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The EU Directive on civil and commercial Mediation: a tool of European judicial cooperation in civil matters under the lens of the effectiveness of Justice and the respect of the right to access to Justice.

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EXECUTIVE SUMMARY

The essay examines the implication and the impact of E.U. Directive 2008/52/UE about the mediation in civil and commercial matters on the right to effective judicial protection. The authors discuss the contribution of Alternative Dispute Resolution systems to an efficient, fair and easily accessible judicial system and illustrate the long road of the European Union to an harmonised regulation of mediation in the context of judicial cooperation in civil matter and the enforceability of mediated agreements in EU Member States. Furthermore, the essay focuses on the relationship between the mediation and the fundamental right to access to justice in the light of a recent verdict of the Court of Justice that set the requirements for the compulsory mediation to ensure the compliance with the principle of effective judicial protection.

1. The use of Alternative Dispute Resolution in the European Union.

The use of Alternative Dispute Resolution (henceforth: ADR) systems is growing in the European Union (henceforth: EU) and it has gained widespread acceptance both among the general public and the legal professions, as a consequence of years of mounting concern about the cost of litigation and courts' congestion, and other obstacles to cross-border dispute resolution in the European Space of Justice. ADR can help to improve the efficiency and the effectiveness of the EU justice systems by providing citizens alternatives to regular judicial proceedings.

Different kinds of ADR exist in the European countries: mediation, conciliation and arbitration. Mediation is a voluntary, non-binding private dispute resolution process in which a neutral and independent person assists the parties in facilitating the discussion between them in order to reach an agreement. As to conciliation, the conciliator's main goal is submitting proposals for the settlement of a dispute by seeking concessions by the parties. Compared to a mediator, the conciliator has more power and is more proactive. The last kind of ADR is the arbitration, in which parties select an impartial third party, known as an arbitrator, whose final decision is binding. Parties can present evidence and testimonies before the arbitrator or a panel of arbitrators. Arbitration is most commonly used for the resolution of commercial disputes as it offers great confidentiality.

2. The slow road of the European Union to an harmonised regulation of mediation.

The gradual recognition by EU Treaties of judicial cooperation in civil matters as a fundamental goal to ensure full access to justice had an impact on ADR too. In 1993 the European Commission (henceforth EC) adopted the *Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market*[1]. Following the Green Paper, EU institutions adopted some important directives concerning consumer protection, which made express reference to the need and importance of ADR[2]. Following the consumer protection, EU focused its attention towards other forms of ADR in different sectors, such as family mediation and civil and commercial mediation.

[1] Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market, available online at http://europa.eu/legislation_summaries/other/l32023_en.htm.

[2] See, for example, Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers; Directive 97/7/EC of the European Parliament and of the Council of consumer protection; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests. Moreover, in the sector of consumer law, methods of ADR have been considered in depth and especially in the electronic commerce field, such as in the Directive 2000/31/EC of the European Parliament and of the Council of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. The text of this Directive is available online at http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=CELEX:32000L0031:en:HTML.

The 1999 Tampere European Council[3] marked the beginning of the slow road of the EU towards the establishment of a sound regulation of the various forms of mediation within the context of the area of freedom, security and justice where the right to access to justice is to be protected. The European Council, gathered in 2000 and 2001[4], further affirmed the adoption of alternative out-of-court procedures as a way to enhance access to justice in Europe and the necessity to identify common criteria regulating the ADR in the EU. As a first outcome of this path, in 2002 the EC adopted the *Green Paper on ADR in civil and commercial law*[5] that defines ADR systems as "out-of-court dispute resolution processes conducted by a neutral third party". This definition refers to the context of judicial proceedings, which are procedures conducted by a judicial authority or assigned by a judge to a third party. According to the Green Paper, ADRs in cross-border disputes are to be regarded as mechanisms able to fill the gap of national judicial proceedings and to assure better access to justice. Indeed, ADRs are often more adequate to resolve disputes because they allow parties to confront each other on the basis of a dialogue and to eventually decide whether or not to resort to judicial mechanisms. The importance of the Green Paper is therefore undeniable because it has identified ADRs not just as an alternative to courts, but, in some cases, as a better mean to guarantee to parties in a dispute the effective protection of their right to access to justice, that is a fundamental value protected both by Article 6 of the European Convention on Human Rights (henceforth: ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union[6].

Subsequently, in July 2004, the EC adopted the *European Code of Conduct of Mediators*, which formulated several principles to which an individual mediator and mediation organisations can voluntarily adhere and that are applicable to all types of mediation in civil and commercial matters[7].

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[3] See Tampere European Council, October 15 and 16, 1999, Presidency Conclusions, available on line at http://www.europarl.europa.eu/summits/tam_it.htm. It is noticeable that for the first time Tampere European Council was asked to identify common substantial and procedural rules capable of guaranteeing an adequate level of legal assistance in cross-border litigation throughout the European Union and to accelerate the resolution of cross-border disputes on small consumer and commercial claims, as well as maintenance claims and on uncontested claims.

[4] In addition to Tampere European Council, see also: Lisbon European Council, March 23 and 24, 2000, Presidency Conclusions, available online at http://www.europarl.europa.eu/summits/lis1_en.htm; Santa Maria Da Feira European Council, June 19 and 20, 2000, Presidency Conclusions, available online at http://www.europarl.europa.eu/summits/fei1_en.htm; Laeken European Council, December 14 and 15, 2001, Presidency Conclusions, available online at http://ec.europa.eu/smart-regulation/impact/background/docs/laeken_concl_en.pdf.

[5] See Green Paper on Alternative Dispute Resolution in civil and commercial law, COM(2002) 196 final, April 19, 2002, available online at http://www.ab.gov.tr/files/ardb/evt/_1_avrupa_birligi/1_6_raporlar/_1_2_green_papers/com2000_green_paper_on_alternative_dispute_resolution.pdf. To know the opinion of the Council of the Bars and Law Societies of European Union, see the document "Response of the CCBE to the European Commission's Green Paper on Alternative Dispute Resolution in civil and commercial law of April 19, 2002", available online at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_response_adr_101_1184143378.pdf.

