

AN EMPIRICAL STUDY ON MEDIATION IN CIVIL AND COMMERCIAL DISPUTES IN EUROPE: THE MEDIATION SERVICE PROVIDERS PERSPECTIVE*

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ABSTRACT: This empirical study seeks to explore the application of mediation and online mediation in civil and commercial disputes from the perspective of service providers in France, Italy, and Belgium. A qualitative approach was used in investigating the effectiveness of mediation, the challenges that mediators face, including online, and its future perspective through the lens of service providers. This study aims to be suitable for policymakers, jurists, researchers, and mediation service providers.

KEYWORDS: Mediation, Online Mediation, Civil and Commercial Disputes, Mediation Service Providers, EU

SUMMARY: INTRODUCTION—1. LITERATURE REVIEW; 1.1. Mediation: Concept Definition and Application; 1.2. Online Mediation.—2. MEDIATION IN EU: PERSPECTIVES FROM FRANCE, ITALY, AND BELGIUM; 2.1. France; 2.2. Italy; 2.3. Belgium; 2.4 Conclusions on Jurisdictions.— 3. EMPIRICAL RESEARCH METHODOLOGY; 3.1. Open-ended Surveys; 3.1.1. Research Design and Data Collection; 3.1.2. Results and Analysis; 3.2. Semi-structured Expert Interviews; 3.2.1. Research Design and Data Collection; 3.2.2. Results and Analysis.—4. DISCUSSION.— ACKNOWLEDGEMENT

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INTRODUCTION

Traditionally, disputants solve civil and commercial cases in front of courts.¹ Nevertheless, the complicated, time consuming and excessively costly procedures involved sometimes impede effective access to justice for citizens, particularly in claims with low and medium pecuniary thresholds.² The unsatisfactory administration of civil justice in some areas has pushed disputants to seek non-adversarial procedures, namely alternative dispute resolution (ADR).³ While a variety of definitions of the term ADR has been suggested⁴, this paper defines it in its broadest sense to refer to any form of dispute resolution process other than litigation.⁵ There are different types of ADR processes that are used to resolve a wide variety of disputes.⁶ Many scholars, however, argue that ‘mediation’ is the most preferable — to other ADR methods as well as to litigation — dispute resolution method because of its flexible, non-binding, informal, and economic nature.⁷ These traits have

¹ Stephen B. Goldberg, Eric D. Green, and Frank E. A. Sander, ‘ADR Problems and Prospects: Looking to the Future’ (1986) 69 *Judicature* 291.

² Pablo Cortés, ‘Using Technology and ADR Methods to Enhance Access to Justice’ (2018) 5 *IJODR* 103.

³ In the recent years, some scholars have referred to the term ‘appropriate’ instead of ‘alternative’. They have argued that the model of dispute resolution should be appropriate to the characteristics of each dispute including the nature of dispute, the parties involved, and their place of residence. See Yona Shamir ‘Alternative Dispute Resolution Approaches and Their Application .Potential Conflict to Cooperation Potential’ (UNESCO,2003); David Otieno Ngira, ‘(Re) configuring ‘Alternative Dispute Resolution’ as ‘Appropriate Dispute Resolution’: A Philosophical Reflection’ (2018) 6 (2) *Alternative Dispute Resolution* 194; Carrie Menkel-Meadow, ‘*Mediation, Arbitration and Alternative Dispute Resolution (ADR)*’ in James D. Wright (ed.), *International Encyclopedia of Social and Behavioral Sciences* (2nd ed., Elsevier 2015); Felix Steffek and others, *Regulating dispute resolution: ADR and access to justice at the crossroads* (Bloomsbury Publishing 2014); Susan H. Blake, Julie Browne and Susan Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2016).

⁴ For example, see Paul D. Carrington, ‘Civil Procedure and Alternative Dispute Resolution’ (1984) 34 *J Legal Education* 298; Richard A. Posner, ‘The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations’ (1986) 53 *U Chi L Rev* 366; Judith Resnik, ‘Many Doors--Closing Doors--Alternative Dispute Resolution and Adjudication’ (1995) 10 *Ohio St J on Disp Resol* 211; E. Casey Lide, ‘ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation’ (1996) 12 *Ohio St J on Disp Resol* 193; Carrie Menkel-Meadow, ‘Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process’ (1998) 31 *Loy L A L Rev* 513; Jean R. Sternlight, ‘Is Alternative Dispute Resolution Consistent with the Rule of Law - Lessons from Abroad’ (2007) 56 *DePaul L Rev* 569.

⁵ See Masood Ahmed, ‘Alternative Dispute Resolution During the Covid-19 Crisis and Beyond’ (2021) 32 *King’s Law Journal* 147.

⁶ These forms of ADR include arbitration, mediation, negotiation, ombudsman procedures, conciliation, and other types of hybrid ADR (e.g., med-arb and mini-trials). See Brian A. Pappas, ‘Med-Arb and the Legalization of Alternative Dispute Resolution’ (2015) 20 *Harvard Negotiation Law Review* 157; Sherry Landry, ‘Med-Arb: Mediation with a Bite and an Effective ADR Model’ (1996) 63 *Defense Counsel Journal* 263; Reba Page R and Ferederick J. Lees, ‘Roles of Participants in the Mini-Trial’ (1988) 18 *Public Contract Law Journal* 54.

⁷ Kenneth R. Feinberg, ‘Mediation - A Preferred Method of Dispute Resolution’ (1989) 16 (5) *Pepp. L. Rev.* 12; Hazel Genn, ‘What Is Civil Justice for? Reform, ADR, and Access to Justice’ (2012) 24 (1) *Yale Journal of Law & the Humanities* 397, 411; Carlos Esplugues, ‘General Report: New Developments

incentivised civil justice systems to promote the use of mediation within their dispute resolution procedures mainly to tackle the court backlogs.⁸

In Europe, the EU Parliament and the EU Council adopted Directive 2008/52/EC (the EU Mediation Directive) aiming to promote the use of mediation in certain civil and commercial matters.⁹ The EU Mediation Directive was the first joint effort in regulating mediation in the European Union.¹⁰ Today, despite a decade of implementing this legislative instrument, there is still considerable imbalance in the use of mediation in the Member States' civil justice systems.¹¹ Imbalance can be especially observed in dealing with cross-border civil and commercial matters. It can be thence concluded that the EU Mediation Directive has not succeeded in delivering its major objective of promoting the use of amicable dispute resolution methods as an alternative to adversarial proceedings.¹²

Over the past two decades, many studies have provided important information on mediation as an especially convenient method for resolving civil and commercial disputes.¹³ However, these studies remain descriptive in nature and mainly focused on mediation from the perspective of disputants. The mediation service providers' (MSPs) viewpoints — as one of the main pillars of any individual or institutional mediation¹⁴ — and practice of online mediation are understudied in the EU.

in Civil and Commercial Mediation – Global Comparative Perspectives' in Carlos Esplugues and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Springer International Publishing 2015), 4.

⁸ Hazel Genn, 'What Is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24 (1) *Yale Journal of Law & the Humanities* 397.

⁹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters 2008 [32008L0052].

¹⁰ This should be, however, noted that the idea about the development and general acceptance of mediation — as part of the general ADR regime — dates to 1990s. Back then, the European Council emphasized on the significance of using alternative — to litigation — methods for settling transnational disputes particularly at cross-border level. See Elizabeth Birch, 'The Historical Background to the EU Directive on Mediation' (2006) 72 (1) *The International Journal of Arbitration, Mediation and Dispute Management* 57.

¹¹ See Esplugues (n 7) 20; Katrin Deckert, 'Mediation in France: Legal Framework and Practical Experiences' in Hopt, Klaus J. Hopt and Felix Steffek (eds) *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012).

¹² Giuseppe De Palo, 'A Ten-Year-Long 'EU Mediation Paradox': When an EU Directive Needs to Be More ...Directive' (European Parliament Briefing 2018) 1.

¹³ For example, see Pablo Cortés, 'Can I Afford Not to Mediate - Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' (2008) 35 *Rutgers Computer & Tech LJ* 1; Cortés, Pablo Cortés & Arno R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21 *Maastricht J Eur & Comp L* 14; Jacobs CA, 'Facilitative Mediation - A Good Option' (2002) 22 *Michigan Probate & Estate Planning Journal* 2; M. R. Zagidullin, 'Legal Liability in Civil and Commercial Proceedings and in Mediation Procedure' (2020) 48 *Perm U. Herald Jurid. Sci.* 388; Anna Howard, *EU Cross-Border Commercial Mediation: Listening to Disputants - Changing the Frame; Framing the Changes* (Kluwer Law International BV 2021).

¹⁴ The institutional model of mediation stands against individual practice of mediation. The institutional mediation service has been favoured by some scholars due to its cost-effectiveness, having higher degree of expertise, and marketing benefits. See Noam Ebner, 'E-Mediation' in Mohamed S.

Therefore, this empirical study intends to explore the application of mediation and online mediation¹⁵ in civil and commercial disputes from the perspective of service providers in the selected Member States: France, Italy, and Belgium.¹⁶ A qualitative approach was used in investigating the effectiveness of mediation, the challenges that mediators face, including online, and its future perspective through the lens of service providers.

This study aims to be suitable for policymakers, jurists, researchers, and other mediation service providers.

The paper proceeds as follows: Section 1, the literature review, expands the discussion on the concept definition and the application of mediation and online mediation. Next, Section 2 provides a brief overview on the implementation of mediation in civil and commercial disputes in the EU, particularly in France, Italy, and Belgium. Section 3 describes the empirical research methodology — through open-ended surveys and semi-structured expert interviews — and presents the results and data analysis. Finally, Section 4 discusses the findings of the empirical study.

1. LITERATURE REVIEW

1.2. Mediation: Concept Definition and Application

There are slight differences of opinion among scholars about the definition of ‘mediation’. However, there is general agreement that mediation refers to ‘a process in which a neutral third party facilitates negotiation among disputants to reach an agreement over a disputed subject matter, without delivering a formal decision’.¹⁷

In a similar, yet more elaborated definition, the *Centre for Effective Dispute Resolution* (CEDR)¹⁸ defines mediation as: ‘a flexible and confidential process in which a neutral third party assists the disputants to reach a consensual agreement through negotiations under the parties’ full control over the process’.¹⁹

Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publication 2012).

¹⁵ In this paper, the terms online mediation and e-mediation are used interchangeably.

¹⁶ These Member States were chosen based on the authors’ academic and professional ties with the MSPs in these jurisdictions.

¹⁷ See Menkel-Meadow (n 3); Steffek and others (n 3); Jethro K. Lieberman and James F. Henry, ‘Lessons from the Alternative Dispute Resolution Movement’ (1986) 53 *The University of Chicago Law Review* 424; Blake, Browne, and Sime (n 3).

¹⁸ CEDR is a prominent London-based dispute resolution body that specialises in ADR, and particular mediation. CEDR plays an imminent role in providing soft skills and solutions for the society to have an effective conflict management through constructive dialogues. See Centre for Effective Dispute Resolution, ‘CEDR Asia Pacific Mediation Rules’ (2010): <<http://www.cedr-asia-pacific.com/cedr/docslib/CEDR%20Asia%20Pacific%20Mediation%20Rules.pdf>> accessed 20 June 2022.

¹⁹ *ibid.*

In the European context, various definitions of mediation by prominent scholars can be found. According to the definitions provided, particularly in the context of consumer-to-business (C2B) relationships, mediation is ‘a process where a neutral third party (as the mediator) assists the consumer and the trader to reach an amicable settlement’. According to this definition, the mediator plays a significant role in facilitating the dialogues between disputants. In this respect, mediators help the parties to conduct an effective communication to identify common objectives and reach an amicable agreement. This type of mediation is known as ‘facilitative mediation’ in which the role of mediator is limited to facilitating communications. The decision-making is left to the parties involved in the process.

Another type of mediation is ‘evaluative mediation’ in which the mediator plays a more active role during the process by evaluating the subject matter of the dispute.²⁰ Most significantly, the mediator proposes settlement schemes to parties.

