial. This obligation is provided for in the applicable legislation, obliging the parties to participate in the mediation procedure with little room for exceptions. Such models are often criticized by scholars as the compulsion to participate in the process is often seen as expanding to the compulsion to settle which may ultimately lead to unfair outcomes.²⁷ Here, examples include the Australian court systems of South Australia, Victoria, and New South Wales where the applicable civil procedure rules impose mediation on the parties regardless of whether they want it or not.²⁸ In this regard, the academic debate is split between the view that this merely aims to promote mediation and that it is excessively intrusive and against the will of parties.²⁹ This model is also criticized for not being flexible enough to offer exceptions on reasonable grounds. Due to such arguments, there has been a partial reform of the categorical mandatory mediation model in some jurisdictions through the introduction of an opt-out model if certain conditions are met. Examples of categorical schemes include the mandatory

²⁶ Contractual mandatory mediation is not analyzed in depth in the conducted research as this model is rarely relevant to family disputes.

²⁷ Julian Sidoli del Ceno, “Compulsory mediation: civil justice, human rights and proportionality,” *International Journal of Law in the Built Environment* 6, no. 3 (October 2014): 286–299.

²⁸ Australian Supreme Court, General Civil Procedure Rules, 2005, § 50.07, accessed February 5, 2023, <http://www.austlii.edu.au/au/legis/vic/consol-reg/sccpr2005433/s50.07.html>; Supreme Court Amendment (Referral of Proceedings) Act, 2000, c. 36, § 110K (Austl.), accessed February 5, 2023, <http://www.austlii.edu.au/au/legis/nsw/num-act/scaopa2000n36488.pdf>; Supreme Court Act, 1935, c. 4, § 65(1) (Austl.), accessed February 5, 2023, <http://www.austlii.edu.au/au/legis/sa/consol-act/sca19351831s65.html>; District Court of Queensland Act, 1967, c. 7, § 97, accessed February 5, 2023, <http://www.austlii.edu.au/au/legis/qld/consolact/dcoqa1967308/s97.html>.

²⁹ Dorcas Quek, “Mandatory Mediation: An Oxymoron – Examining the Feasibility of Implementing a Court Mandated Mediation Program,” *Cardozo Journal of Conflict Resolution* 11, no. 2 (Spring 2010): 479–510.

mediation models developed in some Australian states³⁰ which provide for the categorical referral to mediation of claims explicitly listed in the law.³¹ As a response to the critics of such mandatory schemes, exceptions to the mandatoryness³⁴ have been introduced.³² The mandatory mediation program in Ontario, Canada also refers all civil cases, except family cases, to mediation, but provides the parties the option of seeking exemption by way of motion.³³ Such changes in the categorical nature of the mandatory mediation are perceived as positive as they are deemed to better fit into the parties' needs without putting them at risk or forcing them to settle.³⁴

In summary, categorical mandatory mediation is a model, where parties are coerced to apply mediation by a direct rule in legislation indicating that certain categories of disputes are subject to mandatory mediation.³⁵ An intrinsic part of this model is the obligation for the parties to attend a mandatory initial mediation session while not being required to proceed with the mediation should they choose not to, thus retaining the ability to opt out of it.³⁶

³⁰ Farm Debt Mediation Act 1994 of New South Wales (NSW), Retail Leases Act 1994 (NSW), Legal Profession Act 2004 (NSW) and Strata Schemes Management Act 1996 (NSW), the Motor Accident Insurance Amendment Act 2000 (Queensland, Australia) and the Personal Injury Proceedings Amendment Act 2002 (Qld).

³¹ Alan Limbury, "Compulsory Mediation – The Australian Experience," Kluwer Mediation Blog, October, 22, 2018, accessed February 5, 2023, <https://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/>.

³² As for example the Australian Family Act 2006, which provides an exception for cases with reasonable ground to believe there is domestic violence or a child is put at risk.

³³ Adele Kent, "A Behind-the-Bench Look at the Canadian Judicial System," *Judges' Journal* 50, no. 3 (Summer 2011): 8–13.

³⁴ Miglė Žukauskaitė-Tatorė, "Problems of the relationship between mandatory mediation in civil disputes and the right to judicial protection" (PhD diss., Vilnius Universitetas, 2021).

³⁵ The Greek legislation, with its mandatory mediation information and assessment sessions similar to the Italian model, is an example of the categorical mandatory mediation whereby attending those sessions is a pre-condition to continuing trial. For a critical analysis of the Greek model, see: Anna Plevri, "Mandatory Initial Mediation Session in the Legal Order of Greece: A Step Forward for a Balanced Relationship between Mediation and Judicial Proceedings?," *Yearbook on International Arbitration* 7, (2021): 209–222.

³⁶ Giuseppe De Palo, "Mediating Mediation Itself: The Easy Opt-out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation," *Cardozo Journal of Conflict Resolution* 22, no. 3 (Spring 2021): 543–568.

2.2. Discretionary Mandatory Mediation

Discretionary referral to mediation³⁷ is typically construed as the referral to mediation upon the motion of a judge.³⁸ This name was coined by Prof. Sander who argued that it should be entirely up to the judges to decide whether to compel parties to enter into mediation or not.³⁹ This system is distinguished from purely categorical mandatory mediation by the fact that it vests power in the judiciary to decide and compel parties to the pending proceedings to mediate. However, it opens the debate whether the court orders imposing mandatory mediation comply with the principle of access to justice.⁴⁰ Notwithstanding the above, the discretionary mandatory referral to mediation is viewed positively because of the extensive power of the courts to compel parties to participate in mediation if it is deemed that such participation may stimulate settlement. Many public policy factors support such models as they serve to address the backlog of court cases by channeling those that have the potential to be resolved in mediation. The results from such an application are not only aimed at the reduction of the number of cases pending in court but also at increasing parties' satisfaction with the process outcomes while preserving their ongoing relationship and offering a wide range of potential solutions.