[6] The Article 6 of the European Convention on Human Rights concerns the Right to a fair trial and the complete text of the European Convention of Human Rights is available online at http://www.echr.coe.int/Documents/Convention_ENG.pdf. The article 47 of the Charter of Fundamental Rights in European Union concerns the Right to an effective remedy and to a fair trial and the complete text of the Charter of Fundamental Rights in European Union is available online at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[7] This Code of conduct sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility. It may be used by mediators involved in all kinds of mediation in civil and

The Green Paper on ADR in civil and commercial law and the European Code of Conduct of Mediators were the basis for the adoption in 2008/52/EC of the EU Directive concerning mediation in civil and commercial matters (henceforth: Directive).

It is noticeable that also the Committee of Ministers of the Council of Europe has adopted several Recommendations aimed at promoting and enhancing ADR mechanisms. Recommendation Rec (2002)10[8] addresses mediation in civil matters and recommends the governments of Member States to facilitate mediation in civil matters whenever appropriate and to take or reinforce, as the case might be, all measures which they considered necessary with a view to the progressive implementation of the "Guiding Principles concerning mediation in civil matters"[9]. These principles regard some aspects of mediation in civil matters and, particularly, the organisation of mediation and the mediation process. Rec (2002)10 provides that Council of Europe (henceforth: CoE) Member States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector. Moreover, according to this Recommendation, mediation might take place within or outside court procedures[10] and, even if parties make use of mediation, access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties. This latter principle deserves to be remarked, because mediation may help to reduce conflicts and the workload of courts but it cannot be a substitute of an efficient, fair and easily accessible judicial system. Mediation may be particularly useful when judicial procedures are less appropriate for the parties, because of the costs of litigation or because the formal nature of judicial proceedings does not allow to maintain dialogue between the parties.

As said above, in 2008, the European Parliament adopted the Directive 2008/52/EC[11] on certain aspects of mediation in civil and commercial matters, whose purpose is to build trust in the process of mediation within the EU. The Directive notes that there are a number of advantages of mediation over litigation, including effective costs, flexibility of the procedure; furthermore agreements

commercial matters. It is available on line at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf. In particular, the Article 1.1. of this Code, related to the mediators' competence, provides that: "Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes". Moreover, in the Articles 2.1. and 2.2., the Code gives importance to the requirements of independence and impartiality that mediators must have during the mediation process.

[8] Adopted on 18 September 2002 at the 808th meeting of the Ministers' Deputies.

[9] In these Guiding Principles concerning mediation in civil matters a definition of mediation is given, according to which "mediation is a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators". The complete text of the Recommendation Rec (2002)10 is available online at https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM.

[10] Mediation, indeed, can be judicial, in which there is always the intervention of a judge or a public prosecutor who advises on, decides on and approves the procedure, or private, that is currently the main system of mediation in the European States. In this type of mediation private mediators can be specially trained professionals, certified lawyers or other private legal professionals hired by the parties.

[11] The complete text of the Directive (2008) 52 adopted by the European Union is available on line at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF.

reached through mediation are more likely to be adhered to voluntarily without further recourse to the courts.

It is noticeable that the objective of securing better access to justice, as part of the policy of the EU to establish an area of freedom, security and justice should encompass access to judicial as well as extrajudicial dispute resolution methods. Therefore, the objective of the Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings, as provided in its article 1[12]. In compliance with its 7th Whereas clause, according to which "it is necessary to introduce framework legislation addressing key aspects of civil procedure", the Directive contains a series of provisions regarding the relationship between judicial proceedings and mediation, the possibility to provide – within certain limits – compulsory mediation, the enforceability of agreements resulting from mediation, the confidentiality of mediators, and finally the effects of mediation on statute of limitation and prescription periods.

It has particularly to be remarked that article 5 of the Directive[13] envisages that parties in dispute would seek recourse to mediation voluntarily but it also provides that Member States could elect for mediation to be compulsory before recourse to the courts. This latter aspect is very important for this work and a special reference has to be made to the Italian case, where the legislation implementing the Directive made mediation compulsory for a large set of civil disputes.

The Directive provided that Member States (apart from Denmark, which opted out) were to ensure by 21st November 2010 that its terms were implemented into national law. So far, only Austria, Estonia, France, Greece, Italy and Portugal have notified the Commission that they have implemented the Directive, while Lithuania and Slovakia have provided notification of the courts that are competent for enforcing cross-border mediation settlements.

As regards the enforcement of cross-border mediation settlements, EU individuals are expected to avail themselves of the mechanism established by Brussels 1 Regulation about the recognition

[12] The Article 1 of the Directive (2008) 52 defines the objective and the scope of the Directive, as follows: "1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. 2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii). 3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark".

[13] The Article 5 of the Directive (2008) 52, with reference to the recourse to mediation, provides that: "1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. L 136/6 Official Journal of the European Union 24.5.2008 EN2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system".

and enforcement of judgements[14]. For enhancing the efficacy of cross border mediation within the EU, mediated settlement agreements shall be indeed recognised and enforced in one Member State if reached in another Member State as if they were court judgements, as it will be detailed later in this paper.

It is therefore evident that the Directive aims at providing a legal context that, in addition to harmonizing the mediation processes, attempts to propose this ADR as a quick, sure and effective legal tool for the resolution of the disputes in civil and commercial matters. Mediation is an alternative to judicial proceedings, but at the same time it constitutes a legal tool for promoting better access to justice because the correct functioning of the mediation process should result in the decrease of new disputes being brought before judicial authorities and, as a consequence, even in a reduction of the duration of judicial proceedings.

Following the entry into force of the Treaty of Lisbon, the importance of ADR was finally affirmed by a primary source of EU law too. In particular, article 81 of the Treaty of the Functioning of the European Union (henceforth: TFUE) provides that, in the context of judicial cooperation in civil matters, the European Parliament and the Council, according to the ordinary legislative procedure, can adopt measures necessary for the proper functioning of the internal market aimed at assuring "the development of alternative methods of dispute settlement"[15].

3. MEDIATION IN THE CONTEXT OF JUDICIAL COOPERATION IN CIVIL MATTER AND THE PRINCIPLE OF MUTUAL RECOGNITION OF ENFORCEABLE TITLES

The 2008/52/EC Directive aims at achieving a certain level of legal harmonization of the EU Member States' legal frameworks about mediation with the final goal to further foster judicial cooperation[16].

