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Research Article

DESIGNING AN EFFECTIVE MANDATORY MEDIATION MODEL: GUIDELINES FROM THE INTERNATIONAL JURISPRUDENCE AND NATIONAL CONSTITUTIONAL LIMITS

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ABSTRACT

Background: *The general development of mediation in Europe has been inspired by a number of Council of Europe recommendations and strongly supported by the European Union. However, clear rules with respect to mandatory mediation have never been established, leaving it to national legislators to decide whether and in what form mandatory mediation may be introduced. This has sparked public debate over the last two decades in several Member States that have introduced mandatory mediation as a measure to foster mediation. While some Member States, like Italy and Lithuania, have already introduced specific models of mandatory mediation, others, like Romania and Bulgaria, continue to express doubts about the coexistence of mandatory mediation and the effective right to justice. This article aims to compare international and national approaches towards mandatory mediation, seeking to identify guidelines for national legislators planning to introduce mandatory mediation models.*

Methods: *The primary methods used in preparing this article combined systematic analysis of the scientific literature related to various forms and models of mandatory mediation with a doctrinal analysis of supranational legal regulation in the field of mandatory mediation. This was complemented by a thematic review of key judgments from the Court of Justice of the European Union and the European Court of Human Rights. The research was further enriched by an examination of the legal frameworks and constitutional case law of a few selected countries: Italy, Romania and Bulgaria. This approach involved mapping the examined sources according to their hierarchy—starting with binding EU-level instruments, followed by recommendatory ones, and moving vertically down to domestic statutes and relevant case law.*

The source selection criteria established at the outset of the research included whether the respective legal source explicitly referenced mandatory mediation and relied on Article 6 of the European Convention on Human Rights. Additionally, a qualitative content analysis was conducted on significant national constitutional case law from Italy, Romania and Bulgaria to identify a possible list of criteria for constitutionally unchallengeable mandatory mediation models that could be adopted by countries seeking new effective ways to foster mediation.

Results and conclusions: *The research identified common concerns regarding the introduction of mandatory mediation and proposed a set of criteria to ensure a balance between the mandate to mediate and the right to access to justice. It was concluded that, when narrowly tailored and supported by robust safeguards, mandatory or quasi-mandatory mediation can reduce court congestion and encourage earlier settlement without undermining fundamental procedural rights. The overarching European framework already provides adequate human-rights guidance; however, the remaining implementation gap lies in national design choices concerning exemptions, cost allocation, and mediator accreditation. Embedding an automatic yet non-binding first session, guaranteeing legal-aid coverage and interpreter services, aligning mediator-quality rules, and tracking compliance through digital case-management tools would make it less likely that mediation degenerates into a mere box-ticking exercise. Future research should observe the durability of settlements and overall user satisfaction to ensure that efficiency gains do not erode meaningful access to justice.*

1 INTRODUCTION

Mediation has gained significant traction in Europe as an effective dispute resolution mechanism, promoted by various legal instruments such as the Mediation Directive (2008)[1] and the numerous recommendations[2] adopted by the Council of Europe, followed by the Council of Europe Commission for the Efficiency of Justice (CEPEJ) documents[3] to

1 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] OJ L 136/3.

2 Recommendation No R(98)1 of the Committee of Ministers to Member States on Family Mediation (adopted 21 January 1998) <https://rm.coe.int/1680747b77> accessed 27 May 2025; Recommendation No R(99)19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters (adopted 15 September 1999) <https://rm.coe.int/0900001680910dbb> accessed 27 May 2025; Recommendation Rec(2001)9 of the Committee of Ministers to Member States on Alternatives to Litigation Between Administrative Authorities and Private Parties (adopted 5 September 2001) <https://rm.coe.int/16805e2b59> accessed 27 May 2025; Recommendation Rec(2002)10 of the Committee of Ministers to Member States on Mediation in Civil Matters (adopted 18 September 2002) <https://rm.coe.int/16805e1f76> accessed 27 May 2025.