To conclude, discretionary mandatory mediation is a form of mediation that compels parties through a court order to try and resolve their disputes amicably. The power to decide whether to mandate mediation is entirely vested in the judges, who are most suitable to evaluate the situation and decide on the viability and possible effectiveness of the mediation in the given case.

³⁷ Melisa Hanks, "Perspectives on mandatory mediation," *University Of New South Wales Law Journal* 35, no. 3 (2012): 929–952.

³⁸ Australian National Alternative Dispute Resolution Advisory Council report: "The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General," Attorney-General's Department (Australia), (15 September 2009), accessed February 5, 2023, <https://apo.org.au/sites/default/files/resource-files/2009-09/apo-nid67039.pdf>.

³⁹ Frank E.A. Sander, "Another View of Mandatory Mediation," *Dispute Resolution Magazine*, no. 13 (2007).

⁴⁰ Bret Walker and Andrew S. Bell, "Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)," *Bar News: Journal of the NSW Bar Association Spring issue*, no. Spring 2000 (2000): 7.

2.3. Quasi-Mandatory Mediation

While mediation remains entirely optional under the quasi-mandatory mediation model, it is perceived as mandatory since the legal costs are charged to the party that unreasonably refused to participate or was non-cooperative. An example of such an approach is Australian regulations in the state of New South Wales and the Civil Dispute Resolution Act 2011, whereby the party that does not make “reasonable” efforts to settle the dispute is forced to bear all legal costs. The latter stimulates the parties to mediate under the threat of potential financial consequences. The exact definition of “reasonable efforts” within the mediation process has been debated over the years⁴¹; the conclusion has been that “reasonable” means good faith actions that are customary to such proceedings, in which the participants have not rejected an optional settlement including clauses essentially contained in the subsequent court decision.⁴² Thus, the final court decision itself serves as a criterion for determining whether the party’s behavior was reasonable. Proponents of mandatory mediation argue that such an approach, though not strictly regulated in the applicable legislation, goes a long way toward stimulating the parties to both mediate and genuinely seek settlement where possible.⁴³ On the other hand, its opponents believe that the practice of judges acquiring additional information on the content of the discussions held is tantamount to a breach of confidentiality.⁴⁴ Details of this model, however, were not the subject of the current study and therefore are not examined in greater detail in this paper.

⁴¹ Alexandria Zylstra, “The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled,” *Journal of the American Academy of Matrimonial Lawyers* 17, no. 1 (2001): 69–104; John Lande, “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs,” *UCLA Law Review* 50, no. 1 (October 2002): 69–142.

⁴² Kimberlee K. Kovach, “New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation (Georgian Text),” *Alternative Dispute Resolution Yearbook 2012*, (2012): 139–173.

⁴³ Philip McNamara, “Mandatory and quasi-mandatory mediation,” *Australian bar review* 47, no. 3 (2019): 215–245.

⁴⁴ Hanks, “Perspectives on Mandatory Mediation,” 930.

2.4. Contractual Mandatory Mediation

This mandatory mediation model applies to disputes between parties that had already agreed on a mediation clause that obliges them to attempt to settle their conflict amicably through mediation before referring it to a court or other tribunal but then failed to comply with this commitment.⁴⁵ In such cases, the dispute should reach court only when the parties have evidence that they have complied with their contractual obligation to mediate.⁴⁶ The basis for this is a mediation clause that the parties have voluntarily and contractually agreed to, according to which they are forced to refer the dispute to mandatory out-of-court mediation.

It is argued that mediation clauses form the basis of the fourth type of mandatory mediation whereby admissibility of the court proceedings is only allowed if the parties prove that they have attempted to settle their dispute through mediation. Since contractual relations are less relevant to family law, further research will not include analyzing the application of this model within the EU.

Whether viewed positively or negatively, mandatory mediation is by no means defined uniformly and concisely across jurisdictions. On the contrary, there are fundamental differences between the main types of mandatory mediation and each national legal system includes nuances resulting from its specific socio-cultural context.⁴⁷ Therefore, it can be stated that mandatory mediation is a form of mediation where parties to the dispute are required to mediate by law, court order, contract, or under the threat of potential procedural or economic sanctions.

3. Current Mandatory Family Mediation Trends in the EU

To explore the variety of mandatory family mediation schemes across the EU, this chapter aims to provide an overview of how the above theoretical models of mandatory mediation have developed in practice after the adoption of the Mediation Directive.

⁴⁵ Pierre Bienvenu, “The Enforcement of Multi-Tiered Dispute Resolution Clauses in Canada and the United States,” Annual Convention, International Bar Association (2002).

⁴⁶ Miruna Constantinescu and Monica Simona Corchis, “Are Mediation Clauses Binding and Mandatory,” *Juridical Tribune* 7, no. 1 (June 2017): 53–63.

⁴⁷ Rhee, “Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective,” 7–24.

While there are some sources of official data on the application of mediation in the EU,⁴⁸ no up-to-date study reflects the recent changes in the applicable regulations. Hence, the co-authors went on to interview mediation experts from 27 EU countries⁴⁹ to ensure that their review and conclusions are based on relevant information.

A total of 27 Mediation experts were invited to answer the following questions: 1) does the national legislation imply mandatory application of mediation in family disputes in your country?; 2) if yes, what model is adopted?; 3) if no, are there any considerations or preparations to introduce mandatory family mediation provisions in the nearest future or any other ongoing discussions on this topic?

The interviews were conducted in January and February 2023 by direct emails and/or Zoom calls. All interviewed experts were selected based on the criterion of having at least 5 years of professional experience in mediation. Interview data were transcribed and analyzed using the MAXQDA program, with qualitative content analysis based on axial coding. The text was read and subcategories were identified and combined into categories.