It is important to note that in neither the facilitative nor the evaluative form of mediation does the mediator have any authoritative decision-making power. In fact, the mediator’s efforts are concentrated on directing parties towards reconciling their competing interests through finding a mutually satisfactory resolution.²¹ This characteristic of the mediator is contrary to the function of a judge or an arbitrator during a dispute resolution process.²²

On the advantages of mediation, this process — compared to litigation — gives parties a higher degree of satisfaction and motivates more voluntary compliance with the outcome of the settlement. Nevertheless, it should be noted that in certain circumstances — e.g., failure to reach an agreement, in compliance with the outcome, or lack of a balanced bargaining power between parties — a failed mediation can increase the costs of dispute resolution.²³

In a significant study, Esplugues and Marquis (2015) investigated the notion of mediation in civil and commercial disputes in various jurisdictions across the world. They found out that the notion of mediation as a legal institution should be observed in the context of each legal system and the developed doctrinal approaches as part of a civil justice system.²⁴ In the EU, the notion of mediation in civil and commercial disputes can be considered in the light of Article 3 of the EU Mediation Directive. This Article stipulates that mediation is ‘a structured process in which two or more disputants vol-

²⁰ Evaluative mediation is more commonly used in consumer dispute resolutions. See Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* (2017, Cambridge University Press) 25.

²¹ *ibid* 25-7.

²² Marco Giacalone and Ronald P. Loui, ‘Dispute Resolution with Arguments over Milestones: Changing the Representation to Facilitate Changing the Focus’ (2018) *Jusletter IT*, IRIS 167.

²³ Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 321.

²⁴ Esplugues (n 7) 4.

untarily attempt to resolve a dispute and reach an agreement with the assistance of a mediator'.²⁵

This definition highlights two key factors in a mediation process: that it be voluntary and structured. Although, the voluntary nature of the process refers to the willingness of parties to attempt mediation, Article 3 does not illuminate the concept of a 'structured process'.

This ambiguity may be perceived to be in contradiction with the characteristics of mediation, in particular flexibility and party control over the process. This viewpoint seems to be supported in the definitions of mediation of the CEDR²⁶ and of the *United Nations Commission on International Trade Law* (UNCITRAL) rules on mediation.²⁷ In neither of these instruments has mediation been referred to as a 'structured' process. In our viewpoint, it is necessary that the EU legislator clarify and redefine the concept and process of mediation to avoid any ambiguity.

1.2. Online Mediation

One of the major objectives of this empirical study is to investigate the status of using online mediation, the challenges to its application, and its future perspective in civil and commercial disputes in the EU. Thus, it is necessary to understand online mediation as part of the general Online Dispute Resolution (ODR) regime.

Starting in the early 1990s, with the evolution of ODR, Information and Communication Technology (ICT) began to play a significant role in the conduct of mediation for resolving civil and commercial matters.²⁸ Many scholars have emphasised the usefulness of online mediation and its capacity to provide opportunities for disputants to resolve conflicts in a more effective and convenient manner.²⁹ The scholars have significantly supported the view

²⁵ *ibid* 11.

²⁶ Centre for Effective Dispute Resolution (n 18).20 June

²⁷ According to UNCITRAL rules on mediation: '... "mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.' See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 | United Nations Commission On International Trade Law' <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation> accessed 20 June 2022.

²⁸ Ethan Katsh, 'ODR: A Look at History A Few Thoughts About the Present and Some Speculation About the Future' in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publication 2012).

²⁹ For example, see Bruce Leonard Beal, 'Online Mediation: Has Its Time Come' (1999) 15 Ohio State Journal on Dispute Resolution 735, 736; David A. Ruiz, 'Asserting a Comprehensive Approach for Defining Mediation Communication' (2000) 15 OHIO ST. J. ON DISP. RESOL. 85; Sarah Rudolph Cole, Kristen M. Blankley, 'Online mediation: Where we have been, where we are now, and where we

that referring to e-mediation — as a form of online ADR — promotes access to justice for citizens and in particular for consumers.³⁰ It has also been argued that using online mediation not only reduces the cost and length of procedures, it also improves the parties' access to competent dispute resolution bodies.³¹

In conducting e-mediation, the involved parties can use a variety of basic to complex ICT means.³² These technological mediums include e-mails, audioconference, and videoconference at one end, and digital case management, digital platforms, and automated blind-bidding procedures at the other.³³

ICT plays a pivotal role in ameliorating the informality and flexibility of mediation. As a result, the parties can participate at their great convenience regardless of any physical distance.

From a global perspective, there are several models of successful online mediation service. One of the most prominent examples is the *eBay* ODR system.³⁴ *E-Bay* — in a collaboration with *SquareTrade*³⁵ — introduced a web-based dispute resolution system which allows consumers and traders to settle any sale-related dispute. To use this process, parties should primarily attempt to work out a negotiated agreement. They can use a specific tool that is designed for conducting online negotiation.³⁶ If direct negotiations fail, parties can escalate their dispute to the next level, namely online mediation. In this phase, disputants can request to be assisted by a *SquareTrade* mediator. The assigned mediator guides the parties through the web-based dispute resolution mechanism and assists them in reaching a fair and amicable settlement. *SquareTrade* pays due diligence to ensure parties are well-informed about the facilitative role of the mediator. In the *e-Bay* ODR system design, the mediator can propose a solution subject to the parties' request. The issued proposal, however, is non-binding upon the parties.³⁷

should be' (2006) 38 *U. Tol. L. Rev.* 193; Janet Rifkin, 'Online dispute resolution: theory and practice of the fourth party' (2001) 19 (1) *Conflict Resolution Quarterly* 117; Anne Marie G. Hammond, 'How do you write "Yes"? A study on the effectiveness of online dispute resolution' (2003) 20 (20) *Conflict Resolution Quarterly* 261.

³⁰ See Steve Abernethy, 'Building large-scale online dispute resolution & Trustmark systems' (2003) Proceedings of the UNECE Forum on ODR.

³¹ Ursa Jeretina, 'Consumer online dispute resolution (ODR)-a mechanism for innovative e-governance in EU' (2018) 16 *Cent. Eur. Pub. Admin. Rev.* 45, 64.

³² Colin Rule, *Online Dispute Resolution For Business: B2B, ECommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (John Wiley & Sons 2003) 46.

³³ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Taylor & Francis 2010) 145; Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 *International Comparative Jurisprudence* 76, 79.

³⁴ 'EBay Services: Buying and Selling Tools: Dispute Resolution Overview' <<https://pages.ebay.com/services/buyandsell/disputeres.html>> accessed 20 June 2022.

³⁵ 'Allstate Protection Plans' <<https://www.squaretrade.com/>> accessed 20 June 2022.

³⁶ E-Bay (n 34).

³⁷ Louis F. Del Duca, Colin Rule, and Brian Cressman, 'Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems' (2015) 4 *Penn St JL & Int'l Aff* 242, 270.

In the European context, e-mediation is perceived as a flexible, convenient, and cost-effective process. It is also considered as a process with the potential to provide the most appropriate resolution to C2B disputes, particularly at the cross-border level.³⁸

From the legal standpoint, the EU Mediation Directive does not explicitly recognise online mediation as a form of resolving civil and commercial matters. This approach clearly indicates that the EU legislator leaves it completely up to the Member States whether to adopt e-mediation as a valid method of dispute resolution within their respective jurisdictions.³⁹

To facilitate and improve effective access to justice for consumers, the European Commission adopted EU Regulation No 524/2013 regarding online dispute resolution for consumer disputes.⁴⁰ This legislative instrument enables consumers and businesses to submit their disputes — which arise from e-commerce transactions — to the established EU ODR Platform.⁴¹ This Platform includes a list of approved mediation service providers across the EU. Consumers and traders can submit their complaints in their preferred language and select a mediator from this list.⁴²

The launch of the EU ODR platform has raised consumers and traders' awareness of ADR methods. Nevertheless, this instrument has not made significant inroads in providing an effective access to justice for consumers. Some of its major bottlenecks include limiting the use of this instrument to disputes arising from online transactions; the lack of possibility to conduct the entire process on the Platform; insufficient technological user-friendliness, specifically for vulnerable users; as well as the lack of automatic case referral to the competent MSPs.⁴³ Nevertheless, in our viewpoint the main deficiency refers to the fact that the Platform is limited to functioning as a bridge that connects disputants to mediators.

Despite these criticisms, the EU ODR Platform has great potential to function as a well-established and stand-alone ODR system. However, improvements are crucial to further develop the Platform from a mere referral point to a trustworthy and efficient ODR system. This mechanism has indeed the

³⁸ Arjan Kumar Sikri, 'Mediation: Means of Achieving Real Justice in Consumer Disputes' (2017) 5 IJCLP 1; Jie Zheng, *Online Resolution of E-Commerce Disputes: Perspectives from the European Union, the UK, and China* (Springer Nature 2020).

³⁹ Pablo Cortés, 'Accredited online dispute resolution services: creating European legal standards for ensuring fair and effective processes' (2008) 17 (3) Information & Communications Technology Law 221, 227.

⁴⁰ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

⁴¹ 'Online Dispute Resolution, | European Commission' <<https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase>> accessed 20 June 2022.

⁴² See Marco Giacalone and Sajede Salehi, 'Online dispute resolution: the perspective of service providers' in Francesco Romeo, Marco Dall'Aglio, and Marco Giacalone (eds), *Algorithmic Conflict Resolution* (Torino G. 2019).

⁴³ Fernando Esteban de la Rosa, 'Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes: The Achilles' Heel of the EU ODR Platform' (2017) 4 IJODR 26, 29.

potential to host the entire dispute resolution process between consumers and traders in a single forum.

There are some other examples of ODR service providers in the EU that are specifically focused on offering e-mediation for various types of disputes.⁴⁴ Within the framework of civil and commercial matters, *Youstice* and *e-POM* are the two prominent online mediation service providers.

The Slovakia-based *Youstice* was founded in 2014 with the aim of dealing with large volumes of small C2B claims which arise from online or offline purchases of goods and services. *Youstice* enables consumers and traders to experience a simple ODR process through a tiered negotiation-mediation dispute resolution model.⁴⁵ In a similar approach to *e-Bay*, parties begin the process with direct negotiation. If they fail to reach an agreement in the first phase, either party can request to advance the case to the next level, which is online mediation. The disputants can choose a mediator from the list of accredited MSPs provided by the *Youstice platform*.⁴⁶

Similarly, *e-POM* was established in the Netherlands in 2020 as a European Platform that offers e-mediation services to business parties. The eligible users are online platforms in relation with their business customers. The process begins by submitting a request for mediation to the *e-Pom* system. The applicant must provide the necessary details about the parties and the dispute and upload the relevant documents. In the next step, the requesting party must select a suitable mediator for the process. The competent professional mediators — from all EU jurisdictions — are listed on the *e-POM* platform. The chosen mediator invites the other business party to participate in the mediation process. Upon acceptance of this invitation, the process begins by the mediator holding individual and confidential videoconference sessions with each party. In the final phase, the mediator holds a joint online meeting to assist the parties to reach an amicable settlement.⁴⁷ The mediation agreement settlement that is issued by the *e-POM* accredited mediator and signed by both parties is legally binding. According to the *e-POM* website, this e-mediation service provider has achieved a 95 percent success rate in resolving disputes within a six-weeks' timeframe from start to finish.⁴⁸

⁴⁴ For example, *Uitelkaar.nl* in the Netherlands is particularly focused on providing Online mediation for family disputes. See Laura Kistemaker, 'Rechtwijzer and Uitelkaar.NL. Dutch Experiences with ODR for Divorce' (2021) 59 Family Court Review 232.

⁴⁵ Cortés (n 20) 54-5.

⁴⁶ 'MEET YOUSTICE | ODR – Online Dispute Resolution' <<http://www.odreuope.com/meet-justice>> accessed 20 June 2022.

⁴⁷ 'E-Pom' <<https://e-pom.eu/>> accessed 20 June 2022.