3 CEPEJ, *Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters* (CEPEJ(2007)13); *Guidelines for a Better Implementation of the Existing Recommendation Concerning Family Mediation and Mediation in Civil Matters* (CEPEJ(2007)14); *Guidelines for a Better Implementation of the existing Recommendation on Alternatives to Litigation between Administrative Authorities and Private Parties* (CEPEJ(2007)15) <https://www.coe.int/en/

encourage its proactive development. Fostering mediation enhances the efficiency of dispute resolution, reduces court workloads, saves money and, most importantly, contributes to increasing social harmony and societal prosperity.[4] However, in Europe, there are no ancient traditions of the wide application of mediation, and Member States must take active measures to foster its usage. Today, it is evident that soft measures such as education, accessibility, court fee reductions, etc., are not as effective[5] or as quick to produce results as the introduction of mandatory forms of mediation.[6] Several Member States have already implemented and benefit from **mandatory mediation (MM) models,**[7] **while others still have** doubts about the possible coexistence of mandatory mediation with the effective right to justice.[8]

MM, though lacking an universal definition, in general can be understood as a binding requirement for parties to a dispute, whether before or in the course of a court procedure, to attend an information session with a mediator or in some other ways to initiate

web/cepej/mediation> accessed 27 May 2025; CEPEJ, *Mediation Development Toolkit: Ensuring Implementation of the CEPEJ Guidelines on Mediation* (CEPEJ(2018)7rev) <https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52> accessed 27 May 2025; CEPEJ, *Roadmap for Mediation Based on the CEPEJ-GT-MED Report on "The Impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation"* (CEPEJ(2018)8) <https://rm.coe.int/road-map-for-mediation-based-on-the-cepej-gt-med-report-on-the-impact-/16808c3fd5> accessed 27 May 2025; CEPEJ, *European Handbook for Mediation Law-making* (CEPEJ(2019)9) <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> accessed 27 May 2025; CEPEJ, *Guidelines on Designing and Monitoring Mediation Training Schemes* (CEPEJ(2019)8) <https://rm.coe.int/cepej-2019-8-en-guidelines-mediation-training-schemes/168094ef3a> accessed 27 May 2025; CEPEJ, Sector-specific *Mediation Awareness / Training Programmes* for judges, notaries and lawyers (2019) and for judicial officers (2021) <https://www.coe.int/en/web/cepej/mediation> accessed 27 May 2025; CEPEJ, *Study on the State of Play of Mediation in Administrative Disputes* (CEPEJ-GT-QUAL(2022)1rev) <https://rm.coe.int/cepej-gt-qual-2022-1rev-en-state-of-play-of-the-practice-of-mediation-/1680ab3db7> accessed 27 May 2025; CEPEJ, *Promoting Mediation to Resolve Administrative Disputes in Council of Europe Member States* (CEPEJ(2022)11) <https://rm.coe.int/cepej-2022-11-promoting-administrative-mediation-en-adopted/1680a95692> accessed 27 May 2025.

4 Giuseppe De Palo and Romina Canessa, 'Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union' (2015) 16(1) Cardozo Journal of Conflict Resolution 713; Giuseppe De Palo and others, *"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: Study* (European Parliament DG IPOL 2014).

5 Giuseppe De Palo and Bryan J Branon, 'Coalescing an International Consensus: Recent Developments Suggest Mandatory Elements May be Necessary to Save Courts and Litigants Time and Money' (2014) 32(4) Alternatives to High Cost Litigation 59.

6 Jacqueline M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation' (2011) 37(4) North Carolina Journal of International Law 981.

7 Shahla F Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Edward Elgar 2018).

8 Indrė Korsakoviene, Julija Radanova and Agne Tvaronaviciene, 'Mandatory Mediation in Family Disputes: An Emerging Trend in the European Union?' (2023) 53(2) Review of European and Comparative Law 67, doi:10.31743/recl.15707.

mediation to explore the potential benefits from applying it in the case, maintaining unrestricted right of the parties to leave the process. The development of various MM models across Europe has been underpinned by the provisions of the Mediation Directive and the emerging case law of the European Court of Human Rights (ECtHR)[9] and the Court of Justice of the European Union (CJEU),[10] stating that MM may be an effective tool to promote mediation if certain criteria are observed.[11]

However, on a national level, MM has sparked debates in various jurisdictions, raising concerns about voluntariness, access to justice and procedural safeguards. The Constitutional Courts of several member States have already been asked to assess the extent to which emerging national legislation establishing MM models is consistent with their own constitutions and fundamental right to justice. The Constitutional Courts of Bulgaria[12] and Romania[13] have found that their national MM models were an obstacle to effective access to justice, while the Constitutional Court of Italy[14] has found that such models, which require parties to mediate, generally do not undermine the right to justice.