By analyzing the research data, it was established that as many as 20⁵⁰ (74%) out of the 27 EU countries have already applied at least one of the theoretical models of mandatory family mediation presented in Chapter 2 and have adapted it to their national legal systems. In some Member States, the models adopted apply only to certain family disputes (e.g., issues

⁴⁸ As of January 23, 2023, the European e-Justice Portal offers information on a range of issues regarding family mediation, including the cross-border context, principles and costs. For more, see: “Family mediation,” European E-Justice, https://e-justice.europa.eu/521/EN/family_mediation.

⁴⁹ Belgium, Bulgaria, Czech Republic, Germany, Denmark, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden.

⁵⁰ Czech Republic, Germany, Estonia, Ireland, Greece, France, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Malta, the Netherlands, Hungary, Austria, Poland, Portugal, Slovakia, Finland, Sweden.

relating to the custody of a minor in Austria⁵¹ and France⁵²), while others provide that mandatory mediation applies to all civil disputes, hence including family disputes (e.g., Ireland⁵³). Further, it was found that several countries have adopted more than one model of mandatory mediation (e.g., Lithuania⁵⁴).

3.1. Development of Categorical Mandatory Family Mediation Model in the EU

Specific forms of categorical mandatory family mediation, where litigants are forced to mediate prior to filing their petition, are applied in 6 Member States: Lithuania,⁵⁵ Greece, Croatia, Malta, as well as Estonia in child access cases, and Italy in family business disputes.

Generally, mandatory mediation deals with family disputes relating to child support, custody during or after divorce, child arrangements, division of property, divorce (except for Greece, where mediation deals not specifically with divorce itself but rather with divorce-related issues⁵⁶), or similar matters. However, the content of mandatory family mediation models differs considerably in these six countries.

The Lithuanian model of mandatory mediation is rather liberal due to a legal framework that gives the defendant an exclusive right to refuse to participate in mediation.⁵⁷ The model has been established by the Law on

⁵¹ Federal Act on Judicial Procedure in Legal Matters Other than Disputes (*Außerstreitgesetz – AußStrG*) StF: Federal Law Gazette I No. 111/2003 (NR: GP XXII RV 224 AB 268 S. 38. BR: AB 6895 S. 703.), Section § 107, as amended.

⁵² The Civil Code of France, Article 373–2-10, accessed February 5, 2023, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042193469/2020-08-01.

⁵³ Mediation Act 2017, Number 27 of 2017, Section 16 (1), accessed February 5, 2023, <https://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/print>.

⁵⁴ Agnė Tvaronavičienė et al., “Mediation in the Baltic States: Developments and Challenges of Implementation,” *Access to Justice in Eastern Europe* 5, no. 4 (2022), p. 72–76, <https://doi.org/10.33327/ajee-18-5.4-a000427>.

⁵⁵ Except for issues that are typically handled by courts, e.g., adoption and paternity issues, etc. As such, this applies to cases that parties may not settle through mutual agreement.

⁵⁶ The Law No. 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programs and Other Provisions, Official Gazette on January 17, 2018, Article 182 (d), accessed February 5, 2023, <https://www.wipo.int/wipolex/en/text/464101>.

⁵⁷ Tvaronavičienė, “Mediation in the Baltic States: Developments and Challenges of Implementation,” 75.

Mediation of the Republic of Lithuania, which provides that “Mandatory mediation shall be applied in resolving family disputes considered in dispute proceedings in accordance with the procedure laid down in the Code of Civil Procedure, except for the cases where the dispute is sought to be brought to court by a person who has been subject to domestic violence (...).”⁵⁸ The parties may approach a private mediator or the State Guaranteed Legal Aid Service upon mutual request or on the initiative of one of the parties. However, unlike the categorical model described in the doctrine, parties in Lithuania are not forced to participate in the mediation session, but rather to initiate it, i.e. to offer the opposing party to resolve their dispute amicably. Thus, the obligation to initiate the procedure is on the claimant, while the defendant may refuse to accept the offer to mediate and thus bear the procedural and economic sanctions if the refusal was unjustified. Unless the claimant provides the court with a certificate confirming that he or she have duly proposed mediation to the other party and which has refused to participate, the court will not administer the claim.⁵⁹ The claim will be accepted if the issued documents indicate that mediation has taken place but without settlement. This liberal model of mandatory mediation has been repeatedly criticized for its alleged inefficiency.⁶⁰ Nonetheless, a 2022 study⁶¹ has shown that the Lithuanian model has been successful in achieving the objectives set by the Mediation Directive.

⁵⁸ Republic of Lithuania Law on Mediation of 15 July 2008, *Valstybės žinios*, 2008–07–31, Nr. 87–3462, No X-1702, Vilnius, Article 20 (1), as amended, accessed February 6, 2023, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a1214b42d40911eb9787d6479a2b2829?jfwid=10mfejbvlt>.

⁵⁹ Except for domestic violence cases, as stated in Republic of Lithuania Law on Mediation of 15 July 2008, Art. 20(1).

⁶⁰ Agnė Tvaronavičienė and Odeta Intė, *Mandatory Mediation in Family Disputes in Lithuania: Model and First Year Application Experience* (Wrocław: Wydział Prawa, Administracji I Ekonomii Uniwersytetu Wrocławskiego, 2021) 48.

⁶¹ “Report on the *ex-post* evaluation of the impact of the legal regulation on mandatory mediation in family disputes” as of 30 December 2022, conducted by Order of the Minister of Justice of the Republic of Lithuania No 1R-219 of 30 May 2022: “On Approval of the Plan for Ex Post Impact Assessment of the Current Legal Regulation on Mandatory Mediation in Family Disputes,” Ministry of Justice of the Republic of Lithuania, accessed February 12, 2023, <https://tm.lrv.lt/lt/teisine-informacija/galiojancio-teisinio-reguliavimo-poveikio-ex-post-vertinimas>.