⁴⁸ *ibid.*

2. MEDIATION IN EU: PERSPECTIVES FROM FRANCE, ITALY, AND BELGIUM

Over the last two decades, the EU legislator has taken major policy measures in promoting the use of non-litigious methods for the resolution of civil and commercial disputes on the continent.⁴⁹ The significance of promoting the use of ADR methods is reflected in Directive 2013/11/EU on alternative dispute resolution for consumer disputes.⁵⁰ The fundamental objective of this legislation is to facilitate access to justice for consumers by encouraging the use of amicable models of dispute resolution, including mediation. It also aims at safeguarding a balanced connection between ADR and litigation. This legal instrument explicitly indicates that the Member States must take appropriate measures to enshrine consumers' rights to have access to effective ADR methods including mediation.⁵¹

At the Member State level, the national policymakers have taken relevant measures to encourage the application of mediation in civil and commercial disputes within their respective jurisdictions. These legal provisions aim for tackling the existing case backlogs and delays in delivering justice by courts on the one end and improving effective access to justice for citizens on the other. In the section that follows, we discuss the relevant regulatory measures taken by the national legislators in France, Italy, and Belgium to promote the application of mediation as part of their civil justice systems.

2.1. France

In France, the first fundamental efforts to regulate civil and commercial mediation refer to the enactment of the Law no. 95-125 in 1995.⁵² Through the adoption of this legislation, the mediation rules were officially introduced into France's Code of Civil Procedure (CCP). In 2011, the EU Mediation Directive of 2008 was transposed into the national laws of the country.⁵³ This transposition led to major — and gradual — modifications in the national

⁴⁹ Christopher Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll and others (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Nijhoff 2014) 364.

⁵⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

⁵¹ Marta Poblet and Graham Ross, 'ODR in Europe' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (2nd ed, Eleven Intl. Publishing 2021).

⁵² Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative <<https://www.legifrance.gouv.fr/loda/id/LEGISCTA000024808651>> accessed 20 June 2022.

⁵³ Through Ordinance n°2011-1540 of November 16th, 2011 on reform of civil justice system <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000024804839/>> accessed 20 June 2022.

legal framework for mediation. The major objective was to maintain a harmonious balance between litigation and ADR mechanisms.⁵⁴

In France, mediation is optional in most areas of law. Nevertheless, in the recent efforts to reform the civil justice system, as of January 2020 mediation is mandatory in certain types of disputes.⁵⁵ As the result, in small claims with a monetary threshold of 5,000 euros, and some neighbourhood disputes⁵⁶, the parties are required to attempt mediation prior to going to court.

With respect to the definition of mediation under the French legal framework, Article 21 of Law no. 95-125 states that mediation is '*any structured process by which two or more parties attempt to reach an agreement for the amicable resolution of their disputes, with the assistance of a third party, the mediator, selected by them or appointed, with their agreement, by the judge hearing the dispute.*'⁵⁷ Accordingly, mediation is considered as a 'structured' process. As we have already discussed in Section 1, from our standpoint considering mediation as a 'structured' process may be in contradiction with its main features including flexibility and party control over the process. Against this backdrop, as a possible response to this criticism one may argue that this definition merely encompasses judicial or court-annexed mediation. Therefore, it excludes the contractual form of mediation which is based on the parties' free will without any judicial intervention.⁵⁸

It is critical to note that under the French CCP, there are two forms of mediation: contractual and judicial. Contractual or conventional mediation — which is stipulated within Articles 1530 to 1535 of the French CCP — refers to a fully voluntary process that parties conduct to settle their dispute without referring to a court.⁵⁹ In contrast, judicial mediation — as provided for in Article 131-1 to 131-15 of the French CCP⁶⁰ — is directly connected to the

⁵⁴ Hatanaka Asako Wechs, 'Optimising Mediation for Intellectual Property Law — Perspectives from EU, French and UK Law' (2018) 49 (4) *IIC — International Review of Intellectual Property and Competition Law* 384, 392.

⁵⁵ Under LOI no 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice <<https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000036830320/>> accessed 20 June 2022.

⁵⁶ Including disputes that arise from nuisance, boundary issues, easements, plantations, hedges or pruning, tree maintenance, ditch cleaning, and so forth. See LOI no 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice <<https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000036830320/>> accessed 20 June 2022.

⁵⁷ In France, there is no particular legislative framework to regulate the role and functions of mediators in civil and commercial disputes, nor any statutory system or regulatory body for accreditation of mediators in civil and commercial matters (except for family law cases and consumer disputes). Despite this, Law no. 2016-1547 of November 2016 on the modernisation of the French justice system stipulates that each court of appeal can publish a list of mediators in various civil and commercial matters for the information of the judges.

⁵⁸ Irina Nainodina, 'Court-annexed and Contractual Mediation in France' (2015) 4 *Russian Journal of Comparative Law* 140.

⁵⁹ See French CCP at <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA000025181124/#LEGISCTA000025181172> accessed 20 June 2022.

⁶⁰ *ibid.* at <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA000006117226/#LEGISCTA0000030360395> accessed 20 June 2022.

court-order which mandates that the parties attempt mediation. To enforce a mediation settlement in France⁶¹, both parties, or one with the consent of the other, can apply to the competent court for homologation of this agreement.⁶²

As regards the status of applying civil and commercial mediation in France, the recent regulatory developments demonstrate the French legislator's tendency towards promoting the use of this ADR mechanism. Nevertheless, some critics have questioned the lack of sufficient distinction between mediation and conciliation under the French CCP. In response to this criticism, scholars have taken two different standpoints. While the first approach considers mediation and conciliation as the same processes, the other perceives them as two distinct forms of ADR. In this sense, it is indispensable that the French legislator should draw a clear legal distinction between these two ADR models, most importantly to avoid any procedural uncertainties.⁶³

2.2. Italy

In Italy, Legislative Decree no. 28/2010 transposed the EU Mediation Directive into the national law of the country.⁶⁴ This was the first general regulation of civil and commercial mediation introduced to the country civil justice system. This legislation contemplated four different forms of mediation: voluntary mediation that can be envisioned and implemented at any stage of the dispute; judicial mediation where the judge — upon evaluation of the case — proposes that the parties attempt mediation; contractual mediation in which the parties are bound by virtue of a statutory clause; and finally, obligatory mediation.⁶⁵ The most significant characteristic of this new law was the establishment of mandatory non-judicial mediation for a wide array of civil and commercial matters. Accordingly, the first and final stages of the mediation process are mandatory as a pre-condition to begin with judicial proceedings. This mandate reveals the strong motivation of the legislator to provide an effective solution to the huge case backlogs in the national courts.⁶⁶

Mandatory mediation was declared unconstitutional, and the Italian Constitutional Court revoked it in 2012. However, in less than a year, with a major amendment to the Legislative Decree, mandatory mediation was reintroduced to the legal system. Since the 2013 amendment, the opt-out mandatory

⁶¹ This is regardless of judicial or conventional form of mediation.

⁶² Zheng (n 38) 304.

⁶³ Nainodina (n 58) 146.

⁶⁴ Gina Gioia, 'L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori' (2018) 1 *Revista Ítalo-española De Derecho Procesal* 501, 509.

⁶⁵ Luigi Cominelli and Arianna Jacqmin, 'Civil and commercial mediation In Italy: Lights and Shadows' (2020) 22 *Revista de EMERJ: Escola da Magistratura do Estado do Rio De Janeiro* 11, 12.

⁶⁶ Giovanni Matteucci, 'Mandatory Mediation, The Italian Experience' (2015) 16 *Revista Eletrônica de Direito Processual* 194.

model of mediation⁶⁷ covers a wide array of civil and commercial disputes including property, insurance, banking, and division of assets.⁶⁸ In the most recent regulatory initiative to reform the civil justice system of Italy, the Parliament passed Law no. 206 in November 2021.⁶⁹ This Act extended the scope of mandatory mediation as a pre-litigation step to new categories of civil and commercial claims.⁷⁰

Under the Italian model of mandatory mediation, parties are obliged to participate in the ‘initial’ mediation meeting. During this introductory session, the mediator⁷¹ provides the parties with general information about the process, the advantages, and the potential consequences.⁷² Then, parties are free to decide either to continue with mediation or to refer to the court.

As regards the definition of mediation, Legislative Decree no. 28/2010 (as amended in 2013) has defined this term as *‘the activity, whatever its name, carried out by an impartial third party aiming at assisting, two or more parties in the search of an agreement to settle a dispute, even with the formulation of a proposal to solve that same dispute’*. This definition entails two forms of mediation: facilitative and evaluative. Facilitative mediation refers to a process in which the mediator assists the parties through validating their viewpoints

⁶⁷ In the Italian model of mediation, the first meeting is only mandatory. Thus, some scholars have referred to this system as a ‘quasi-mandatory mediation’. See Vittorio Indovina, ‘When Mandatory Mediation Meets the Adversarial Legal Culture of Lawyers: An Empirical Study in Italy’ (2020) 26 Harv Negot L Rev 69.

⁶⁸ Legislative Decree no. 28/2010 and Ministerial Decree no. 180/2010 ruled mandatory mediation in the following civil matters: property (diritti reali), lease (locazione), insurance contracts (contratti assicurativi), partition (divisione), wills and inheritance (successioni ereditarie), medical malpractice damages (risarcimento danni da responsabilità medica), financial contracts (contratti finanziari), loans (comodato), business rents (affitto di azienda), libel (risarcimento da diffamazione a mezzo stampa), family covenants and agreements (patti di famiglia). See Giovanni Matteucci, ‘Mediation and Judiciary in Italy 2019’ (2020) 21 (1) Revista Eletrônica de Direito Processual 106; Giovanni Matteucci, ‘Mandatory Mediation, The Italian Experience’ (2015) 16 Revista Eletrônica de Direito Processual 194.

⁶⁹ This legislation mainly aims at improving effectiveness of civil trials by expediting the proceedings and accelerating digitalization of the civil justice system. See LAW 26 November 2021, n. 206 on Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of alternative dispute resolution tools and urgent measures to rationalize procedures on the rights of persons and families as well as on enforcement. (21G00229) (OJ General Series n.292 of 09-12-2021) <<https://www.gazzettaufficiale.it/eli/id/2021/12/09/21G00229/sg>> accessed 20 June 2022.

⁷⁰ According to Article 1 (c) of the Law n. 206, the scope of mandatory mediation is extended to the disputes arising from procurement, franchising, network, administration, and partnership agreements. See *ibid*.

⁷¹ According to Legislative Decree no. 28/2010, civil and commercial mediation can be only offered by the accredited individual and/or institutional mediators registered with the Ministry of Justice. This list can be found at ‘Ministero della Giustizia: Organismi di mediazione’ <https://www.giustizia.it/giustizia/it/mg_3_4_15.wp> accessed 11 June 2022. See Mykola Logvynenko and Iryna Kordunian, ‘Registers of Mediators in Europe: Comparative and Legal Analysis’ (2021) 2 *Baltic Journal of Legal and Social Sciences* 81 <<https://doi.org/10.30525/2592-8813-2021-2-9>> accessed 10 June 2022.

⁷² In Italy, the establishment and function of mediation service providers — in the context of mandatory civil and commercial mediation — are mainly regulated by Legislative Decree no. 28/2010 and Ministerial Decree no. 180/2010. See Pierra Pellegrinelli, ‘The Management of a Mediation Organization According to the Italian Law’ (2012) 3 (4) *Beijing Law Review* 184.

and interests to find and analyse solutions to a dispute.⁷³ In contrast, in evaluative mediation, the mediator helps the parties to find a solution to their dispute. Further, the mediator clarifies the weaknesses of the case and most significantly gives his/her opinion as to the likely outcome of litigation.⁷⁴ The evaluative model is generally used in court-connected mediation. While the facilitative form is principally focused on the voluntary nature of mediation and party control over the outcome, the evaluative mediation emphasises the legal rights of the parties.⁷⁵ The Italian legislator has principally aimed for facilitative mediation because the provided definition explicitly specifies that the mediator assists parties to find solutions and reach an agreement.⁷⁶

The enforcement of mediation settlement agreements is stipulated within Article 12 of the amended Legislative Decree of 2013. Accordingly, in cases where the disputants are assisted by lawyers and the settlement is signed by all the involved parties, such an agreement is enforceable without any necessity for homologation. In contrast, if the parties are self-represented in the mediation process, they can — together or one with the consent of the other — request the competent court to homologate the mediation agreement settlement.⁷⁷

At present, according to the official statistics, the Italian model of mandatory first mediation session in civil and commercial matters has achieved a high rate of success.⁷⁸ The most remarkable impact of this opt-out mediation model can be observed in reducing the huge case backlogs in the national courts. The legislator's approach towards adopting a mediation system design which is initially mandatory has provided disputants with an opportunity to get familiar with mediation. This provides the parties with a possibility to settle their dispute in an amicable manner. This system can be a prominent example to be considered by other civil justice systems in the EU.