Judicial cooperation in civil matters aims to establish closer interaction between the authorities of Member States. It seeks to eliminate obstacles deriving from incompatibilities between the various legal and administrative systems, and thus to facilitate access to justice. Its cornerstone is the principle of mutual recognition and enforcement of judgements and of decisions resulting from

[14] Council Regulation (EC) No 44/2001of 22 December 2000.

[15] In particular, the Article 81 of the Treaty on the Functioning of the European Union (TFEU), (former Article 65 TEC), provides that: 1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: … (e) effective access to justice; … (g) the development of alternative methods of dispute settlement.

[16] Prof.Dr. Carlos Esplugues Mota, *New Trends for Cross-Border Litigation in Europe: The Directive of 2008 on Mediation in Civil and Commercial Cases,* Meiji Law Journal, 2013.

extrajudicial cases[17].

Until now, the principle of mutual recognition has produced many directives and regulations in different fields such as maintenance obligations, European small claims procedure, European order for payment procedure, European enforcement order for uncontested claims, jurisdiction recognition and enforcement of judgments in civil and commercial matters ("Brussels I"), jurisdiction recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels II"), insolvency proceedings, and alternative dispute resolution: mediation.

As early as 1993, the Maastricht Treaty included judicial cooperation in civil matters in its Title VI. The Amsterdam Treaty transferred judicial cooperation in civil matters to Title IV of the EC Treaty (Article 65), thus "communitising" it and including it in the area of freedom, security and justice[18]. With the entry into force of the Lisbon Treaty in December 2009, judicial cooperation in civil matters was moved, from the third pillar, under Title V of the Treaty on the Functioning of the European Union, together with all other aspects of the area of freedom, security and justice. Henceforth, decisions in this field are taken in accordance with the ordinary legislative procedure (co-decision procedure), except for issues relating to family law.

The following paragraphs will focus on technical aspects of mediation and in particular on the enforceability of the amicable settlement of disputes out-coming from mediation.

[17] Note "*The Stockholm Programme — An open and secure Europe serving and protecting citizens*" (No 2.3.2 and 3.4.1), *OJ C* 115, 4.5.2010. The Action Plan Implementing the Stockholm Programme is contained in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens (COM(2010) 171). For the principle of mutual recognition to function effectively, the Commission will take actions to strengthen mutual trust. To this end, actions to develop common minimum standards in both criminal and civil law will also be proposed. In addition, for citizens to better benefit from the European judicial area, the Commission will propose actions to facilitate access to justice, especially in terms of legislation relating to civil status documents, and to support economic activity, such as legislative proposals on the enforcement of judgments. At the same time, in order to achieve coherence with the international legal order, the Commission has subscribed the Lugano Convention with non EU-countries such as Switzerland, Norway and Iceland, which are physically in the European continent or in the nearby.

[18] Between 1993 and 2009, the EU legally comprised three pillars. This structure was introduced by the Treaty of Maastricht on 1 November 1993, and was eventually abandoned on 1 December 2009 upon the entry into force of the Treaty of Lisbon, when the EU obtained a consolidated legal personality. 1.The European Communities pillar handled economic, social and environmental policies. It comprised the European Community (EC), the European Coal and Steel Community (ECSC, until its expiry in 2002), and the European Atomic Energy Community (EURATOM). 2. The Common Foreign and Security Policy (CFSP) pillar took care of foreign policy and military matters. 3.Police and Judicial Co-operation in Criminal Matters (PJCC) brought together co-operation in the fight against crime. This pillar was originally named Justice and Home Affairs (JHA).

4. THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE IN EU MEMBER STATES.

As illustrated before, the recourse to mediation can occur before, during or after a judicial proceeding, it can be voluntary or compulsory[19], as ordered by law[20] or by a judge[21], and can be subject to incentives or sanctions.

EU Member States implemented differently the 2008/52/EC Directive. Spain, for example, took the opportunity to make a profound intervention in its domestic jurisdiction, by adopting a general framework of mediation; other jurisdictions, such as the English one, were interested just by a minimal intervention on the existing legislation, without calling into question the overall system, that was already largely in compliance with the rules laid down by the Directive. In an intermediate position are placed Germany and France where the Legislature in implementing the Directive took the opportunity to take action on the existing legal framework in order to improve it and solve certain problems that had emerged from the practice.

One innovative declination of the Directive, that is a mediator judge directly delegated by the judge of the proceeding, had a very small implementation. This kind of mediation is typical of the previous French system, *i.e. mediation judiciaire*, and was already recognized by the Loi n. 95-125 of 8 February 1995, and finally consecrated by Décret n. 96-852 of 22 July 1996[22]. Therefore, the European initiative was welcomed "*avec beaucoup de sérénité*" from the French doctrine. In France the Directive was implemented by means of the adoption of the *Ordonnance* n. 2011-1540 of 16 November 2011, whose main intervention was the complete replacement of Chapter I of Title II of Loi n. 95-125[23].

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[19] According to the 12th EU Directive Whereas clause and art. 3 of the Directive, mediation could be chosen voluntarily by parties, prescribed mandatorily by law, or suggested by the judge and delegated to another judge "who is not responsible for any judicial proceedings relating to the matters in dispute".

[20] Italian jurisdiction knows legally mandatory extra-judicial forms of conciliation, in front of joint committee, in labor conflicts (compulsory since 1942 till 2011) and in consumer contends (i.e. Telecommunication fields: law July 31, 1997 no. 249..The first attempt of a mediation in front of a third party mediator has been settled for corporate trials by legislative decree January 17, 2003 no. 5, but -because of the optionally based access- it failed.

[21] In Italy besides the mandatory mediation as a condition of admissibility of a judicial proceeding, Legislative decree No. 28 of 2010 provides for a mediation mandated by the court after having "assessed the nature of the case, the state of inquiry and the behavior of the parties".