Another example of a mandatory family mediation model is the Greek one, which, however, does not refer the parties to mediation, but rather to a mandatory information session with a mediator. Participants are also obliged to be assisted by lawyers.⁶² In these mandatory information sessions, the parties must decide whether to proceed and engage in mediation. In contrast to the Lithuanian model, non-compliance with the Greek mandatory requirements would not lead to the inadmissibility of the court proceedings but would merely delay them until such time that the parties provide evidence of completing the mandatory procedure.⁶³ Such an approach is very similar to the Italian mandatory mediation model, which has been praised by the EU institutions and repeatedly held up as an example.⁶⁴ However, this model does not include one of the main advantages of the Italian model – the “opt-out” principle, where the parties are obliged to participate in an initial information meeting but have the freedom to withdraw from further mediation without any sanctions. The Greek model merely envisages that if a party does not show up to a pre-mediation session the judge will continue with the hearing but is entitled to fine that party up to €500.⁶⁵

As already mentioned, the Italian model of mandatory mediation has been repeatedly recognized as the most successful in Europe because it has brought a sharp increase in the results of mediation use in the country.⁶⁶

⁶² The Law No. 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programs and Other Provisions, Official Gazette of January 17, 2018, Art. 183(1).

⁶³ Koumpli Vassiliki, “Greece: Institutionalizing Mediation Through Mandatory Initial Mediation Session (Law 4640/2019),” Kluwer Mediation Blog, January 20, 2020, accessed February 6, 2023, <https://mediationblog.kluwerarbitration.com/2020/01/20/greece-institutionalizing-mediation-through-mandatory-initial-mediation-session-law-4640-2019/>.

⁶⁴ ‘Rebooting’ the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, requested by the European Parliament’s Committee on Legal Affairs, (2014), 164, accessed February 6, 2023, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IP-OL-JURI_ET\(2014\)493042_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IP-OL-JURI_ET(2014)493042_EN.pdf); Giuseppe De Palo, “A Ten-Year-Long ‘EU Mediation Paradox’ When an EU Directive Needs to Be More... Directive.”

⁶⁵ LAW NO. 4640 Government Gazette A’ 190/30.11.2019, Art. 7 para 6, as of January 26, 2023. Access here: <https://www.kodiko.gr/nomothesia/document/580509/nomos-4640-2019>.

⁶⁶ ‘Rebooting’ the Mediation Directive, (2014), 6.

Surprisingly, however, the requirements of categorical mandatory mediation in family disputes are exclusively applied in family business cases and not in other types of family disputes. This has been retained in the latest legislative amendments from late 2022, maintaining the view that parties to family disputes, other than business ones, can only be mandatorily referred to mediation by a motion of the judge (discretionary model).

In the case of Malta, the categorical model of mandatory family mediation is combined with a discretionary mandatory court referral to mediate. Notwithstanding that family mediation is mandatory under the law, the court summons the parties to appear before a mediator prior to proceeding with separation or divorce.⁶⁷ There is no exception to the mediation procedure even in cases of domestic violence.⁶⁸ The court first invites the parties to appear before a judge prior to deciding whether it is in their best interests to mediate.

In the Republic of Croatia, the New Family Act⁶⁹ mandates that parties be referred to mandatory counseling and family mediation. While parties to a family dispute are primarily obliged to participate in mandatory counseling, a systematic assessment of the statutory provisions leads to the conclusion that the first family mediation meeting prior to initiating divorce proceedings is mandatory in cases where the spouses have a minor child.⁷⁰ In other words, parties who are involved in family disputes and have a child must participate in a mediation information session before bringing a claim to a court in Croatia.

Estonia has only recently introduced mandatory mediation provisions for certain family disputes. Although the obligation to attempt mediation in child access disputes is not directly expressed by law, since

⁶⁷ The Civil Court (Family Section), the Civil Court (General Jurisdiction) and the Court of Magistrates (Gozo) Superior Jurisdiction (Family Section) Regulations on 16th December 2003, Article 4 (3), as amended. Access here: <https://legislation.mt/eli/sl/12.20/eng/pdf>.

⁶⁸ Ibid.

⁶⁹ The Family Act the Republic of Croatia (Obiteljski zakon; Narodne novine) (Official Gazette, No 103/15 and 98/19), Zagreb, September 22, 2015. Access here: https://narodne-novine.nn.hr/clanci/sluzbeni/2015_09_103_1992.html.

⁷⁰ Ibid., Art. 54(3).

September 1, 2022, Article 560¹ of the Code of Civil Procedure⁷¹ states that “The petition that is filed with the court must be accompanied by a certificate of unsuccessful mediation mentioned in §13 of the Act on State-funded Family Mediation Services or by a certificate of unsuccessful conciliation mentioned in §12 of the Conciliation Act.”⁷² Hence the parties are obliged to try to amicably resolve child access disputes before going to court but are allowed to choose between mediation and conciliation for such attempts. This is quite a novel practice for Europe as it presents parties with the right to choose the manner through which settlement is reached. Further statutory provisions stipulate that where the court petition is not accompanied by a certificate of unsuccessful mediation or conciliation and there is no indication of domestic violence, the court accepts the petition and is obliged to direct the parents to undertake the mediation procedure provided for in the Act on State-funded Family Mediation Services, thus prioritizing mediation over conciliation.⁷³ Hence, not only does Estonia apply the categorical mandatory mediation model, but the courts are now obliged⁷⁴ to direct the parties to undertake family mediation.