2.3. Belgium

In Belgium, civil and commercial mediation was regulated by the Belgian Mediation Act of 2005.⁷⁹ This legislation was added to part VII of the Belgian

⁷³ Zena Zumeta, 2014. 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' <<https://www.mediate.com/articles/zumeta.cfm>> accessed 20 June 2022.

⁷⁴ Scott H. Hughes, 'Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One' (1998) 59 *The Alabama Lawyer* 246.

⁷⁵ Zumeta (n 73).

⁷⁶ Alessandra De Luca, 'Mediation in Italy: Feature and Trends' in Carlos Esplugues and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Springer International Publishing 2015) 348.

⁷⁷ *ibid* 350-60.

⁷⁸ Matteucci (n 66).

⁷⁹ The Belgian Mediation Act of 2005 also regulates the role and function of mediation service providers in Belgium.

Judicial Code (BJC).⁸⁰ This Act is applicable to all types of disputes — including civil and commercial cases — on a completely voluntary basis. Integrating mediation rules into the BJC is a clear indicator of the intention by the Belgian legislator to improve the use of ADR as part of the civil justice system of the country.⁸¹ In 2018, the legislator exerted a stronger will by encouraging judges to promote the use of amicable dispute resolution methods within civil proceedings. This amendment also emphasised the role and responsibilities of lawyers and judicial officers for raising parties' awareness of mediation as an alternative to litigation.

With respect to the definition of mediation, prior to the reform of the law in 2018 this term was not defined by the Belgian legislator. Currently, Article 1723/1 of the BJC refers to mediation as '*a confidential and structured process of voluntary consultation between conflicting parties that takes place with the assistance of an independent, neutral, and impartial third party that facilitates communication and attempts to lead the parties to develop a solution on their own*'. This definition embodies several distinctive characteristics of mediation including its confidential, voluntary, and facilitative nature. This legislative reform also distinguished between out-of-court (or voluntary) and judicial mediation.⁸² Article 1730 of the BJC states that voluntary mediation is an out-of-court process freely chosen by disputants. This form of mediation is implemented without any signal or intervention from the judge either prior, during, or after judicial proceedings.⁸³ Conversely, Article 1734/1 of the BJC refers to the judicial mediation in which the judge at the joint request of the parties or on his/her own initiative — but with the disputants' agreement — orders mediation in a pending judicial proceeding.⁸⁴

The enforcement rules of mediation settlements are provided by Article 1733 of the BJC. Accordingly, where the mediation was conducted by an accredited mediator, the written and signed settlement agreement can be presented to the competent judge for homologation.⁸⁵ However, if the mediation

⁸⁰ See Articles 1724 to 1737 of BJC, 10 OCTOBRE 1967. -CODE JUDICIAIRE. - Septième partie : LA MEDIATION (art. 1724 à 1737) Inséré par L 2005-02-21/36, art. 8 à 21; ED : 30-09-2005, sauf art. 11; ED : 22-03-2005, 'LOI - WET' <shorturl.at/cvNVZ> accessed 20 June 2022.

⁸¹ Piet Taelman and Stefaan Voet, 'Mediation in Belgium: a Long and Winding Road' in Carlos Esplugues and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Springer International Publishing 2015) 92.

⁸² Liesbet Deben, 'The New Belgian Mediation Rules of 2018, a Revolution for Commercial Dispute Settlement or a Measure in Vain?' in Koen Byttebier and Kim Van der Borgh (eds) *Law and Sustainability. Economic and Financial Law & Policy – Shifting Insights & Values*, (vol 6. Springer 2021) 210-12 <https://link.springer.com/chapter/10.1007/978-3-030-92620-5_8> accessed 04 July 2022.

⁸³ Ivan Verougstraete, 'The Belgian law on mediation' in Institut de Formation Judiciaire (ed). *Family mediation and guidance in crossborder disputes within the EU: How to improve practices?* (Institut de Formation Judiciaire 2012) 43.

⁸⁴ Deben (n 82).

⁸⁵ In Belgium, the accreditation and registration of mediators is carried out by the Belgian Federal Mediation Commission. The list of accredited mediators can be found at 'Commission fédérale de médiation' <<https://www.cfm-fbc.be/fr/trouver-un-mediateur>> accessed 12 June 2022.

was conducted by a non-accredited mediator, the settlement agreement can be only enforced by a notary.⁸⁶

Despite the regulatory measures implemented to improve the use of mediation in Belgium, it remains difficult to draw a conclusion on the effectiveness of these initiatives.⁸⁷ This is mainly due to the lack of sufficient access to the official statistics on the use of mediation in this Member State. The still high volume of disputes in national courts, however, reveals that these measures have not achieved considerable success in promoting the use of mediation in resolving civil and commercial disputes.⁸⁸

2.4. Conclusions on Jurisdictions

In a nutshell, this section reviewed that EU regulatory initiatives have played an important role in encouraging the Member States to promote the use of mediation, particularly in civil and commercial matters. With respect to e-mediation, it has been explained that the EU legislator established the first EU ODR Platform aiming at encouraging the use of online ADR in cross-border C2B disputes. The Platform can be considered a remarkable initiative for reinforcing the application of mediation across the Union. Nevertheless, further improvements are needed to turn this instrument from a mere referral point into a stand-alone ODR system. This improvement will enable disputants to conduct the entire process on a single platform.

It was also presented that mediation — either in a contractual or court-connected form — has been practiced for many years in France, Italy, and Belgium. It was concluded that the Italian model of an opt-out mandatory first mediation session has succeeded in reducing the case backlog in national courts. In Belgium, given the recent reforms in the law, the national legislator has declared the evident intention to improve the use of mediation in civil and commercial matters. However, the present workload of the courts reveals that embracing the mediation culture should be pursued as a long-term objective in this Member State. It was also discussed that the existing legal framework for mediation in France should be subject to further improvements. It was especially argued that to avoid any procedural uncertainties, the national legislator should clearly distinguish between mediation and conciliation in relevant legislative instruments. This distinction must be specifically drawn by considering the fundamental differences between mediation and conciliation, including the role of the neutral third party. In this respect, whereas the mediator only facilitates the course of negotiation between the disputants to

⁸⁶ Zheng (n 38) 305.

⁸⁷ The last official data regarding the number of mediations in Belgium can be found in Verougstraete (n 84).

⁸⁸ Taelman and Voet (n 81) 92-3; Alex Tallon, 'De rechtstoegang en de bemiddeling' in Edgard Boydens and Roger De Baerdemaeker (eds) *Justitie: Vraagstukken en perspectieven voor morgen* (Antemis Limal 2013).

reach an agreement, the conciliator is allowed to provide parties with advice on the substance of the subject matter by issuing formal recommendations. Another important distinguishing criterion refers to the interest-based nature of mediation — since the main objective is to meet the real interests of the parties — against the right-based nature of conciliation — in which the major focus is placed on the legal rights of the disputants.⁸⁹

Finally, online mediation is also practiced in France, Italy, and Belgium. However, very few studies have investigated the application and effectiveness of e-mediation from the perspective of MSPs in these jurisdictions. On this account, one of the major objectives of this empirical study was to investigate the status of practicing online mediation and its efficiency in these Member States.

3. EMPIRICAL RESEARCH METHODOLOGY

The empirical part of the present study attempts to gain a profound understanding of the status and implementation of mediation in civil and commercial disputes in France, Italy, and Belgium. This paper also aims at identifying the key themes (effectiveness, application of online mediation, the challenges, and the future perspective) in carrying out civil and commercial mediation from the perspective of MSPs. In this respect, we adopted a qualitative research methodology using open-ended surveys⁹⁰ and semi-structured expert interviews. This research method was adopted to enrich the acquired data, provide a more in-depth analysis, and better interpret the results of the surveys through the findings of the qualitative phase.⁹¹ This approach was already used by Filler (2012) in comprehensive empirical research to investigate applied mediation in commercial disputes in Europe.⁹²

The empirical research method was implemented in two consecutive phases. In the first phase, the open-ended surveys were used in particular to help us understand the findings of the theoretical section. This step provided a real perspective on the practice of mediation by MSPs from a general perspective and helped us to better design the interview questions.⁹³ In the second phase, we carried out the semi-structured expert interviews to pro-

⁸⁹ The Law Reform Commission, 'Alternative Dispute Resolution: Mediation and Conciliation: Report' (November 2010) 17-18 <https://www.lawreform.ie/_fileupload/reports/r98adr.pdf> accessed 20 June 2022.

⁹⁰ In this study, the terms 'survey' and 'questionnaire' are used interchangeably. See Nicholas Harland and Elizabeth Holey, 'Including Open-Ended Questions in Quantitative Questionnaires—Theory and Practice' (2011) 18 *International Journal of Therapy and Rehabilitation* 482.

⁹¹ Rob Timans, Paul Wouters, and Johan Heilbron, 'Mixed Methods Research: What It Is and What It Could Be' (2019) 48 *Theory and Society* 193.

⁹² Filler Ewald A., *Commercial Mediation in Europe: An Empirical Study of the User Experience* (Kluwer Law International BV 2012); Fahimeh Abedi, John Zeleznikow, and Emilia Bellucci, 'Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes' (2019) 27 (3) *International Journal of Law and Information Technology* 209.

⁹³ Timans, Wouters, and Heilbron (n 91).

vide more in-depth insights about mediation in the studied jurisdictions. This stage enabled us to investigate the implicit dimensions of expert knowledge and utilise them in generating theories based on the collected data.⁹⁴

The main driving factor for selecting these Member States refers to the authors' well-established academic and professional network in these countries. This choice particularly assisted us to connect to the most renowned MSPs more effectively in each jurisdiction at the time of the pandemic.

3.1. Open-ended Surveys

3.1.1. Research Design and Data Collection

In the initial phase of this empirical research, we used open-ended surveys to explore the status and implementation of mediation by MSPs in civil and commercial disputes in general.⁹⁵ The questionnaires requested textual and numerical information from the respondents.⁹⁶ The advantage of using open-ended questions was to provide the participants with opportunities to provide a wide range of responses and to express their opinions freely. Further, some of the given answers included unexpected data that assisted us in designing more elaborated questions for the semi-structured expert interviews in the second phase of the empirical research.⁹⁷

A series of open-ended questions were designed in two sections (see *Appendix A*). The initial part aimed at obtaining numerical data, e.g., the number of submitted and concluded cases, as well as the duration of mediation. The second section, however, was particularly focused on mediation process-related elements. These factors included instruction and providing guidance to parties; barriers against conducting effective mediation; online mediation and the ICT tools used in carrying out the process; and finally, evaluating user-friendliness of the provided services to their clients.

The survey was originally designed in English and was translated into French and Italian. Conducting a multilingual survey allowed us to make the questions more easily comprehensible in the native language of the participants.⁹⁸

⁹⁴ Stefanie Doeringer, 'The Problem-Centred Expert Interview, Combining Qualitative Interviewing Approaches for Investigating Implicit Expert Knowledge' (2021) 24 (3) *International Journal of Social Research Methodology* 265, 267.

⁹⁵ Robert K. Yin, *Case study research: Design and methods* (Fifth ed, SAGE 2014).

⁹⁶ Cornelia Züll, 'Open-Ended Questions. GESIS Survey Guidelines' (2016) GESIS Leibniz Institute for the Social Sciences 1; Onofrio Rosario Battaglia and Benedetto Di Paola, 'A Quantitative Method to Analyse an Open-Ended Questionnaire: A Case Study about the Boltzmann Factor' (2015) 38 *Il nuovo cimento C* 1.