[22] According to this system of judicial médiation any judge, in case of disputes relating to the agreeable rights, can appoint a mediator (judge who is not responsible for the judicial proceedings relating to the matter or matters in dispute) or a mediation body (which in turn will submit to the court the name of the individual who will be responsible for mediation. The court's decree determines the amount and terms of payment of the mediator's fees, establishes the initial duration of the mediation attempt and the next date of hearing. The judgement is suspended for a period not exceeding three months, extendible only once at the request of the mediator. The mediation attempt, however, may end at any time at the initiative of one of the parties, the mediator or judge. Unless the parties agree otherwise, everything that happens during the attempt is likely to remain unknown to the court before which the proceedings will resume in the event of failure of the attempt itself. Agreements resulting from mediation are enforceable (Art. 131-12 Code de procédure civil).

[23] The framework was completed by Decree No. 2012-66 of 20 January 2012, who introduced a new book, V, dedicated to the *amiable resolution des différends*., into the the *Civil Code de procedure.*

Italy, instead, implemented the Directive by adopting a controversial system of mandatory mediation, as it will be detailed below.

5. Enforceability of mediated agreements in Eu Member states.

In order to give effectiveness to the recourse to mediation, the agreement achieved through that instrument shall be enforceable in the other Member States; to this effect, it should be qualified as an executive title[24].

The EU Directive devotes the 16th, 19th, 20th, , 21st, 22nd Whereas to the enforceability of the national and cross-border agreements coming from mediation and the whole article 6 that is about "Enforceability of agreements resulting from mediation"[25].

The Member States recognize various forms of enforceability to mediated agreements under different conditions.

In Italy, according to art. 12 of legislative decree no 28/2010, pursuant to art. 6 par. 1 of the Directive, amicable agreements are enforceable either *if the agreement has been signed by the parties and by their lawyer* (who certify the conformity of the agreement to mandatory rules and

[24] Elena D'Alessandro, *Il conferimento dell'esecutività al verbale di conciliazione stragiudiziale e la sua circolazione all'interno dello spazio giuridico europeo* in *Riv. trim. dir. proc. civ.*, fasc.4, 2011, pag. 1157.

[25] They state that "(16). To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services", and "(19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable" and "(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility", and "(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State", and "(22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation". These principles inspired the Article 6 - Enforceability of agreements resulting from mediation. 1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

public order) or *if one or more parties ask the President of the Tribunal for the homologation (exequatur) of the agreement.*

Germany, which transposed the Directive in July 2012 by the "Act to Promote Mediation and Other Methods of Out of Court Dispute Resolution" did not include in the law special provisions for enforcing agreements resulting from mediation[26]. Nevertheless, certain provisions of the German Code of Civil Procedure make reference to enforcement of mediated settlement agreements: therefore a mediated agreement is generally enforceable upon the following conditions established by the German Code:

- if it has been homologated by lower German Civil Court (Amstgericht) upon written motion by all parties or upon written motion by one party with the consent of the others. There is no time limit for enforcing a mediated agreement. Enforcement shall be refused if the agreement is void;
- the mediated settlement agreement has been declared enforceable by a German notary (Section 794, par. 1, No 5 of the German Code of Civil Procedure);
- or by means of a lawyers' settlement (sec. 796a ZPO).

According to Article 131-1 of the French Code of Civil Procedure, after having obtained the consent of the parties, a French court may appoint a third person for mediation. In such a case, the mediator is a delegate of the court. Upon the request of the parties, the court shall declare enforceable the written agreement (Article 131-12 of the French Code of Civil Procedure). The *exequatur* proceedings belong to non-contentious matters ("*L'omologation relève de la matière gracieuse*").

Article 1441-4 of the French Code of Civil Procedure is instead concerned with enforcement of agreements reached in mediation processes conducted out of court, by a third party. Pursuant to Article 1441-4 of the French Code of Civil Procedure the President of the High Court will confer enforceability to the written settlement submitted to him/her. The proceedings belong to not contentious matters. Enforcement shall be refused if the court finds that the agreement is contrary to French public policy. It is also to be noticed that the *Court de Cassation*, in a recent decision of 2010, held that, as an alternative to the *exequatur* procedure, it is possible to have the mediated agreement incorporated into a notarial instrument by a notary. By this way, the mediated agreement shall become enforceable without the intervention of a court.

In Spain, the Real Decreto Ley No 5/2012- Royal Decree on Mediation in civil and

[26] Christian Duve (Directorate general for internal policies), *Lessons learnt from the implementation of the EU Mediation Directive in Germany: the point of view of lawyers,* European Parliament, Brussels, 2011. Mediation settlements will often not have to be enforced at all. It has been statistically proven that parties are more likely to voluntarily comply with a mediation settlement than they are willing to comply with a court decision.

commercial matters, dated 5 March 2012, states that an agreement resulting from mediation shall be enforced upon a motion by "las partes" (both parties involved): (a) by the court or tribunal that heard the dispute, if judicial or arbitrate proceedings were pending; (b) by the tribunal of first instance of the place where the agreement was signed if the parties went directly to mediation. It is also possible to have a mediated agreement certified by a notary upon consent of both parties (Article 25 Royal Decree on Mediation). The notary shall verify that the requirements of the Royal Decree have been fulfilled and that the content of the mediation settlement agreement is not contrary to the Spanish Law.

In England, parties to a civil dispute before a court, who have reached an agreement through mediation, may apply to the court to have their agreement endorsed by a judge. The court should be satisfied as to the fairness of the agreement reached[27]; the endorsed agreement becomes legally binding and enforceable by a court's 'consent order'.

6. Do differences in Eu Member States legal frameworks on mediation allow forum shopping?

The above comparison among EU Member States legal frameworks shows the existence of significant differences as to legal requirements for mediated agreements to be declared enforceable by a court or by a public notary. In particular, in Germany, unlike in Italy, the conferral of enforceability is always subject to the consent, expressed or implied, by all the parties who signed the written settlement.

It may also be observed that there are differences as to the extent of the control exercised by the courts in order to confer the enforceability to mediated agreements. Moreover, in Italy as well as in France it would be possible at any time for a party to start subsequent proceedings to obtain the annulment of an enforceable agreement.

Thus, notwithstanding these differences, it seems possible to imagine phenomena of forum shopping related to cross-border mediation.