In conclusion, a pure categorical mandatory mediation model, whereby parties are required to participate in an out-of-court mediation to avoid litigation, has not been found in any EU Member State. However, the wide discretion given by the Mediation Directive for introducing various mediation models into the national legislation has enabled Member States to adapt the mandatory family mediation to the specific features of their national legal systems. The models applied by all 6 countries discussed above feature more differences than similarities. The essential common characteristic of those models is that they all provide for out-of-court mediation before a trial. Access to the court then is secured by the requirement to furnish a certificate that evidences an appropriate attempt to mediate (Croatia), the fact

⁷¹ Code of Civil Procedure of Republic of Estonia of 20th of April 2005, as amended. Access here: <https://www.riigiteataja.ee/en/eli/502122022001/consolide>.

⁷² *Ibid.*, § 560¹ (1).

⁷³ *Ibid.*, § 560¹ (2), (3), (4).

⁷⁴ “Which they regularly use” according to a respondent: “In this case, we see that not all families use the service, but most are willing to try. Although the efficiency of family mediation in these cases is yet to be researched, the first overview will most likely be available in early spring 2023, after receiving the first results.”

of initiating mediation (Lithuania), or participating in a mediation information session (Italy). If the parties do not comply with the pre-litigation dispute resolution procedure, the court may order them to mediate or take part in an informative mediation session (Greece, Malta, Estonia).

The models discussed above are mostly used in combination with the judge's discretion to re-refer the participants to mediation if they had failed to comply with their statutory obligation or to impose sanctions for unreasonable withdrawal from the mediation procedure. In addition, one may conclude that categorical mandatory family mediation is implemented in two ways in the EU, with one involving directing parties to mediation and the other obliging them to participate in a mediation information session.

3.2. Development of the Discretionary Mandatory Family Mediation Model in the EU

While the idea that mediation, a mechanism voluntary by design, can be mandated by court order is still an anathema to many scholars,⁷⁵ the application of this model in some EU countries is quite widely established and no less diverse.⁷⁶ Discretionary mandatory referral to mediation exists in 17 (62%)⁷⁷ of the Member States.

As noted above, in some cases the referral to mediation or mediation information session does not apply to all family disputes but is limited to a certain defined category. For example, judges in Austria are allowed to “order” such measures as participation in an initial mediation information session as part of child custody or access proceedings to safeguard the welfare of the child vis-à-vis the parties.⁷⁸ The court's ability to refer the parties

⁷⁵ Quek, “Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,” 484–487, accessed February 4, 2023, <https://ssrn.com/abstract=2843509>.

⁷⁶ Odd Tjersland, Wenke Gulbrandsen, and Hanne Haavind, “Mandatory Mediation outside the Court: A Process and Effect Study,” *Conflict Resolution Quarterly* 33, no. 1 (2015): 23–28.

⁷⁷ Czech Republic, Germany, Greece, France, Italy, Cyprus, Lithuania, Luxembourg, Malta, the Netherlands, Hungary, Austria, Poland, Portugal, Slovakia, Finland, Sweden.

⁷⁸ Federal Act on Judicial Procedure in Legal Matters Other than Disputes (Außerstreitgesetz – AußStrG) StF: Federal Law Gazette I No. 111/2003 (NR: GP XXII RV 224 AB 268

to mediation or a mediation information session is frequently accompanied by free access to mediation services (Portugal, Czech Republic).

The number of Member States, where judges are empowered to refer parties to mediation information sessions is increasing. Such regulations have recently been introduced by the Czech Republic, Germany, Austria, Cyprus, France, and Hungary. Furthermore, discretionary mandatory referral to family mediation features elements of the much-vaunted “opt-out” model, allowing parties to withdraw from mediation without facing any sanctions.⁷⁹

In summary, discretionary mandatory referral to family mediation is the most widely used mandatory mediation model in the EU Member States. One may assume that following Italy’s example and recognizing the advantages of the “opt-out” model courts are increasingly empowered to refer parties to mediation or mediation information sessions.

3.3. Development of Quasi-Mandatory Family Mediation in the EU

The quasi-mandatory mediation model exists in 4 Member States. It is mostly used in combination with other mandatory mediation models, serving as somewhat of a safeguard for them. Usually, the party that refuses to mediate or is non-cooperative faces economic sanctions, which may involve a fine (Greece⁸⁰, Ireland⁸¹) or departure from the usual rules of legal costs allocation (Lithuania⁸²), i.e., bearing both parties’ litigation expenses. Unfortunately, there is insufficient information to confirm that courts indeed exercise this right. Respondents from Greece and Lithuania noted that courts do not employ this option since it is difficult, and sometimes impossible, to

S. 38. BR: AB 6895 S. 703.), Section § 107, accessed January 28, 2023, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=2000304>.

⁷⁹ Except for the additional burden for the claimant in Germany.

⁸⁰ The Law No. 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programs and Other Provisions, Official Gazette on January 17, 2018, Art. 182.

⁸¹ Mediation Act 2017, Section 16 (1).

⁸² The Law on Approval, Entry into Force and Implementation of the Civil Procedure Code of the Republic of Lithuania. Code of Civil Procedure“, No IX-743, Valstybės žinios, 2002–04–06, No. 36–1340, Art. 93(4), accessed February 1, 2023, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435>.

prove that a party has been acting in bad faith during mediation without breaching mediation confidentiality.

Claimants in Germany face additional procedural burdens. They must state whether they had attempted mediation before filing the claim or explain the reasons for not doing so. Even though refusal to mediate before the litigation does not cause any direct sanctions, the claimant is obliged to state their grounds, which may affect the court's consideration and decision in the given case.

To sum up, quasi-mandatory family mediation is rarely used in the EU and is mostly viewed as a safeguard for the successful application of other mandatory mediation models.

3.4. General Overview of the Implemented Models and Latest Discussions on Mandatory Family Mediation in the EU

The study results showed the great diversity of the applied models and the trend of Member States combining them into yet different ones. It can be concluded that the EU countries have followed the general guidelines of the Mediation Directive and have introduced and promoted family mediation in their national legislation under various mandatory schemes, including the implementation of certain classical or hybrid models of mandatory mediation.