⁹⁷ Michael R. Hyman and Jeremy J. Sierra, 'Open- versus Close-Ended Survey Questions' (2016) 14 *NMSU Business Outlook*, 3.

⁹⁸ Yuling Pan and others, 'Multilingual survey design and fielding: Research perspectives from the US Census Bureau' (2014) *Statistical Research Division Study Series* (Survey Methodology 2014-01) 7 <<https://www.census.gov/srd/papers/pdf/RSM2014-01.pdf>> accessed 20 June 2022.

The targeted MSPs were identified through several sources. For example, from our academic and professional network of mediators, from the list of approved ADR bodies on the EU ODR Platform⁹⁹ and using the Google search engine.¹⁰⁰

The questionnaires were distributed via e-mail among the invited MSPs in France, Italy, and Belgium within a three-months timeframe.¹⁰¹ The invitees have expertise in civil and commercial mediation. In the invitation e-mail, the research project, and the purpose of conducting the survey was briefly and clearly explained to the invitees. Further, all the participants were ensured that we take all the adequate and necessary measures to protect the privacy and anonymity of the data subjects at all stages of this research.¹⁰²

Member State	Number of surveys sent	Number of returned surveys	Response rate, %
France	59	8	13.5
Italy	37	4	10.8
Belgium	45	6	13.3
Total	141	18	12.7

Figure 1. The number of MSPs invited/participated in the survey

As shown in Figure 1, the total number of 141 MSPs were invited to take part in the survey. The Table illustrates that surprisingly only 12.7 percent of who were sent invitations filled in and returned the questionnaire. The returned surveys yielded a 13.5% response rate for France, 10.8% for Italy, and 13.3% for Belgium. Despite two reminders to the invitees to participate in the survey, the overall response to the questionnaire was poor compared to the total number of distributed invitations. In this sense, approximately half of the contacted MSPs never responded to the email invitations. Some other invited entities indicated that they are unwilling to participate in the survey due to busy work schedules; lack of sufficient experience with the content of the survey; and confidentiality of their data.

Above all, it is critical to indicate that the outbreak of the COVID-19 pandemic and its unprecedented challenges to face-to-face interactions have also played a significant role in the low response rate to the survey. During the pandemic, MSPs were forced to abruptly shift to an entirely online mediation

⁹⁹ See 'Online Dispute Resolution | European Commission' <<https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>> accessed 20 June 2022.

¹⁰⁰ In using Google search engine, the eligible MSPs for the purpose of this research were identified matching the following parameters: i) the respective jurisdiction of the MSPs was either in France, Italy, or Belgium; ii) they had expertise in conducting civil and commercial mediation; iii) they had more than five years of experience in conducting civil and commercial mediation.

¹⁰¹ From June to August 2021.

¹⁰² Sheng Zhong and Zhiqiang Yang, 'K-Anonymous Data Collection' (2009) 179 *Information Sciences* 2948.

service. This sudden change deeply immersed these entities in getting used to the 'new normal' procedures specifically in relation to technicalities.

Once the surveys collection was completed, the acquired data were accordingly analysed. The result was then visualised in graphical figures to provide a more developed and precise understanding of the research for readers.

3.1.2. *Results and Analysis*

The first set of questions on the survey aimed at gathering statistical and descriptive data. Accordingly, the survey inquired about the number of filed mediation applications, the total number of concluded cases, and the length of mediation process. This part enabled us to find the success rate of mediation in civil and commercial disputes. Further, the descriptive data assisted us to ensure reliability of the provided data by the MSPs according to the degree of their engagement and expertise with civil and commercial mediation.

Statistical data — The responses to the question on the yearly average number of filed mediations and the number of settled cases reported that in Belgium and Italy there is approximately a 85% success rate for parties to reach a settlement. In France, the surveyed MSPs reported that 75% of the initiated mediations reach the final stage where a settlement agreement is issued. Overall, these figures indicate that mediation has been successful in providing parties with an opportunity to reach a solution. Significantly, several surveyed MSPs indicated that the success rate of voluntary mediation is much higher in comparison with court-ordered mediation.¹⁰³

Next, the participants were asked whether the outbreak of the COVID-19 pandemic has had any impact on the number and types of referred cases for mediation. Only a small percentage (approximately 16%) of the responses reported their mediation services have not been affected by the pandemic. In contrast, most participants (nearly 84%) agreed that the pandemic has had a great impact on MSPs. They referred to the exponential growth in the number of cases as well as the dramatic increase in the use of online mediation.

The overall responses of the participants demonstrated that the pandemic has substantially increased the number of requests for civil mediation particularly for divorce and child custody. Nevertheless, the majority of referred cases to mediation were consumer complaints arising from bookings of holiday packages. Some of the participants explicitly referred to the constantly changing COVID-19 measures by the authorities that have caused many cancelled holidays bookings. As the result, consumers invoke the argument of *force majeure* to request dissolution of a contract or to postpone its enforce-

¹⁰³ This finding led us to specifically investigate into the impact of mandatory mediation, and its effectiveness in civil and commercial disputes as one of the main themes of the next section on conducting the semi-structured expert interviews.

ment. On the other hand, businesses were reluctant to refund their clients due to the binding nature of relevant contracts. Therefore, many of these C2B disputes were referred to mediation during the pandemic.

Processing time — The MSPs reported various timeframes for the mediation process. As shown in Figure 2, Belgium has the shortest processing time with maximum two months per case. This should be noted that the collected data revealed that there is a correlation between the size of an MSP and the proceeding time. Large MSPs have access to more employees and human resources, thence the mediation process is more expedited compared to small-sized MSPs. The responses also indicated that large MSPs are mostly in close collaboration with consumer protection centres which play a remarkable role in two aspects: encouraging consumers to attempt mediation; and referring consumers to accredited MSPs.

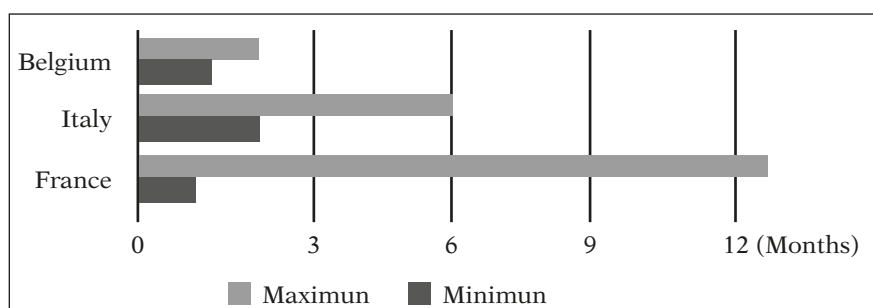


Figure 2. Minimum and maximum processing time for mediation

The second set of questions concentrated particularly on the mediation process with respect to understanding the elements that play a pivotal role in the effectiveness of this process. It should be noted that this part is mainly focused on the essence of the mediation process regardless of any specific jurisdiction.

Instruction and guidance — The MSPs were asked a twofold question. Firstly, the participants were questioned whether they give parties instructions on how the mediation process works. The responses revealed that approximately 90% of the participants provide instructions for their clients prior to the session. This information relates to the procedure, the code of ethics, and legal consequences of agreement and/or disagreement. The MSPs who offered online mediation reported that they also give the parties detailed instructions on how to use the specific ICT tools — e.g., a videoconference software — prior to the mediation session. The second question targeted the MSPs' preferred means of communication in connecting to their clients. The responses revealed that to communicate information, the MSPs use 'face-to-face information sessions; telephone calls; e-mail; the MSP's website; video-tutorials; and mail.

Barriers impeding effective mediation process — When the participants were asked about the major obstacles faced in conducting mediation, they reported several hurdles that prevent parties to reach an amicable settlement. As illustrated in Figure 3, most respondents referred to parties' lack of awareness about the advantages of mediation and how it works; the lawyers' low degree of collaboration; the parties' negative attitude towards mediation; and the inadequate training for mediators.

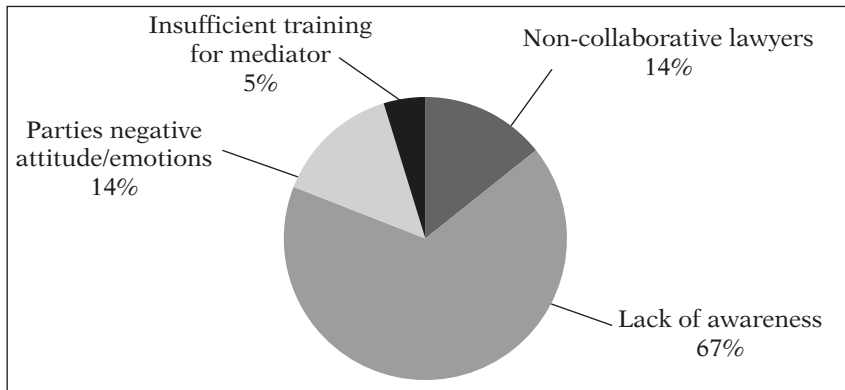


Figure 3. Major barriers in conducting an effective mediation

As the pie chart above shows, the parties' lack of knowledge of the mediation process and its advantages is the primary obstacle to the efficiency of mediation. As reported by one MSP, the parties must be properly informed of the benefits of mediation as a simple, cost-effective, and expedited dispute resolution method compared to litigation. This is necessary to raise awareness of mediation in C2B disputes because most consumer complaints involve low-pecuniary threshold claims. Another respondent commented that sufficient knowledge of mediation can overcome parties' mistrust in this process and reduce fear of the subsequent legal consequences. It was also indicated that it is necessary to inform parties that mediation is not a 'just-talking' process. In fact, mediation facilitates reaching an amicable settlement.

As regards the role of lawyers, several responses reported that non-trained lawyers play a destructive role in the mediation process. The overall responses explicitly pointed out that non-collaborative and non-trained lawyers consider mediation as an unnecessary and time-wasting step to seek the rights of their clients. According to the surveyed MSPs, lawyers perceive mediation as a threat to their profession.

Online Mediation — This part of the survey investigated the application of online mediation by the MSPs. A minority of the participants (approximately 22%) reported that they never used e-mediation within their practice. They reported that conducting online mediation requires access to sufficient and complicated infrastructures which only prolongs the processing time. In addition, they commented online communications lack body language

and non-verbal cues, particularly facial expressions and gestures. Therefore, e-mediation is not as effective as face-to-face mediation.¹⁰⁴

It should be, however, considered that the overall responses to this question was positive. Almost 78% of the participants reported they use online mediation within their practice. One participant reflected that e-mediation provides parties with an opportunity to mediate at their convenience and comfort. As a result, in online mediation individuals have more confidence compared to its in-person format. Another surveyed MSP maintained that considering the pandemic and the subsequent mobility restrictions, e-mediation is currently viewed as a necessity. The extensive use of this ODR method proved to be a more convenient instrument in comparison to face-to-face mediation.

The respondents were also asked to explicitly clarify what specific ICT tools they use for conducting mediation (See Figure 4.).

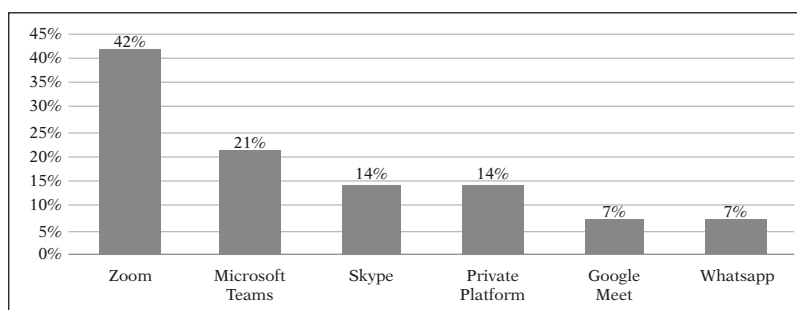


Figure 4. ICT tools used for conducting online mediation

User-friendliness of mediation services — It is critical to note that the concept of ‘user-friendliness’ in this research is used in a non-tech context¹⁰⁵, and only relates to the services offered by MSPs.