7. The enforceability of the cross-border mediation agreement in a member State different from the one where it was concluded.

The cross-border enforceability of an enforceable mediation agreement is allowed by the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters.

[27] Alexandra De Luca, *La mediazione in Europa. una questione di cultura e non di regole* in *Riv. Dir. Civ.*, 2013, 6, 1451.

The same Mediation Directive suggests the recourse to Regulation 44/2001. For the purposes of this Regulation, "judgement" means any judgement given by a court or tribunal of a Member State, whatever the judgement may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. According to Article 38, a judgement given in a Member State and enforceable in that state shall be enforced in another Member State.

The Italian version of Article 58 of Reg. 44/2001 – which almost exactly corresponds to the French and German versions- requires that enforceable transactions should be concluded before a court in the course of a trial. This provision apparently does not cover the amicable agreement set outside the court and then homologated by a court. The English version of Article 58, instead, talks of "settlement approved by a court", in a way to include "out of court" mediation agreements.

The above discrepancies in the Regulation terminology, depending on the concerned State, could raise practical problems as to the free circulation of courts' homologated mediation agreements.

Because of language inconsistencies affecting the different versions of the text of article 58 Reg. 44/2001, in its Communication to the European Parliament of 9 February 2004, COM (90) on the European enforcement order for uncontested claims, the European Commission felt the need to clarify that the term "court settlement" is also referred to the "court settlements that have become enforceable by virtue of a court decision (homologation)".

Moreover, the European Court of Justice (henceforth: ECJ) has repeatedly stated that the text of a provision of EU law cannot be interpreted in isolation, in one of its versions only, but it should be interpreted and applied in light of the versions existing in the other official languages and, therefore, that provision must be interpreted by reference to the system of which it forms part[28].

In view of the ECJ case law, a harmonized interpretation of Italian, French, German versions of article 58 of re. 44/2011 with the English one, should likely include both mediation agreements concluded before a court and mediation settlements reached out of court[29]. The question, however, is open and the last word is expected from the ECJ, when it will be addressed by a request of preliminary rulings interpretation.

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[28] Ex multis: ECJ, 12 november 1969, C-29/69, Stauder c. Ulm, in Racc., 1969, p. 419, point 3; ECJ, 7 July 1988, C-55/87, Moksel c. Balm, in Racc., 1988, p. 3845, point 15; ECJ, 2 april 1998, C-296/95, EmuTabac, in Racc., 1998, p. I-1605, point 36; ECJ, 19 april 2007, C-63/06, Profisa, points 13 and14, in Racc., 2007, I-3239; ECJ, 9 june 2011, C-52/10, EleftheritileorasiAe«AlterChannel», points 23 e 24.

[29] See, in French doctrine, Gaudemet Tallon, *Compétence et exécutiondesjugements en Europe*, 4, Paris, 2010, p. 496. Differently Kropholler-von Hein, Europäisches Zivilprozessrecht, 2011, Buch, Kommentarp. 690, who assumes that exequatur, coming from a judge or a notary, gives to the amicable agreements a public nature according in the sense of art. 57 reg. Ce n. 44/2001 and not in the sense of a judicial arrangement according to art. 58 reg. Ce n. 44-2001. Actually, mediation agreement cannot be confused with a judgment which circulates according to art. 33 reg. Ce n. 44 / 2001; it would circulate, instead, without the need of being a judgment but thanks to art. 57 reg. Ce n. 44/2001.

8. The enforceability of the cross-border mediation pecuniary agreements.

As regards pecuniary agreements, it may be applicable Council Regulation (EC) No 805/2004 that has established the European Enforcement Order for uncontested claims[30].

Article 3 defines as uncontested, the claim if:

(a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings[31]; or (…)

(d) the debtor has expressly agreed to it in an authentic instrument[32].

As seen above, the mediation agreement, according to different procedures in various Member States, can be approved or homologated by a court or can also be incorporated in an notary authentic instrument.

In principle, such mediation agreements can therefore be certified as European enforcement orders in a way that mediated agreements declared enforceable in one Member State are directly binding in the other EU Member States. Article 24 of Reg. 805/2004, for the purpose of circulation in a different Member State, considers sufficient that the title is enforceable in the Member State of origin.

By virtue of the issue of the executive European title certificate, an executive proceeding may be established in another Member State without the need to obtain locally a declaration of enforceability (*exequatur*). The executive proceeding shall be governed by the procedural provisions in force in the Member State in which the enforcement is to be conducted. However Council Regulation (EC) No 805/2004 concerns only executive titles relate to pecuniary claims.

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[30] Crifò, *First step towards the Harmonization of Civil Procedure. The Regulationcreating an EuropeanEnforcement Order for uncontested claims*, Civil Justice Quarterly, 2005, 200 ff.; D'Avout, *La circulation automatique des titres exécutoires imposée par le règlement 805/2004 du 21 avril*, Revue Critique Droit Internationelle Privè 2004, 1 ff.; De Cesari, *Decisioni giudiziarie certificabili quali titolo esecutivo europeo nell'ordinamento italiano*, Foro Italiano 2006, V, 103 ff.; De Cristofaro, *La crisi del monopolio statale dell'imperium all'esordio del TEE*, Int'Lis 2004, 141 ff.

[31] Or (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or(c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin.

[32] Examples of such cases include: Tribunale Milano, 23.4.2008, FI 2009, I, 926, with comment by Caponi. The claim cannot be declared uncontested until the time for lodging a statement of opposition has elapsed. Shall the certification nonetheless be issued, therefore, the debtor can propose an application of withdrawal of the European Enforcement Order certificate. In the same sense OGH Austria, 22.2.2007, IPRax 2008, 440, with comment by Bittmann, 445, noting that if, from the beginning, the claim was contested, it is possible for the debtor to propose an application of withdrawal of the European Enforcement order.