At the outset of this research, Bulgaria and Denmark were the only Member States that had entirely voluntary recourse to mediation without any additional measures to use or promote the procedure in family matters. Nevertheless, in February 2023 amendments to the Mediation Act and the Civil Procedure Code of Bulgaria were published in the State Official Gazette;⁸³ this will see Bulgaria transition towards a hybrid model of mandatory mediation, with categorical mediation applicable mainly to six types of cases,⁸⁴ all of which exclude family matters, starting from July 1, 2024.

⁸³ Bulgarian Official Gazette, issue 11, 2023 (February 2, 2023), access: <https://dv.parliament.bg/DVWeb/fileUploadShowing.jsp?&idFileAtt=550352&allowCache=true&openDirectly=false>.

⁸⁴ Categorical mandatory mediation may be used in the following cases: 1) allocation of the use of jointly owned property according to the Property Act; 2) monetary claims arising from co-ownership; 3) division of property; 4) condominium disputes; 5) payment of company share value upon withdrawal from a limited liability company under Art. 125(3)

The upcoming changes will implement the discretionary mandatory mediation model in family cases, allowing judges to decide whether to refer disputed family members to mandatory mediation at the relevant court centers, which will be managed by mediators with legal education and special training provided by the Supreme Judicial Council.

In Belgium, Latvia, Spain, Romania, and Slovenia, where it is up to the parties to decide whether to mediate in family disputes, certain incentives are offered to encourage mediation. Moreover, such countries as Ireland, Croatia, the Netherlands, Hungary, Portugal, Slovakia, and Finland all use additional incentives despite applying at least one mandatory family mediation model. In Belgium, Latvia, and Romania, judges hearing family cases must inform parties about the possibility of resolving their dispute through mediation, as well as the advantages of choosing to do so. In contrast, judges in Ireland, Spain, France, Croatia, the Netherlands, Portugal, and Slovenia may suggest or recommend trying to reach an amicable solution through mediation. Courts in Slovakia may invite parties to attend an information session with a mediator to discuss the advantages of mediation. In Ireland, lawyers may be legally obliged to advise parties to consider using mediation as a means of dispute resolution.⁸⁵ Another incentive is offering mediation free of charge thanks to public finance involvement (Spain,⁸⁶ Finland,⁸⁷ Slovenia⁸⁸), or at least introducing state-regulated mediator fees (Luxembourg⁸⁹). Using family mediation is also encouraged by imposing additional qualification requirements on family mediators

of the Commercial Act; 6) liability of a manager or controller of a limited liability company for damage caused to the company under Art. 142(3) and Art. 145 of the Commercial Act.

⁸⁵ Mediation Act 2017 of I, Section 14 (1) (a), Section 15.

⁸⁶ European e-Justice Portal, Spain, accessed February 1, 2023, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?SPAIN&member=1.

⁸⁷ European e-Justice Portal, Finland, accessed February 2, 2023, https://e-justice.europa.eu/372/EN/family_mediation?FINLAND&member=1.

⁸⁸ The Act on Alternative Dispute Resolution in Judicial Matters (Zakon o alternativnem reševanju sodnih sporov - ZARSS; UL RS Nos 97/09 and 40/12 - ZUJF), Article 22(1), accessed 1 February 2023, <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5648>.

⁸⁹ Grand-Ducal Regulation of 25 June 2012, Art. 4, accessed February 1, 2023, <https://legilux.public.lu/eli/etat/leg/rgd/2012/06/25/n4/jo>.

(Poland,⁹⁰ Luxembourg,⁹¹ Finland⁹²), thus increasing public confidence in mediation.

For a better understanding of the way different models of mandatory mediation in family disputes, including combinations of several models, are applied in each EU Member State, see the Map of EU Mandatory Family Mediation Models (Fig. 1).

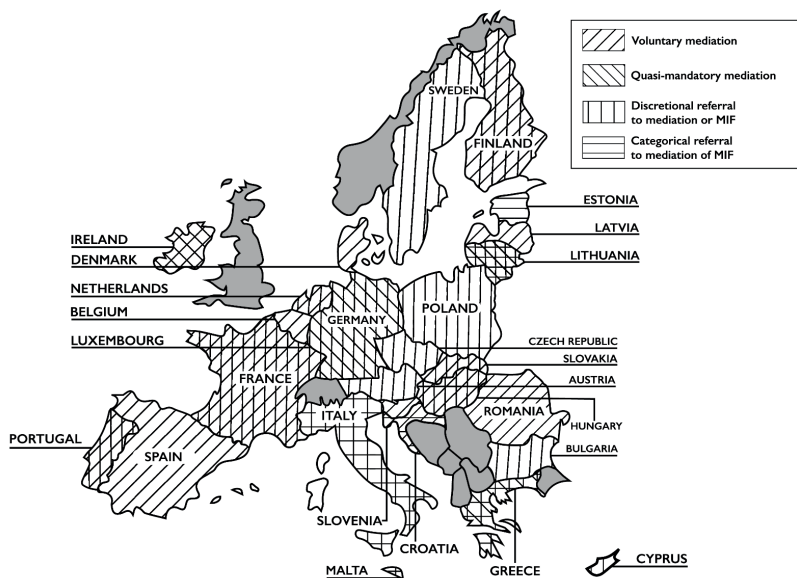


Fig. 1. Map of EU Mandatory Family Mediation Models.

Since this study has highlighted a tendency for discussions on mandatory mediation in the EU Member States, the above map is highly likely to

⁹⁰ The European e-Justice Portal, Poland, accessed February 1, 2023, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?POLAND&member=1.

⁹¹ New Code of Civil Procedure, Mémorial, Partie A, 2018–07–12, n° 589, ISN: LUX-2018-L_107472, Art. 1251–3, accessed January 18, 2023, https://legilux.public.lu/eli/etat/leg/code/procedure_civile/20210916.