The purpose of this article is to analyse the European and national legal frameworks and case law related to the MM and its compatibility with the right to access to court, with the aim of identifying the main rules and criteria for finding an efficient balance in this field. The methodology applied involves first charting the supranational legal acts, starting with binding EU instruments such as Directive 2008/52/EC, followed by relevant Council of Europe soft-law texts, and then moving to national implementing statutes. Only sources that expressly regulate MM and that refer to, interpret, or are tested against the access-to-

9 *Momčilović v Croatia* App No 11239/11 (ECtHR, 26 March 2015) <https://hudoc.echr.coe.int/eng?i=001-152990> accessed 4 April 2025; *Popadić v Serbia* App No 39094/09 (ECtHR, 30 August 2022) <https://hudoc.echr.coe.int/fre?i=001-219210> accessed 4 April 2025.

10 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* (CJEU (Fourth Chamber), 18 March 2010) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0317> accessed 1 April 2025; Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare - Società Cooperativa* (CJEU (First Chamber), 14 June 2017) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0075> accessed 4 April 2025.

11 Cornelis Hendrik (Remco) van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(4) Access to Justice in Eastern Europe 7, doi:10.33327/AJEE-18-4.4-a000082.

12 Case No 11/2024 (Constitutional Court of the Republic of Bulgaria, 1 July 2024) <https://www.constcourt.bg/bg/case-660> accessed 10 July 2025.

13 Decision No 266 'On the unconstitutionality Exception of Provisions of Article 200 of the Civil Procedure Code, as well as those of Article 2 Paras (1) and (12) and Article 60^1 of Law no 192/2006 on the Mediation and Organisation of the Mediator Profession' (Constitutional Court of Romania, 7 May 2014) <https://legislatie.just.ro/Public/DetaliiDocument/159260> accessed 12 April 2025; Decision No 17 (Constitutional Court of Romania, 17 September 2018) <https://legislatie.just.ro/Public/DetaliiDocument/206036> accessed 12 April 2025.

14 Decision No 272 (Constitutional Court of the Italian Republic, 24 October 2012) <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2012&numero=272> accessed 14 April 2025.

justice provisions of the European Convention on Human Rights (ECHR) were included, in order to narrow the scope of the analysis to legal texts specifically targeting the subject. This was then followed by a thematic review of related CJEU and ECtHR decisions in the field of MM, with a focus on identifying the main rules necessary to ensure a balance between MM and the right of access to a court. Subsequently, MM models adopted in Italy, Romania and Bulgaria were examined and briefly presented, with a focus on the national Constitutional Courts' decisions and legal challenges which they have introduced. The aim of this in-depth analysis is to highlight commonalities between the concerns shared by these countries regarding MM. The examination of doctrinal findings, judicial benchmarks and scholarly commentary culminated in reaching several conclusions about the existing trends in the international and national legal regulation and case law of MM in Europe and offering some proposals for a universally applicable model of MM.

2 THE LEGAL LANDSCAPE OF MANDATORY MEDIATION IN EUROPE: INTERNATIONAL STANDARDS AND JUDICIAL INTERPRETATIONS

2.1. Recommendations of the Council of Europe

The usage of alternative dispute resolution methods (ADR), including mediation, is widely encouraged by the recommendations of the Council of Europe. In its earliest Recommendation No. R(81)7, it was stated that Member States should take measures to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes, either before any court proceeding or in the course of it.[15] It was also recommended that judicial policy should encourage, where appropriate, the friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.[16] The broad usage of ADR was positioned as one of the measures for increasing access to justice and, more generally, enhancing the efficiency of national judicial systems.