9. The access to justice as E.U. fundamental right

The principle of access to justice is one of the key objectives of the EU policy[33] in order to establish an area of freedom, security and justice where individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. Access to justice for all is a fundamental right proclaimed in article 6 of the ECHR such as in article 47 of the Charter of Fundamental Rights of EU - as it has been illustrated in the paragraph 2 - and it has been determined by the ECJ to be general principle of Community law[34]. Access to justice is an obligation which is met by the Member States through the provision of "swift and inexpensive" legal proceedings. The concept of access to justice includes promoting access to judicial as well as the extra-judicial dispute resolution methods: the Member States are encouraged to facilitate the creation and the access to extra-judicial dispute resolution procedures, and mediation specifically, within the scope of a proper functioning of the internal market as concerns the availability of mediation services. In such context, the Directive promotes the use of the ADRs in a predictable legal framework that ensures a balanced relationship between mediation and judicial proceeding and contributes to this objective by facilitating access to dispute resolution through two types of provisions: first, provisions that aim at ensuring a sound relationship between mediation and judicial proceedings, by establishing minimum common rules in EU on a number of key aspects of civil procedure; secondly, by providing the necessary tools for the courts of the Member States to actively promote the use of mediation, without nevertheless making mediation compulsory or subject to specific sanctions.

10. The ADRs and the relationship with the right of access to justice under article 6 of the "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" and article 47 of the "*Charter of Fundamental Rights of the European Union*".

The aim of the Directive is to create substitutive methods for an efficient, fair and easily accessible judicial system: ADRs are an integral part of the policies aimed at improving the right to access to justice and they should be deemed as "complement judicial processes".

One of the factors underpinning the development of ADR is of a practical and conjunctural nature. ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing and more and more disputes are being brought to courts, the proceedings are becoming more lengthy and the costs

[33] See the "*Green Paper*" "*on alternative dispute resolution in civil and commercial law*", presented by the E.U. Commission dated 19th April 2002, after the meeting in Tampere of the European Council dated 19th October 1999 for the alternative extrajudicial procedures to be created by the Member States.

[34] Case 222/84 *Johnston* [1986] ECR 1651 (judgment given on 15.5.1986).

incurred by such proceedings are increasing to such levels that they can often be disproportionate to the value of the dispute. Moreover, the quantity, complexity and technical obscurity of the legislation also help to make access to justice more difficult. Cross - border disputes tend to result in even more lengthy proceedings and higher court costs than domestic disputes[35]. With the completion of the internal market and the intensification of trade and the mobility of citizens, disputes between citizens from different Member States and between persons residing in different Member States, amplified by the expansion of cross - border e-commerce, are steadily increasing, irrespective of the importance of the issue or the monetary value involved, and the number of cross - border disputes being brought before the courts is increasing correspondingly. In addition to the practical problem of overworked courts, these disputes often raise complex issues which involve conflicts of laws and jurisdiction and practical difficulties of costs and language. Under this point of view, ADRs are in most cases faster and, therefore, usually cheaper than ordinary court proceedings. This is especially true in countries where the court system has substantial backlogs and the average court proceeding takes several years to be completed (as in Italy). This is why, despite the diversity in areas and methods of mediation throughout E.U., there is an increasing interest for this means of resolving disputes as an alternative to judicial decisions. Thanks to the above undisputed advantages, mediation may be considered as a useful way to ensure and improve the right of access to justice set out in the article 6 of the ECHR and article 47 of the Charter of Fundamental Rights of EU as a "complement judicial process"[36].

11. The Italian case

Italy has been plagued by substantial backlogs in the court system with an average delay of three and a half years before a civil case reaches a verdict. If a litigant wishes to appeal a civil case, he/she can expect to be waiting up to ten years for a final judgment. This situation has had adverse consequences for the Italian government which, by 2000, had paid out over € 600 million to individuals who brought claims that Italy had violated article 6 of the ECHR. Then, in response to the Directive, Italy announced a fortification of its mediation regime in an attempt to eliminate "one million cases" from the courts. In April 2010, Italy notified the European Commission that it had passed a statutory instrument, Legislative Decree no. 28/2010 on *"Mediation Aimed at Conciliation of Civil and Commercial Disputes"*, implementing the Directive. That scheme went far beyond the Directive's terms, introducing a categorical mandatory mediation regime for disputes in real property; insurance, banking and financial agreements; division of assets; inheritance; family law;

[35] On these questions, see in particular the information in the Commission *"Green Paper"* of 9 February 2000 "*Judicial cooperation in civil matters: the problems confronting the cross-border litigant*", COM(2000) 51 final.
[36] See page 8 of the "*Green Paper*".

tenancy law; neighbor disputes; compensation claims for car or boat accidents; medical negligence claims; and defamation in the press and other media. It also introduced a non-mandatory mediation procedure for all other civil or commercial claims. According to the rules set out in the Legislative Decree no. 28/2010, no court proceedings could be brought until the mandatory attempt to settle the dispute has been undertaken (so that the mediation is conceived as a judicial admissibility condition of the action brought to the court). The scheme came into effect on 20 March 2011 to fierce opposition from lawyers, striking over fears that it would jeopardise their practices. However, by judgment no. 272/2012 rendered by the Italian Constitutional Court, some provisions of the Legislative Decree no. 28/2010 were declared unconstitutional, including those provisions requiring a mediation procedure to be conducted before a court. As a result, the matter how to ensure the right to (swift and inexpensive) access to justice in Italy is still open.

For some EU Member States, such as Italy, where delays in civil litigation are endemic, mandatory mediation schemes could have the potential to assist that the disputants to access appropriate dispute resolution mechanisms within a reasonable time by, at the same time having the effects to reduce the caseload of courts. However this mandatory mediation schemes must respect the principle of effective judicial protection.

12. Mediation and the principle of the effective judicial protection: the mandatory mediation and restrictions to the "procedural autonomy" of the member states. The jurisprudence of the European Court of Justice.

Mediation is an alternative to the judicial process"[37] and, at the same time, it constitutes a legal tool for promoting better access to justice because, as said above, the correct functioning of the mediation process should result in the decrease of new disputes being brought before judicial authorities and, as a consequence, in a reduction of the duration of judicial proceedings. Therefore, it can be affirmed that the Directive on mediation falls into those interventions intended to realize far better access to justice. Although mediation is to be considered, in general terms, as a tool aimed at improving the access to justice, at the same time, it should not be constitute an obstacle to the right of accessing the judicial system. That is the real and unique general prohibition that the Directive provides for in the mediation process. Notwithstanding the advantages connected to the role that ADRs can play in the general context of access to justice for all (as seen under paragraph above), the national legislation, like the Italian one, implementing the Directive may make use of the ADRs mainly as a tool to reduce the workload of the courts, with the effect of restricting the parties' rights to access the courts in the meaning of the article 6 of the ECHR and article 47 of the

[37] The 19th Whereas of the Directive underlines that, even with reference to the enforceability of the agreement resulting from mediation, "*mediation should not be regarded as a poorer alternative to judicial proceedings"*.