This final question had a twofold purpose. Firstly, it investigated how MSPs ensure their mediation services are user-friendly towards their clients. As illustrated in Figure 5, the overall responses to this question enabled us to identify various indicators used by the MSPs in measuring user-friendliness of their services.

Secondly, the surveyed MSPs were asked whether they conduct any satisfaction survey to collect feedback on user-experience with the quality of

¹⁰⁴ See Joel B. Eisen, ‘Are We Ready for Mediation in Cyberspace?’ [1998] Brigham Young University Law Review 1305.

¹⁰⁵ According to Borgman (1986), the concept of ‘user-friendliness’ is not limited to its application to a human-machine interface. She believes that by using ‘user-friendliness’ as a characteristic of an item in a non-tech context, we refer to an entity which creates comfort for the one who uses that item. See Christine L. Borgman, ‘Toward a definition of user friendliness: A psychological perspective’ (1986) *UCLA Journal* 29.

mediation services. Gathering feedback from clients is a main factor in measuring the effectiveness of the offered services by MSPs. Surprisingly, almost 44% of the participants reported that they do not collect any user feedback. Nevertheless, some of the responses showed that they occasionally receive e-mails from the parties who express their satisfaction with the mediation service.

Mediator-to-party factors	Mediator-oriented factors	Mediation process factors
<ul style="list-style-type: none"> – Holding separate meetings with each party – Connection and reception by mediator towards parties – Room facilities (e.g., comfortable seat, adequate ventilation, hot/cold drinks, etc.) – Ensuring each party has the opportunity to move to a separate room in case of strong emotions 	<ul style="list-style-type: none"> – Highly prepared and trained mediator – Anticipating the questions from the parties – Well-planned time management prior and during the sessions – Active listening – Providing instructions on the mediation process – Clarifying pros and cons of mediation (personalised to each case) – Respecting self-determination of the parties in reaching an agreement 	<ul style="list-style-type: none"> – Respecting informality of the process – Use of qualified administrative staff – Adequate and timely communication with clients – Choosing the most convenient means of communications (e.g., phone and e-mails) – Accessible (e.g., free of charge) and readable services (e.g., easy-to-find information on the MSP's website) – Digitalising mediation process (e.g., case management, conducting sessions, etc.)

Figure 5. Elements MSPs consider in measuring a user-friendly mediation service for clients

Over half of the surveyed MSPs reported that they officially conduct client satisfaction surveys after the closure of mediation process. Feedback is collected regardless of whether the parties reached an agreement. The participants responded that they use different means of communication to collect this data. The feedback collection methods include distributing paper and/or electronic survey forms; e-mail and telephone queries; as well as collecting data from client reviews input on Google.

Feedback has revealed that users were specifically satisfied with highly skilled mediators in drafting settlements based on the mediator's legal and technical expertise. In addition, great listening skills in mediators were appreciated by the users. Feedback has also revealed that many users were satisfied with the flexibility and convenience of the mediation process compared to civil proceedings. These elements assisted parties in resolving many long-lasting disputes in an expedited, cost-effective, and amicable manner.

3.2. Semi-structured Expert Interviews

3.2.1. Research Design and Data Collection

The main objective of conducting the semi-structured expert interviews was to gain profound understanding of the implementation of civil and commercial mediation, including online, its effectiveness, the challenges faced, and its future perspective. This method — as a qualitative data collection strategy — addresses the ‘how’ research questions leading to a better understanding of experiences of a social phenomenon.¹⁰⁶ The expert interviews provide researchers with an opportunity to have a flexible engagement with interviewees in exploring their points of view on a research subject matter.¹⁰⁷ Expert knowledge is a significant resource for filling the theoretical gaps in the topic. It also helps to develop theories based on the professional experience of the interviewees.¹⁰⁸

In terms of sample selection, nine potential study subjects in total — three experts per jurisdiction — were chosen from France, Italy, and Belgium.¹⁰⁹ All the invited experts agreed to take part in the interview. The major criterion for selecting the interviewees was based on their high degree of knowledge, expertise, and wide experience with civil and commercial mediation (either as an individual or institutional MSP¹¹⁰).

Figure 6 gives an overview of participants comprising of their gender, educational background, years of experience, and country of practice.

	<i>Gender</i>	<i>Educational Background</i>	<i>Years of Experience</i>	<i>Country of Practice</i>
1	M	Law	13	France
2	M	Law	20	France
3	M	Law	30	France
4	F	Law	13	Italy
5	M	Law	22	Italy
6	M	Economics	23	Italy

¹⁰⁶ Skjot M. Linneberg and S. Korsgaard, ‘Coding Qualitative Data: A Synthesis Guiding the Novice’ [2019] *Qualitative Research Journal*.

¹⁰⁷ Kristina Simion, ‘Qualitative and Quantitative Approaches to Rule of Law Research’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2817565 <<https://papers.ssrn.com/abstract=2817565>> accessed 20 June 2022.

¹⁰⁸ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds) *Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

¹⁰⁹ According to Webley (2010), in qualitative research, the focus is more limited to a smaller number of study subjects or data sources, where people are considered as a data rich source to examine them in-depth. See *ibid*.

¹¹⁰ Ebner (n 14).

7	M	Economics/Finance	19	Belgium
8	M	Law	7	Belgium
9	M	Law	5	Belgium

Figure 6. Characteristics of interviewees (per jurisdiction)

The individual interviews were held remotely through various means — at the interviewee convenience — including videoconferencing via *Zoom*, *Google Meet*, *Microsoft Teams*, as well as over the telephone. The length of the interviews ranged between 45 and 90 minutes. The interviews were conducted in English and French within August and September 2021. In carrying out the semi-structured expert interviews, we followed the three-step empirical phenomenological method developed by Eckartsberg (1986). According to this approach:

- 1) Firstly, the knowledge gaps regarding the subject matter were identified, thence the questions were accordingly designed to fill the existing gaps.
- 2) Secondly, the data were collected through expert interviews.
- 3) Lastly, the obtained data were thoroughly explicated to extract the significant statements of the participants about their experience with the subject matter. The extracted relevant statements with the research themes were then converted into textual descriptions.¹¹¹

The interview questions were designed according to two key elements (See *Appendix B*): 1) to fill the knowledge gaps we identified with the most impact on the implementation of civil and commercial mediation; 2) to enhance the understanding of the subject matters within the scope of the main research question of this study.

Accordingly, the findings of the expert interviews were categorised into four main themes:

1. *Perspectives on mandatory mediation*¹¹²
2. *Efficiency of mediation and the causes of its failure*
3. *Application of online mediation*
4. *Challenges and future perspective*

¹¹¹ Rolf Von Eckartsberg, *Life-World Experience: Existential-Phenomenological Research Approaches in Psychology* (Center for Advanced Research in Phenomenology 1986) 20.

¹¹² As mentioned before, the findings of the surveys revealed that the mandatory and/or voluntary nature of mediation plays a pivotal role in its success and failure. In addition, as the model of mandatory mediation in Italy achieved success, it was important to obtain experts' perspectives into the impact and effectiveness of mandatory mediation in civil and commercial disputes — from different jurisdictions — as one of the main themes in the second part of the empirical study.

Upon completion, the recorded interviews were transcribed. All the transcriptions were thoroughly checked to ensure the transcript validly represents what has been stated in the recordings.¹¹³

The main relevant — with each of the four themes — statements of the participants were compared, and the thematic similarities and differences in each jurisdiction were considered. To ensure the validity, completeness, and relevance of the data extracted from the thematic comparison — where appropriate — the data was thoroughly checked (individually and jointly) by the researchers.¹¹⁴

The discussion on the findings of the interviews and the four main themes of this qualitative study will be presented in Section 4.

3.2.2. *Results and Analysis*

In this part, we present the obtained results from the expert interviews — as categorised by jurisdiction — against the backdrop of the four major themes.

Theme 1: Perspectives on mandatory mediation

France — The experts' perspectives on mandatory mediation was one of the main themes that we extracted from the interviews. As regards to the question of whether mediation should be mandatory, the three interviewees in France unanimously agreed that mediation should always remain optional. As noted by Interviewee F.1: *'mediation should always remain as a choice for the parties, and it should not be imposed upon them in any circumstance.'* Commenting on the voluntary basis of mediation, Participant F.2 added: *'if mediation becomes mandatory, the parties will go to mediation sessions with a totally different intention. They try mediation only because they are obliged to do so, and once they get the certificate, they will move to the court'*. Another Participant also added: *'mediation should always be an option in any case, as imposing it on the parties will lead to an artificial process. Human nature does not want to abide with an obligation. It is also to note that to widen the use of mediation requires changing the mindset of people about this process'. Mediation is not a suitable solution for every case'*.

¹¹³ See Mero-Jaffe I, 'Is That What I Said? Interview Transcript Approval by Participants: An Aspect of Ethics in Qualitative Research' (2011) 10 International Journal of Qualitative Methods 231, 232; Tom Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods* (SAGE 2001) 224-229.

¹¹⁴ Michael Meuser and Ulrike Nagel, 'The Expert Interview and Changes in Knowledge Production' in Alexander Bogner, Beate Littig and W Menz, *Interviewing Experts* (Palgrave Macmillan 2009) 36; Alexander Bogner, Beate Littig, and Wolfgang Menz, 'Generating qualitative data with experts and elites'; in Owe Flick (ed) *The sage handbook of qualitative data collection* (SAGE Publications 2018).

Italy — In contrast to the participants in France, the interviewed mediators in Italy expressed unanimous support for mandatory mediation in civil and commercial matters. We noted that the model of mandatory mediation in Italy has greatly raised citizen awareness of mediation and its advantages. In this regard, Interviewee I.1 explained how mandatory mediation can be extremely effective by adding: *'...the statistics on high number of cases [that were solved through mediation] in Italy prove that mandatory mediation has been effective'*.

We also noted that mandatory mediation has helped mediation culture to grow in the country. Another MSP added: *'based on my experience I believe that mandatory mediation helps to grow mediation culture...the acceptance of mediation in Italy [especially in the beginning where the mediation was not obligatory¹¹⁵] was very challenging, because the mediation culture was not present...mandatory mediation also helps growing voluntary mediation since it provides an opportunity for people to get familiar with this instrument'*.

Interviewee I.3 in a similar argument agreed with the effectiveness of mandatory mediation. It was, however, emphasised that it is important to correctly understand the notion of mandatory and voluntary mediation: *'there is a misconception and misunderstanding about the words mandatory and voluntary in the context of mediation...a full mandatory mediation model cannot be imposed on the parties as well, as it can lead to denial of justice...therefor, I strongly believe that the mediation model of first mandatory meeting works well, as it pushes the parties to attend the first session then decide to continue with full mediation, or terminate it for turning to court'*.

Belgium — Our findings from the interviews in Belgium indicated that the experts principally support a non-mandatory mediation model. This approach is like that of the Interviewees from France. In this respect, one participant commented: *'mediation means to provide two parties to be able to talk, and if it is mandatory the parties will not be willing to put efforts towards reaching a solution. I am not sure the results achieved through a mandatory mediation will be always good. As the parties need to be motivated for mediation'*.

In a similar argument, Interviewee B.2 stated that mandatory mediation increases the failure rate of mediation: *'...my personal experience shows that when a judge forces the parties to go to mediation, I have to first convince the parties that it is a good opportunity for them, but the parties do not do mediation wilfully...they prefer to go to court...so, the rate of failure of mediation increases'*. This MSP then suggested that the most appropriate method to mandate mediation is through adding a mediation clause to the contract. Another interviewee urged that mandatory mediation can be only effective in certain types of disputes such as successions.

¹¹⁵ To indicate the interviewees' special emphasis on a subject matter, the sentences are inserted within [...].