Specifically, the Council of Europe provided Member States with Recommendations on family mediation and mediation in civil matters.[17] Acknowledging the special characteristics of family disputes and considering the potential of family mediation to satisfy the needs and the interests of the parties, it was recommended to introduce or promote family mediation.[18] This recommendation was complemented by a set of basic guidelines for the Member States, including a clear notion that mediation should not, in

15 Recommendation No R(81)7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice (adopted 14 May 1981) <https://rm.coe.int/168050e7e4> accessed 27 May 2025.

16 Recommendation No R(86)12 on Measures to Prevent and Reduce the Excessive Workload in the Courts (adopted 16 September 1986) <https://rm.coe.int/16804f7b86> accessed 27 May 2025.

17 Recommendation No R(98)1 (n 2); Recommendation Rec(2002)10 (n 2).

18 Recommendation No R(98)1 (n 2).

principle, be compulsory.[19] However, this did not amount to a blanket rejection of MM in family cases, as specific forms were considered appropriate for promoting mediation. For example, Member States were recommended in individual cases to provide relevant information on mediation (for example, by making it compulsory for parties to meet with a mediator), thereby enabling the parties to consider whether mediation would be possible and appropriate. This can be interpreted to mean that, according to the Council of Europe, participation in the mediation process should not be mandatory, but parties may be obliged to familiarise themselves with the mediation process before or during judicial proceedings.[20]

The Recommendation on mediation in civil matters[21] reflected a more conservative approach towards mediation. A certain degree of precaution may be seen from such statements, such as: "Although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system."[22] Considerable attention was placed on the need to guarantee access to courts. In regard to MM, it was stated only that states should consider the extent, if any, to which agreements to submit a dispute to mediation may restrict the parties' rights of action. This recommendation relates not only to MM imposed by legal regulation (categorical mandatoriness) or judicial discretion, but rather to MM arising from contractual clauses or agreements between disputing parties to mediate.

In 2007, the European Commission for the Efficiency of Justice (CEPEJ) did not explicitly recommend measures directly concerning MM but provided some statements related to it. For example, it was stipulated that judges should be able to provide information or arrange information sessions on mediation for the litigants "<...> and, where applicable, invite the parties to use mediation and/or refer the case to mediation."[23] CEPEJ also encouraged Member States to use indirect measures, related to specific procedural sanctions, as stated that:

"Parties could be sanctioned if they fail to actively consider the use of amicable dispute resolution. For example, Member States may consider establishing a rule that parties normally entitled for reimbursement of their litigation costs in the civil or family dispute resolved by court judgment or decision do not receive full reimbursement if they have

19 ibid, para II, a.

20 It should be clarified, howe Recommendation No R(98)1er, that in the scope of this article, both the obligation to engage in mediation or participate in the mandatory initial informational session in all or certain categories of disputes defined by statutes before or after a court action has been filed, or the mandatory referral of a judge, will be used in the broadest sense of the term "mandatory mediation", even though the academic community defines these concepts differently. More about the emerging trends on different mandatory mediation, see: Korsakoviene, Radanova and Tvaronavičienė (n 8).

21 Recommendation Rec(2002)10 (n 2).

22 ibid.

23 CEPEJ, *Guidelines for a Better Implementation of the Existing Recommendation Concerning Family Mediation and Mediation in Civil Matters* (n 3) para 12.

refused to go to mediation or if they failed to present the evidence that they have actively considered the use of amicable dispute resolution."[24]

To sum up, the Council of Europe recognises mediation and other ADR methods as effective tools for resolving civil and family disputes. It also views them as efficient means of reducing court workloads and increasing access to justice in general. While its recommendations and further documents do not restrict MM, they establish ground principles for maintaining a balanced relationship between various forms of MM and access to justice. MM information sessions and other forms of mandatory introduction of the disputants to mediation are permitted, whereas compelling parties to actively engage in the mediation process should not be mandatory.