Charter of Fundamental Rights. Indeed, a few factors regarding the recourse to ADRs, strictly related to the cost of litigation, the timing, the prevailing legal culture and political climate and the attitudes of the legal profession, as better outlined below, might result in a negative impact to this fundamental right.

As a general point of view, the ADR should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, according to the article 5 of the Directive, the national legislation is not prevented from making the use of mediation compulsory or subject to incentives or sanctions provided that such rules do not prevent parties from exercising their right of access to the judicial system. Indeed, a Member State could establish that the implementation of a mediation attempt constitutes a condition for proposing a judicial action (a condition for the admissibility of an action before the courts), or even a necessary condition in order that the proceeding can proceed (a condition to proceeding in court). The choice left to the individual Member State to prescribe the compulsoriness of the mediation attempt, and to reconstruct this attempt as a condition for the admissibility of action or a condition to proceeding in court, is a choice that implicates procedural matters. In particular, it concerns procedural rules that have to be complied with to propose a judicial action. The Member State has the competence to regulate and to define its own procedural rules, that is the "procedural autonomy" of the EU Member States[38]. The procedural autonomy of the State is subject to two limitations: the first is the principle of equivalence, according to which procedural rules governing actions cannot be less favorable than those regulating similar domestic actions; the second is the principle of effectiveness[39], which provides that such rules must not make it in practice impossible or excessively difficult to exercise the rights conferred by EU law. A more general limitation stems from a general principles of EU law, and in particular in this context by

[38] Amongst several decisions, see: Case 45/76, Comet, [1976] ECR 2043, para. 13; Case 33/76, Rewe, [1976] ECR 1989, para. 5; Case C-312/93, Peterbroeck, [1995] ECR I-4599, para. 12; Case C-228/96, Aprile, [1998] ECR I- 7141, para. 18; Case C-453/99, Courage e Crehan, [2001] ECR I-6297, para. 29; Case C-62/00, Marks & Spencer, [2002] ECR I-6325, para. 34; Case C-13/01, Safalero, [2003] ECR I-8679, para. 49; Joined Cases C-222/05 to C-225/05, van der Weerd and Others, [2007] ECR I-4233, para. 28; Case C-432/05, Unibet, [2007] ECR I-2271, para. 39; Case C-268/06, Impact, [2008] ECR I-2483, para. 44; Case C-12/08, Mono Car Styling [2009] ECR I-6653, para. 48; Case C-472/08, Alstom Power Hydro, [2010] ECR I-623, para. 17; Case C-240/09, Lesoochranárske zoskupenie, not yet reprinted in [2011] ECR, para. 47. The topic of procedural autonomy has been examined, under several profiles and as to different sectors, by D. U. Galetta, Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "*Functionalized Procedural Competence*" of EU Member States (2010).

[39] As far as the principle of effectiveness is concerned, it is to be recalled that according to the EU Court of Justice "cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically impossible or excessively difficult must similarly be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings": see Joined Cases C-222/05 to C-225/05, van der Weerd and Others, supra note 88, para. 33; Case C-312/93, Peterbroeck, supra note 88, para. 14; Case C-426/05, Tele2 Telecommunication, [2008] ECR I-685, para. 55; Case C-63/08, Pontin, [2009] ECR I-10467, para. 47.

the principle of effective judicial protection enshrined in aforementioned article 6 of ECHR and 47 of the Charter of Fundamental Rights of EU**.** Under this point of view, the main issue that arises is the following: it may the compulsory ADRs be deemed consistent with the fundamental principle of the right to (swift and inexpensive) access to justice? In other words, does the choice made by an individual Member State, as allowed by the Directive, to impose a compulsory mediation comply with the principle of effective judicial protection? The individual Member State's legislation, that is the case of Italy, could indeed establish that the implementation of a mediation attempt constitutes a condition for the admissibility of an action before a court or to proceeding in court (as seen before): in both cases, there exists a restriction of the right to access to justice. Since, as outlined above, the article 5 of the Directive accepts the validity of mandatory mediation schemes, this implicitly suggests that the EU sees such schemes as overall consistent with the principle of effective judicial protection (under article 6 of the ECHR and 47 of the Charter of Fundamental Rights). However, it must be remarked that article 5(2) of the Directive admits national legislation "*making the use of mediation compulsory*"[40] provided that "*such legislation does not prevent the parties from exercising their right of access to the judicial system*". The Directive has therefore chosen to leave the Member States free to configure the mediation attempt as a duty or as a free option: both choices are allowed so that the imposition to a compulsory mediation does not necessarily violate the principle of judicial protection but it may be subject to restrictions to preserve the parties' rights to access courts. The latter interpretation is given support by a judgment of the ECJ, handed down on 18 March 2010[41] ("*Alassini*" judgment), in response to a preliminary ruling concerning the compliance of Italian law to EU law. In its ruling the ECJ set the requirements that must be met to make a compulsory attempt to reach an out-of-court dispute settlement to comply with the principle of effective judicial protection. The ECJ found that mandatory out-of-court proceedings do not in practice make the exercise of individual right impossible or excessively

[40] This provision has been recently recalled by the European Parliament resolution of September 13, 2011 on the implementation of the directive on mediation in the member states, its impact on mediation and its take-up by the courts (2011/2026(INI)), which expressly recognizes that art. 5(2) of Directive 2008/52/EC allows to make as compulsory the recourse to mediation (lett. K.5). Art. 5(2) of the directive has been criticized by André-Dumont, supra note 43, p. 122, who considers it "*inconsistent with the voluntary nature of mediation*".