⁹² The European e-Justice Portal, Sweden, accessed January 18, 2023, https://e-justice.europa.eu/372/EN/family_mediation?SWEDEN&member=1.

change soon. Active debates on the introduction of categorical mandatory mediation are ongoing in Cyprus.⁹³ In other Member States, legislative amendments have already been drafted (Poland⁹⁴) and are currently awaiting to be voted by the Parliament or have just been adopted and will enter into force shortly (Bulgaria⁹⁵). Though somewhat less intense, the debates in other countries are no less promising: Slovakia is running a pilot project to test the effect of judges referring child disputes to mediation⁹⁶; Latvia is testing the impact of family mediation in the context of NGO projects⁹⁷; the Swedish Forum for Mediation⁹⁸ and Conflict Management and the Swedish Bar Association⁹⁹ have expressed¹⁰⁰ the need to offer mediation before

⁹³ As of November 16, 2022, “Regulations on Transparency Authority and Mediation in Family Disputes to be voted on,” accessed February 2, 2023, <https://www.kathimerini.com.cy/gr/politiki/pros-psifisi-oi-kanonismoi-gia-arxi-diafaneias-kai-diamesolabisi-se-oikogeneiak-akes-diafores>;

⁹⁴ As of 2nd February, 2023, in „Pravo.pl” website listed „Boom na szkolenia dla mediatorów, MS chce profesjonalizować zawód”, accessed February 2, 2023, <https://www.prawo.pl/prawnicy-sady/krajowy-rejestr-mediatorow-juz-w-polowie-2023-roku.503516.html>.

⁹⁵ Amendments in the Mediation Act of 2017, Bulgarian Official Gazette, issue 11, 2023 (2 February, 2023), accessed February 13, 2023, <https://dv.parliament.bg/DVWeb/fileUploadShowing.jsp?&idFileAtt=550352&allowCache=true&openDirectly=false>.

⁹⁶ Listed on the official website of the Ministry of Justice of the Slovak Republic as “Mediácia odporúčaná súdmi je cestou k vyriešeniu sporov mimosúdne,” accessed February 2, 2023, <https://www.justice.gov.sk/tlacovespravy/tlacova-sprava-3768/>.

⁹⁷ Listed on the European e-Justice Portal as of January, 22, 2023, accessed January 22, 2023, https://e-justice.europa.eu/372/EN/family_mediation?LATVIA&member=1; listed on the official website of Council of Certified Mediators in Latvia as of February 3, 2023, accessed February 3, 2023, <https://sertificetmediatori.lv/2023-gada-sertificetu-mediatoru-padome-turpina-istenot-programmu-mediacija-gimenes-stridos/>.

⁹⁸ The Referrals of the Swedish Bar Association have been listed on the official website of the Government of Sweden since January 27, 2023, accessed February 5, 2023, <https://www.regeringen.se/490533/contentassets/74007bc5352148c288fc585d51b7005a/sveriges-advokatsamfund.pdf>.

⁹⁹ The Referrals of the Swedish Forum for Mediation and Conflict have been listed on the official website of the Government of Sweden since May 29, 2017, accessed February 5, 2023, <https://www.regeringen.se/49df9f/contentassets/d9c66d32fac040848e5d1b48fe07c5f0/064-barns-rattsskydd.pdf>.

¹⁰⁰ The State’s public investigations on “all times of parenthood (SOU2022:38 part 1)” and “See the child! (SOU2022:38 part 2)” have been listed on the official website of the Government of Sweden since June 30, 2022, accessed February 5, 2023, <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2022/06/sou202238/>.

the court is involved and called for mediators to be appointed early during the court process,¹⁰¹ though this is not yet regulated by Swedish law. Some studies have recently revealed the positive effects of mandatory mediation and the impact of such legislative solutions on the development of a culture of peaceful dispute resolution (Czech Republic,¹⁰² Lithuania¹⁰³). Even in Italy, which for over a decade has been considered the European benchmark for mandatory mediation due to its skyrocketing use of mediation, the year 2022 has brought further actions to expand the range of disputes that will be subject to mandatory mediation starting from early 2023.¹⁰⁴

It is evident that classifying mandatory mediation implementation levels into four distinct categories, as proposed in previous studies,¹⁰⁵ is no longer sufficient as regards family cases. The mediation categories distinguished by the academia, i.e., full voluntary, voluntary with incentives and sanctions, required initial mediation session, and full mandatory mediation, do not adequately reflect the range of mandatory family mediation models implemented by EU countries. Thus, the co-authors of this paper believe it is necessary to expand this distinction and propose a new classification (see Fig. 2.).

¹⁰¹ The “DEBATT – Om medling och rättsskydd” has been listed on the “Dagens Juridik” website since January 5, 2023, accessed February 5, 2023, <https://www.dagensjuridik.se/debatt/debatt-om-medling-och-rattsskydd/>; The “Sverige sämst i Norden på medling mellan föräldrar” has been listed on the “Dagens Juridik” website since January 16, 2023, accessed February 5, 2023, <https://www.dagensjuridik.se/debatt/sverige-samst-i-norden-pa-medling-mellan-foraldrar/>.

¹⁰² Dagmar Brožová and Jan Zouhar, “The effect of court-mandated mediation on the length of court proceedings in the Czech Republic,” *European Journal on Law and Economy* 53, (2022): 485–508, <https://doi-org.skaitykla.mruni.eu/10.1007/s10657-022-09729-6>.

¹⁰³ “Report on the *ex-post* evaluation of the impact of the legal regulation on mandatory mediation in family disputes” of 30 December 2022, conducted by Order of the Minister of Justice of the Republic of Lithuania No. 1R-219 of 30 May 2022 “On Approval of the Plan for Ex Post Impact Assessment of the Current Legal Regulation on Mandatory Mediation in Family Disputes.”