Theme 2: Efficiency of mediation and the causes of its failure

France — The second theme in this part of the study referred to the effectiveness of mediation in providing a satisfactory solution to civil and commercial disputes. The interviewed mediators in France considered mediation to be an effective instrument to handle disputes in an amicable manner. As Participant F.1 emphasised: *'mediation is effective in most cases, especially where the interpretation of law is not helpful in resolving a dispute. Some problems are not only legal issues, therefore in these cases mediation as a global solution can be a great help to effectively resolve the problem.'* Another interviewee emphasised the cost-effective, expedited, and confidential nature of mediation: *'it enables the parties to settle the dispute in a short period of time [compared to the lengthy proceedings in tribunals]. Mediation is also cheaper than the judicial proceedings, it is also a confidential process.'* Participant F.3 also highlighted the effectiveness of mediation and emphasised the importance of the parties' satisfaction in measuring this efficiency.

The interviewees were also asked about the major factors that cause a mediation to fail. The provided responses referred to various factors: lack of good faith from either party; lack of mutual understanding and listening; incompetency of mediator; and complicated nature of the case. Nevertheless, the most surprising cause of failure mentioned by the interviewees in France was the lack of collaboration from lawyers.¹¹⁶

Italy — The interviewed mediators in Italy unanimously agreed that mediation is generally an effective method of dispute resolution in civil and commercial matters. They stated that mediation enables parties to settle their dispute in a more timely and cost-effective manner compared to ordinary civil proceedings. As commented by Participant I.1: *'...despite the existing disadvantages of mediation, mediation has resolved cases in a cost-effective and timely way...the benefits are much higher than the costs...from the judicial point of view mediation reduces the number of cases in courts and judges spend less time on high number of cases.'* Another participant mentioned that mediation is generally effective specifically in enabling parties to have control over the process: *'...but it is not suitable for every type of dispute...cases where future relationship between parties is important, they are the most suitable disputes for mediation'*. Participant I.3 similarly argued: *'mediation is effective, but it is not a one-size solution for all types of dispute'*.

With respect to reasons behind a failed mediation, the interviewees referred to several factors: lack of good faith in parties; complexity of the case; and incompatible nature of the case with mediation. Nevertheless, the participants mentioned incompetent mediators and non-collaborative lawyers as the two main elements to cause the failure of mediation. As one interviewee noted: *'the lack of training of lawyers in Italy, as they have not been sufficiently*

¹¹⁶ In the survey results and analysis, the lack of collaboration from lawyers was also identified as a key factor behind the failure of mediation. See Section 3.1.2.

trained on the use of mediation...the next reason is the insufficient specialised training of mediators.' In a similar argument, another MSP emphasised the significance of training for lawyers and mediators: *'untrained lawyers and mediators can also cause failure of mediation...it is very important for these professionals not to lose the interests of the parties in mediation...so training is a very important element'.*

Belgium — The entirety of the interviewed experts in Belgium agreed that mediation is efficient in the resolution of civil and commercial disputes. Participant B.1 indicated: *'in Belgium [since 1991] we see the efficiency of mediation, every day. In telecom sector, about 9 out of 10 cases reach a solution for a dispute between consumers and telecom operators.'* Another participant referred to the solution-oriented nature of mediation and the significant role of lawyers in the process: *'people seek to find solutions for the dispute in a mediation compared to trials...lawyers are also able to perform their tasks towards their clients without any need for autocracy in front of a judge...there is much more teamwork in mediation between the lawyer and client; as they talk more, they listen more...this does not usually happen in the courts'.* In a similar argument, Participant B.3 interestingly commented: *'in some disputes, people are not seeking for the law, but they look for justice...the judicial order cannot offer the best solution every time...for example, in neighbour and companies disputes in which the parties need to preserve a good relationship for a long time...the judge is only concerned by the task and not focused on the long-term relationship to be preserved for the future'.*

Regarding the main causes of failure of mediation, the interviewees referred to inappropriate interventions by lawyers, as well as the incompatible nature of certain disputes with mediation. Most significantly, one MSP added: *'the foremost reason refers to the parties' openness towards mediation. If parties are very closed in their position, it will be difficult to have a successful mediation.'*

Theme 3: Application of online mediation

France — The participants reported that they have used online mediation as part of their services since the outbreak of the COVID-19 pandemic due to the imposed mobility restrictions. One MSP indicated: *'since 2020, we have launched an online platform [Justicity¹¹⁷] that enables mediators [through subscription] to use the platform for holding their Online mediation sessions'.*

We noted that France has not adopted any specific legislation on online mediation. As a result, the existing rules on tradition mediation are also applicable to e-mediation. Nevertheless, the legislator only requires obtaining ISO certification for the ODR service providers.

¹¹⁷ Plateforme de Médiation et d'Arbitrage 100% En Ligne - JUSTICITY' <<https://justicity.fr/>> accessed 20 June 2022.

As a main part of this theme, we focused on exploring the advantages and disadvantages of using online mediation through the lens of MSPs. With respect to the advantages, as noted by one interviewee: *'...physical distance between the parties is an issue that escalates the mediation costs, and most importantly it can be a probable excuse for the party who is not willing to try mediation...with online mediation the costs and excuses are diminished.'* The participants also reported that the ICT means that are used to carry out mediation facilitate data storage. These tools also increase the data accessibility for parties and their lawyers with the possibility to use this data in future court proceedings.

In relation to the disadvantages of e-mediation, the MSPs referred to the high costs of advanced ICT infrastructures, as well as the need for procuring a secure and well-established Internet connection.

Italy — The interviewed mediators in Italy reported a widespread practice of online mediation in this jurisdiction. According to Participant I.1: *'although before the pandemic I was holding almost 50% of my mediation meetings online, by the outbreak of COVID-19 and the imposed restrictions, approximately 80-90% of all my mediations took place online'*. Similarly, another MSP referred to the impact of the pandemic on his experience with e-mediation: *'since February 2020...I have conducted 35 online mediations...at practical level, although I do not feel very comfortable in conducting mediation sessions online, but since the start of pandemic, I have grown some interest in online mediation'*. Interviewee I.3 emphasised the necessity to distinguish between the two existing definitions of online mediation adding: *'one definition refers to holding mediation through videoconferencing, and the other to online case management systems...in conducting mediations via videoconference, during the pandemic, we have carried out many mediations through Zoom...in relation to online case management, we have a decade of experience with managing the whole mediation process on an online platform with more than 30,000 archived cases'*.

From a regulatory point of view, the participants reported that the general rules on physical mediation are also applicable to e-mediation, in Italy. Nevertheless, they stated that since May 2020 the government has issued specific rules concerning the authentication of party's signature by lawyers in digital documents.¹¹⁸

The participants also indicated advantages offered by online mediation in terms of cost, time, convenience, and flexibility of the process. It was interestingly noted by one interviewee: *'in Italy, in conducting physical mediation, the standards for judicial competence must be met, but in online mediation you can always go beyond competence'*.

¹¹⁸ These rules have authorised lawyers to authenticate the party's signature with their digital forms. In the context of mediation, once the mediator sends the PDF format of the settlement to the lawyer and party, the party can physically sign and scan the document. Finally, the lawyer applies the digital signature in accordance with the law.

Regarding the disadvantages, the lack of direct non-verbal communication was mentioned as a fundamental flaw in e-mediation. Participant I.1 explained: *'human beings need some sort of direct communication...mediators especially need to get a better feeling from the parties in a physical meeting rather than just having a virtual interface'*. Likewise, another MSP added: *'online mediation is the filter that computers create to communications among the parties...you can hide somehow your real intentions behind the computer...as a mediator you need to know that non-verbal communication [and the mood of the parties] is harder to be discovered in virtual spaces'*.

Belgium — The interviewed mediators indicated that they have used e-mediation within their practice. Participant B.1 explained: *'it depends on what you mean by online mediation. In our mediation service, the complaints are submitted either by an electronic form or e-mail. We do not use videoconference for holding online mediation sessions [with the only exception for telecom operators with whom we speak about some most complicated cases]'*. Our findings, however, revealed that the application of online mediation in Belgium is not as common as its practice in France, and particularly in Italy. Given that, not every participant was interested in conducting e-mediation: *'I have limited experience with online mediation as I am not interested in it...during the COVID-19 pandemic we had to conduct many online mediation sessions...but it is only suitable for information sessions to explain the procedures and rules to the parties prior to in-person meetings...also, after in-person meetings, if the settlement is 95% reached and parties cannot [or do not want to be present in any other in-person meeting [and you can just use an online session for ensuring 100% of the agreement is reached]]'*.

The participants reported that, in Belgium, there is no legislative difference between online mediation and traditional mediation. The participants referred to e-mediation as a flexible, convenient, and more practical dispute resolution mechanism. One interviewee stated: *'in online mediation, parties tend to listen more and the process is also faster'*. In terms of disadvantages, the interviewees referred to the difficulties in understanding emotions and reading the body language of parties in e-mediation. Participant B.2 commented: *'people do not like to talk in front of the computer, especially when information is confidential...no one wants to record his own words...also, the mediator does not have enough time to calm down the parties [if any tension arises in the session]'*. Another MSP also placed emphasis on the importance of body language: *'it is difficult to concentrate on the faces of the parties and have a panoramic vision from them...it is also difficult to create a good atmosphere through Internet...I am very sensitive about the body expression during the meeting which online mediation does not make it possible for me to grasp this feeling'*.

Theme 4: Challenges and future perspective

France — The last main theme of this qualitative research focused on identifying the major obstacles the MSPs face in practicing mediation within their respective jurisdiction. The interviewees referred to the lack of collaboration among mediators and mediation associations, the poor quality of Internet connections (in e-mediation), and the role of lawyers in impeding the conducting of effective mediation. To promote the use of mediation and its efficiency, two participants emphasised the importance of raising lawyers' awareness of mediation and of providing sufficient training for mediators. Another interviewee referred to improving the use of online mediation: *'there are some tools which could increase the use and effectiveness of online mediation. For instance, an index for analysing non-verbal communication; tools for importing the notes taken by the mediator in the final draft; also, the possibility for sharing documents where parties and mediator can work and share simultaneously.'*

With respect to the impact of the COVID-19 pandemic on practicing mediation, one participant explained: *'I do not believe that there has been a great impact. In France, maybe there is more delay in delivering justice by the court, but it really did not improve the number of mediations. However, it may have escalated the number of mediators who are now ready and willing to conduct online mediation [as before the Pandemic many mediators were not in favour of Online mediation, and they preferred physical mediation]. So, the COVID-19 has had a positive impact on the application of online mediation'*. Another participant emphasised the impact of the pandemic on increasing the practice of e-mediation: *'everything has changed, and the parties and lawyers understand the importance of online mediation as a cheaper and less time-consuming method of dispute resolution'*.

During the pandemic, many MSPs shifted towards conducting online mediation. Therefore, we asked the interviewees for their opinion on the future perspective of e-mediation. The participants indicated that the COVID-19 pandemic has tremendously influenced social interactions, including in terms of dispute resolution. As commented by Interviewee F.1: *'people are now more receptive towards considering online mediation as a serious method for resolving disputes.'* Another participant pointed to the increased application of online mediation in future in a broader context: *'I do believe that online justice delivery as a service [as indicated by Richard Susskind] is an incredible method. It is a global development regarding the accessibility to court, city services, ecological matters, and equality between the parties. Soon, the whole justice system will be digitalised [also mediation], except maybe in very important matters or where the dispute involved a large group of people. So, physical mediation remains as an exception. I am comfortable by imagining going to a mediation room through my computer.'*

Italy — Various viewpoints were expressed with respect to impeding factors that MSPs face in Italy in practicing mediation. Participant I.2 reported

that some individual mediators face financial difficulties to sustain themselves since individual mediators — compared to MSP institutions — usually receive significantly fewer cases. Participant I.3 referred to another impediment adding: *‘a major barrier is the fact that only the first mediation meeting is mandatory [which is also free of charge] and it does not provide adequate incentives for the parties to seriously consider mediation as an option for resolving the incurred dispute’*. Another interviewee explained that there is no major obstacle to application of mediation by MSPs in Italy: *‘Italy has this advanced model of mediation since 2013 based on a constitution order...so, I think there are not obstacles or problems...mediation is in the catch of lawyers and judges ...the only point is that ordinary people [on average] do not know what mediation is since there is lack of sufficient awareness about solving disputes through mediation [rather than going to courts]’*.