[41] Judgment of the Court (Fourth Chamber) of 18 March 2010 (references for a preliminary ruling from the "*Giudice di Pace di Ischia*" – Italy) – Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08) ('*Alassini*'). On this legislation and on the "*Alassini"* judgment see G. Armone and P. Porreca, "La *Mediazione Civile nel Sistema Costituzional-comunitario*", (2010) 135, no. 8, Part IV, Foro Italiano, pp. 372 et seq.; C. Besso, "*Obbligatorietà del Tentativo di Conciliazione e Diritto all'Effettività della Tutela Giurisdizionale*", (2010) 12 Giurisprudenza Italiana, pp. 2585-2589; G. Rizzo, "*L'Obbligatorietà del Tentativo di Conciliazione Extragiudiziale in Ambito di Servizi di Comunicazioni Elettroniche tra Operatori di Telecomunicazione e Utenti Finali*", (2010) 27, no. 10, Corriere Giuridico, pp. 1292-1304. On this issue, see H. R. Dundas, *"Court-Compelled Mediation and the European Convention on Human Rights Article 6*", (2010) 76, no. 2, Arbitration: The Journal of the Chartered Institute of Arbitrators, pp. 343-348; G. Fiengo, "*Principio della Tutela Giurisdizionale Effettiva e Previo Esperimento di Procedura di Conciliazione Extragiudiziale in Materia di Servizi di Comunicazione Elettronica*", (2010) 3 Diritto Pubblico Comparato ed Europeo, pp. 1238-1241.

difficult and, therefore, they are not contrary to the (swift and inexpensive) access to justice so long as ADRs procedure:

ι) does not result in a binding decision (such as, for example, the decision of arbitration panel): the mediator is not expected to make suggestions or to propose a solution but it operates with the aim to facilitate a voluntary agreement between the parties[42];

ιι) does not cause a substantial delay for the parties to bring legal proceedings before courts and in litigation: the Member State shall fix strict time limits for the completion of the procedure (in order to identify such time limits there are no criteria: the Italian legislation fixed a four month time limit for the completion of the mediation attempt)[43]. In order to establish whether the time limit set for the completion of the compulsory mediation attempt causes a substantial delay, it can be considered the average duration of the process in the individual Member State on one side and the criteria elaborated by the European Court on Human Rights about reasonable length of the proceedings on the other side;

ιιι) does not oust the court's jurisdiction due to limitation periods: article 8 of the Directive provides that the request of mediation should determine the interruption and/or suspension of the prescription period, as well as the impediment of limitation. As a consequence, the new prescription and limitation periods should run from the date when the mediator announces the negative result of the mediation[44];

ιϖ) it is not excessively costly. Costs represent an essential factor that must be taken into account: they should be reasonable and proportionate to the importance of the issue and the amount of the work carried out by the mediator and whereas they are too high (above all compared to

[42] In favor of the facilitative mediation scheme, it could be eventually recalled the wording of the 10th Whereas clause, first period, of the Directive 2008/52/EC, according to which: "*This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator*". See also art. 3(a), Directive 2008/52/EC

[43] As to the reasonableness of the length of the proceedings, ECHR settled case-law provides that "*the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant*": see Application No. 31333/06, McFarlane v Ireland, para. 140; see also Application No. 1602/62, Stögmüller v Austria, [1969] ECHR (Ser. A.), p. 9, para. 5; Application No. 49017/99, Pedersen and Baadsgaard v Denmark, [2004-XI] ECHR, para. 45; Application No. 54071/00, Rokhlina v Russia, para. 86; Application No. 75529/01, Sürmeli v Germany [2006-VII] ECHR, para. 128; Application No. 49163/99, Kalpachka v Bulgaria, paras 65, 68; Application No. 18274/04, Borzhonov v Russia, supra note 93, para. 39.

[44] See 24th, Directive 2008/52/EC, according to which: "*In order to encourage the parties to use mediation, member states should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member states should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the member states, for instance in the area of transport law, should not be affected by this Directive*".

judicial costs in the prospect of a failure of mediation proceedings) ADRs may be inconsistent with the fundamental right to access to justice[45].

In conclusion, it can be affirmed that a compulsory mediation procedure (such as any ADRs procedure), does not necessarily violate the principle of effective judicial protection. In order to avoid this violation, individual Member State must meet the requirements clearly prescribed by the ECJ in the "*Alassini*" judgment according to which the principle of effective judicial protection is not absolute and it can be subject to restrictions in order to achieve general interests, that are the overall improvement of access to justice and the reduction of the overall length of judicial proceedings, thanks to the overall reduction of the number of actions brought before the judicial authorities.

[45] The issue regarding the potential costs of the ADRs procedures higher than a judicial proceeding – and additional to those - (and mainly when such disproportion rises with the increase of the value of the dispute and its complexity which requires, for instance, the appointment of an expert with specific skills who gives assistance to the mediator) was raised, in a preliminary ruling to ECJ, by an Italian judge – the "*Giudice di Pace*" di Mercato San Severino (Italy) in "*Società Imballaggi Metallici Salerno c/ Di Donna*"- with referral to the Legislative Decree no. 28/2010 on *"Mediation Aimed at Conciliation of Civil and Commercial Disputes"*. The query raised by the Italian judge was: "*Do Articles 6 and 13 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union ..., Directive 2008/52/EC ..., the general European Union law principle of effective judicial protection and, in general, European Union law as a whole preclude the introduction in a Member State of the European Union of a set of rules [such as] Legislative Decree No 28/2010 and Ministerial Decree No 180/2010 ... which provide that the costs of compulsory mediation are at least twice those of the legal proceedings that mediation is designed to avoid, a disparity which increases exponentially as the amount involved in the case increases (to such an extent that the costs of mediation may reach more than six times those of legal proceedings) and the complexity of the case increases (such as to require the appointment of an expert, paid by the parties to the mediation, to assist the mediator in disputes that call for specific technical knowledge, even though any technical report prepared by the expert [or] the information he has obtained may not be used in any subsequent legal proceedings)?*". The matter, unfortunately, was not examined by the ECJ: as a result of the declaration of unconstitutionality of the Legislative Decree no. 28/2010 by the Italian Constitutional Court (verdict no. 272/2012), the claim did not proceed before the ECJ.