¹⁰⁴ “Legislative Decree No. 149 of 10 October 2022,” Italian Official Gazette, S.O, accessed January 20, 2023, https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2022-10-17&atto.codiceRedazionale=22G00158&elenco30giorni=false;

¹⁰⁵ Giuseppe De Palo, “A Ten-Year-Long ‘EU Mediation Paradox’ When an EU Directive Needs to Be More.... Directive.”

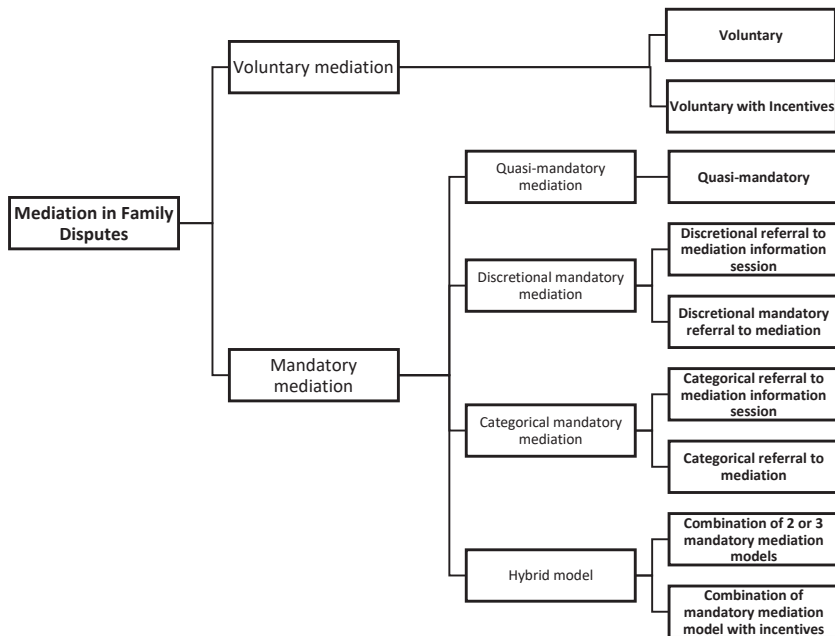


Fig. 2. Mandatory Family Mediation Models in the EU.

Firstly, a distinction needs to be made between the models that provide for incentives to promote mediation and sanctions for parties unreasonably refusing to mediate or acting in bad faith during mediation. In light of the doctrinal proposal, sanctions should be considered a separate model of mandatory mediation – quasi-judicial mediation. By 2024, following the entry into force of Bulgaria’s legislative amendments introducing mandatory mediation, Denmark will remain the only EU country with a fully voluntary mediation model. Furthermore, following the observed tendency to refer parties not only to mediation but also to a mediation information session, both by law and by a judge’s decision, it is necessary to expand the categorical and discretionary models of mandatory mediation by breaking them down into two sub-categories. It is also suggested that a new hybrid model of mandatory family mediation should be defined, which would include cases where two or three existing mandatory

mediation models are combined or at least one model of mandatory mediation is supplemented with incentives for the use of mediation. Countries that should be viewed as following the hybrid model include Lithuania, Greece, and Germany, where three models of mandatory mediation are combined, as well as Italy and Malta, where a combination of two mandatory mediation models is used. Others, like Ireland, France, Croatia, Finland, the Netherlands, Portugal, and Slovakia, combine at least one model of mandatory mediation with incentives to encourage the voluntary use of mediation.

4. Conclusions

Although the Mediation Directive (2008) has obliged the Member States to foster mediation through the means they deem suitable for their national legal systems, many studies conducted by the EU institutions and a recent ex-post study in Lithuania have shown that the aims of the Directive were fulfilled only in those countries that introduced mandatory mediation.

Mandatory mediation is a form of mediation where disputed parties are required to mediate by law (categorical), court order (discretionary), contract (contractual), or potential procedural or economic sanctions (quasi-mandatory). The application of these four doctrinal models in the EU has increased dramatically over the last decade.

The co-authors' assumption that mandatory mediation in family disputes has become an EU-wide trend has been confirmed by analyzing empirical data. Indeed, 20 out of the 27 EU Member States already use one or more models of fostering mediation in its mandatory form. Moreover, at least 9 Member States are actively considering or have already drafted legislative amendments to adopt certain forms of mandatory family mediation.

Reviewing the categorical, discretionary, and quasi-mandatory models of mandatory mediation, which are most relevant to family mediation, makes it evident that they have evolved into multiple forms. Adapting theoretical models to the needs of specific states has resulted in significant differences across the Member States. Today, the existing national models of mandatory mediation are impossible to classify if viewed through the lens of previous doctrinal classification. This leads to the need to re-consider the doctrinal models, as well as analyze, compare, and distinguish those new models to suggest a new classification, which may better reflect the existing variety

of mandatory mediation models and be more helpful to other countries seeking good practices to adopt.

The study indicates that the discretionary model, which empowers the judge to refer the parties to mediation or a mediation information session, is the most frequently used mandatory mediation model in family disputes, or at least in child disputes. Meanwhile, there is a noticeable rising trend in the use of categorical referrals to mediation and mediation information sessions for parties involved in family disputes; however, these are adapted and tailored to the national legal framework and social environment of each country. Furthermore, an increasing number of Member States are applying hybrid models of mandatory mediation, combined with financial or procedural incentives to encourage the use of mediation in family disputes.

Bearing in mind the overall tendency of mediation mandatoriness in family disputes, one can identify new horizons for future research. The wide employment of various mandatory family mediation models across the Member States may bring many supranational challenges to the EU. Issues like the legal movement of family mediators and their different qualification requirements, as well as recognition of certificates of unsuccessful mediation procedures, and the risk of forum shopping, are only some of them. Resolving these problems will require deeper systematic analyses and proposing solutions to the EU legislative bodies.

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