To promote the use and effectiveness of mediation, the participants suggested for the need to raise lawyers’ awareness of mediation. Besides, it was stated that mediators must be trained sufficiently to improve their negotiation skills. One participant referred to the benefits of mandatory mediation and encouraged the extension of the scope of this legislation: *‘the data suggests that most mediations still come from the first meeting mandate...so, I think that this mandate should be expanded to all other civil and commercial mediations’*.

The participants agreed that the outbreak of the COVID-19 pandemic has had a great impact on the growth of Online mediation. Participant I.1 argued: *‘since the beginning of pandemic, the growth of online mediation was evident... during the lock-down in Italy, all mediation service providers tried to develop or improve ODR systems for offering effective services to their clients...I believe that due to the COVID-19 impact, now online mediation is finally considered at the same level of physical mediation’*. Participant I.2 agreed that the pandemic opened a window of opportunities for e-mediation; however, he emphasized: *‘...there is still a big gap in understanding people’s interests and the real intention behind people’s faces in online mediation...Maybe AI or new devices can come up and have the possibility of providing more real virtual meetings...I would be, however, very happy to come back to normal days and prefer to conduct physical mediation.’* Another expert explained that the number of economic cases were increased due to the pandemic: *‘we solved many economic disputes due to the pandemic [for example, disputes arising out of late rental payments are coming to mediation] that are covered by mandatory mediation’*.

With respect to the future of online mediation, the participants indicated that this model of ODR will grow faster. As one MSP reflected: *‘online mediation was sort of a promise especially in certain areas [such as consumer disputes due to the extremely large number of cases particularly at cross-border level] ...so, online mediation is a possible way to solve these disputes...ODR should be the first line of dispute resolution in consumer-to-business disputes in Europe’*. One of the participants emphasised the effective role of the EU ODR Platform in providing MSPs with the common standards for conducting

cross-border mediation. The most significant indication was made of the Italian design of mediation as a role model for other jurisdictions: *'I think that Italy has discovered a great model compared with most EU countries...the data on the high number of conducted mediations in Italy proves that the Italian model of mediation has been efficient... for the future, there should be a rational approach from governments and ministries of justice to find a right legislative framework to introduce some form of mandatory mediation'*.

Belgium — As noted by the interviewed mediators, the major obstacles to implement an effective mediation in Belgium can be found in peoples' — including judges and mediators — attitude towards ADR. Participant B.1 noted: *'people in Belgium [compared to other EU Member States] are really convinced about the necessity for going to the judicial system'*. Another MSP argued similarly that: *'in our experience, the most important barrier is convincing both parties to attempt mediation'*. To increase the use and effectiveness of mediation, one participant proposed that the mindset of people must be changed through establishment of legislative measures: *'in 2018, the law increased the power of judges in asking the parties to try mediation...this reform has increased the number of mediation cases...but I am not convinced that I see any serious initiative from the public to use mediation'*. A similar view on the necessity for establishing a mandatory legal framework for mediation was echoed by another participant: *'as a solution, to improve the effectiveness of mediation in Belgium, I suggest following the mediation models practiced in Italy and France'*.

The participants acknowledged that during the COVID-19 pandemic Online mediation was more in the spotlight. One MSP explained how the pandemic increased peoples' tendency towards attempting mediation: *'it was a great booster in civil and especially commercial law...for example, in written contracts between the business partners, when there is an issue due to COVID-19, and the parties cannot find the answer in the terms and conditions of the contract, they have to negotiate [via mediation] the issue and the raised difficulties [in performing contract-related obligations] due to COVID-19...so, I believe it was a help for the parties to encourage them to mediate'*.

The interviewees indicated that the use of online mediation will increase in future. Nevertheless, they emphasised that human physical interactions remain a main pillar of every mediation. Interestingly, Participant B.2 referred to physical mediation as 'real mediation': *'online mediation is going to be more used, but I think real mediation is always preferred...to reach a solution for the parties, human contact is necessary'*. Another MSP emphasised the importance of physical interactions in mediation: *'there are already many initiatives which offer the possibility to start and conduct mediation completely online... but, I think that physical mediation is more interesting method for people as they can meet in person and they are able to use the options to best express their emotions [that are possible in physical mediations]...I am very confident that in the next few years mediation will keep on being also physical'*.

4. DISCUSSION

The findings of this empirical research provided rich data in answering the main research question of this study. Accordingly, the following conclusions can be drawn from the survey results and the expert interviews.

Mandatory mediation — In relation to whether mediation should be mandatory as part of a civil justice system, two main viewpoints were identified: 1) Mediation should always remain as a choice to the parties. Imposing mediation may result in an artificial process, lack of sufficient efforts from the parties, and the increased rate of the failure of mediation. Moreover, mediation is not suitable for every type of dispute; 2) Mediation must be mandatory as it helps the mediation culture to grow. Mandatory mediation also changes the social mindset towards positive aspects of mediation and reduces the judiciary case backlogs. This mandate can apply to specific types of dispute (e.g., in succession cases). The Italian model of mandatory mediation is a prominent example of widespread and effective practice of obligatory mediation.

Efficiency of mediation and causes of its failure — In general, mediation can help resolve civil and commercial disputes in an effective manner. There are, however, some elements that directly influence the effectiveness of mediation, including the nature of the dispute; the parties' attitude; the cultural context; the sensitivity of lawyers; the professionalism of the mediator; and the status of disputes between the parties.

It was also understood that in evaluating the efficiency of mediation, there are various factors to consider including:

- the extent to which the obtained result has responded to the parties' expectations of conducting mediation;
- time is a significant element. Thus, the solution must be reached within a reasonable timeframe;
- the costs of mediation for the parties must be reasonable compared to the costs of civil proceedings;
- the mediation service must be visible to all people, particularly to the most vulnerable individuals in a society (e.g., consumers, elderly, etc.); and,
- the number of cases resolved through mediation must be considered as an important element in measuring the effectiveness of a mediation service.

There are several barriers that cause the failure of a mediation process, including non-collaborative lawyers; the lack of adequate proficiency and experience for mediators; the nature of some disputes may not be suitable for mediation; the parties' attitudes towards mediation; and lack of good faith from the parties.

Online mediation — Online mediation has gained great momentum with the outbreak of the COVID-19 pandemic. Almost all mediators had to try e-mediation at some stage since early 2020 because of the imposed mobili-

ty restrictions. There are no specific rules enacted by national legislators in any of the studied jurisdictions to regulate online mediation. Therefore, the rules on traditional mediation are also applicable to e-mediation. According to most interviewed experts, there is no substantial difference between online and physical mediation since only the mode of conduct differs. It could be, however, useful if legislators were to consider appropriate legal measures to provide specific instructions on digital signatures with respect to online mediation settlement agreements. There are major advantages to using online mediation such as convenience, flexibility, speediness, and cost-effectiveness. These characteristics can incentivise disputants to use this ODR mechanism. Given that, one should also take into account the disadvantages — e.g., the lack of non-verbal communication and body language, the difficulty in understanding the real emotions of parties — so as to enable choosing the most appropriate dispute resolution method.

Challenges and future perspective — Mediation service providers face different types of barriers within their practice. The main impediments include lawyers' little enthusiasm for mediation; a lack of adequate awareness about the effectiveness of mediation; financial difficulties faced by some mediators due to the lack of sufficient cases; and technological complexities in conducting online mediation.

To increase the use and promote the effectiveness of mediation, the experts have offered the following suggestions:

- raising public awareness about the potential of mediation is resolving civil and commercial disputes in an expedited, convenient, and flexible manner;
- providing sufficient training for lawyers and mediators, particularly to promote their negotiation skills and expertise;
- using advanced ICT tools in carrying out online mediation; and
- adopting new regulatory establishments on mandatory mediation — e.g., by studying the best practices like the implemented mediation model in Italy — to ensure an effective implementation.

It was also understood that the COVID-19 pandemic situation had a great impact on the growth of online mediation practice in France, Italy and Belgium (and all over the world). Most significantly, many consumers faced cancelled and delayed judicial proceedings during the pandemic. As a viable solution, they chose online mediation to resolve their C2B disputes. In fact, the pandemic provided an opportunity for citizens, mediators, and judicial actors to understand the potential of online mediation in providing an alternative to resolve disputes in a more expedited, amicable, cost-effective, and convenient manner. As most interviewees reflected, in future we will indeed witness even more exponential growth in the use of ODR methods, particularly online mediation.

The most significant limitation of this research lies in the fact that the sample size of this empirical study was small. This was caused by the outbreak of the COVID-19 pandemic leading to a low response rate and survey fatigue. Therefore, we recognise that the findings of this study cannot be generalised. Nevertheless, this work offers valuable insights into the status of application of mediation and online mediation in civil and commercial disputes from the perspective of mediation service providers in particular.

Taken together, this study has thrown up many questions in need of further investigation. Most significantly, further research should be undertaken to explore the issues — e.g., enforceability of mediation settlement agreements and digitalisation, confidentiality, and trust, voluntary or mandatory participation, alternative to or integrated in the judiciary etc. — that may arise through the use of mediation and e-mediation, as well as the appropriate preventive measures to be taken.

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Appendix A — Questions of the Semi-structured Surveys

General Questions:

- 1) *What types of disputes are covered by your mediation service? (Civil, commercial, family, etc)*
- 2) *How many cases have been referred for mediation in the last five years (May 2017 to May 2021)?*
- 3) *How many cases have been officially initiated?*
- 4) *How many cases have been concluded leading to a decision by mediator and how many were settled outside mediation?*

- 5) *What has been the average processing-time for each case?*
- 6) *What impact the Covid-19 has had on the number and types of cases referred for mediation?*

Process-related Questions:

- 7) *Do you provide any instructions for the parties prior/during the process?*
- 8) *What means of communication is used between the mediator and parties?*
- 9) *According to your experience, what are the major barriers in users tendency/trust in choosing mediation rather than litigation?*
- 10) *What barriers have you experienced in conducting face-to-face mediation?*
- 11) *How do you ensure providing a user-friendly service to the parties?*
- 12) *Do you offer Online mediation? If so, what specific platform or software you use for mediation process?*
- 13) *If yes, how many cases have been referred for online mediation in the last year (May 2020 to May 2021)?*
- 14) *What are the distinguished services offered by your company (compared to other mediation service providers)?*
- 15) *Do you carry out any satisfaction survey to collect the users' feedback? If yes, what feature(s) in your service has received most appreciation? what is the most frequent complaint(s) about the offered mediation service?*

Appendix B — Questions of the Semi-structured Expert Interviews

Background and Introduction

What is your personal experience of civil and commercial mediation?

I. MEDIATION AND THE MANDATE

- 1) *Is mediation regulated in your jurisdiction?*
- 2) *Do you have any mandatory mediation as part of your civil justice system?*
- 3) *What is your personal view on whether mediation should be used as mandatory in the civil justice system?*
- 4) *Do the courts in your jurisdiction recognize and enforce a mediation settlement? Is there any law and/or specific procedure in this respect?*

II. ONLINE MEDIATION

- 5) *Do you have any experience with Online mediation? What are the pros and cons of it?*
- 6) *Are the existing rules for mediation in your jurisdiction also applicable to Online mediation?*

III. EFFICIENCY AND RISKS IN MEDIATION

- 7) *Do you think mediation processes/procedures really work in civil and commercial disputes?*
- 8) *Does mediation help resolve disputes in an effective manner? What are the main elements to evaluate the mediation efficiency?*
- 9) *In your opinion, what are the main reasons behind a failed mediation?*

IV. CHALLENGES AND FUTURE PERSPECTIVE

- 10) *What are the main obstacles that mediation service providers (mediators, in general) encounter in conducting mediation?*
- 11) *What are your suggestions for improving the use and efficiency of mediation?*
- 12) *What do you think about the COVID-19's influence on the practice of mediation?*
- 13) *What is your prediction about the Online mediation development for the next decade?*

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