2.2. The European Union Legal Framework on Mediation

The mediation policy of the European Union (hereinafter, the EU) has been significantly influenced by the position of the Council of Europe. The Mediation Directive, adopted in 2008, was primarily intended to promote mediation in cross-border disputes. However, this directive clearly allowed Member States to apply its provisions also to internal mediation processes. While implementing the Mediation Directive into their national law systems, the majority of Member States opted to apply this regulation to national disputes as well.[25]

In the Mediation Directive, the process of mediation is depicted as voluntary, while at the same time, the possibility of MM is also provided for. Article 5(2) of the Mediation Directive states that "is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."[26]

Almost the exact wording is chosen in the Directive 2013/11/EU on consumer ADR (the Consumer ADR Directive). While acknowledging that consumers can use ADR methods voluntarily, it similarly provides that this is "without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."[27]

These two identical provisions of EU law establish a general rule: MM is permissible so long as the fundamental right of access to a court is preserved. At first glance, this rule appears explicit—it can be interpreted as a guarantee that, if the MM procedure fails, the parties

24 ibid, para 49.

25 Jan Tymowski, *The Mediation Directive: European Implementation Assessment: In-depth analysis* (EPRS 2016) doi:10.2861/902931.

26 Directive 2008/52/EC (n 1).

27 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) [2013] OJ L 165/63, art 1.

should always retain their fundamental right to refer their case to the court. Still, the MM process itself may, in certain disputes and under specific circumstances, be costly, time-consuming and ineffective. This raises the question of how an MM model should be arranged to guarantee a sufficient level of access to justice at all its stages. At least in part, the answer to this question can be found in the jurisprudence of the CJEU and the ECtHR.

2.3. CJEU Case Law on Mandatory Mediation

The CJEU has already ruled on MM in several judgements and established a list of criteria, which should be observed in seeking a balanced relationship between MM and the right to justice.

The most significant CJEU judgement in this field was delivered in *Alassini and Others* (the Alassini case).[28] In this case, the CJEU examined whether the Italian law requirement for the customers to attempt an out-of-court conciliation procedure with telecom providers before filing a claim to the court violated EU law, specifically in regard to the principle of adequate judicial protection. The Court acknowledged that imposing an additional procedure before accessing the courts could potentially infringe on the right to effective judicial protection. However, it reaffirmed that even fundamental rights are not absolute and may be restricted for legitimate objectives, provided that the essence of the right is not impaired.

In Alassini, the CJEU established a set of criteria related to the specifics of the mandatory extrajudicial settlement procedures necessary to follow:

1. The procedure must not result in a decision which is binding on the parties unless the parties agree.
2. It must not cost a substantial delay for the purposes of bringing legal proceedings.
3. It must suspend the period for the time-barring of claims.
4. It must not give rise to costs—or give rise to very low costs—for the parties.
5. It must be accessible by means other than exclusively electronic communication.
6. Interim measures must be available in exceptional cases where the urgency of the situation so requires.

It was concluded that if national legislation imposes a mandatory out-of-court settlement procedure, which fully meets the above-mentioned criteria, the principles of equivalence and effectiveness or the principle of effective judicial protection, are not violated or unproportionally restricted.

A few years later, in 2017, the CJEU revised the criteria in *Alassini* in *Menini and Rampanelli* (the Menini case).[29] The CJEU was approached with a question whether a requirement to mediate before reaching the court is in line with the Consumer ADR Directive, which

28 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* (n 10).

29 Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare* (n 10).

emphasises voluntary participation in ADR. The CJEU reaffirmed the *Alassini* approach, ruling that MM is permissible if it does not impede the consumer's right to access the judicial system. It repeated the *Alassini* criteria as the test for compatibility of an MM model with the right to justice.

In addition, the Court introduced two new criteria to consumer disputes:

1. Under the Consumer ADR Directive, consumers cannot be obliged to be represented by a lawyer in the ADR process. The Italian requirement for legal assistance in MM was found incompatible with Articles 8(b) and 9 of the Directive, which guarantee access to ADR without legal representation costs.
2. National rules cannot unduly restrict a consumer's ability to withdraw from mediation. Article 9(2) of the Consumer ADR Directive allows parties to exit the procedure at any time; therefore, a national law stating that a consumer needs special justification to withdraw from mediation contradicts EU law.

The CJEU has remained consistent in demanding a balance between mandatory ADR procedures and the protection of access to justice in its recent jurisprudence as well. In *Cajasur Banco SA v. JO* and *IM*,[30] the CJEU examined Spanish national law regulations on the requirement of consumers to make an out-of-court request to the trader before litigating an unfair contract term. Although this was not the central question in the case, the CJEU echoed the principle that pre-litigation requirements are justified only so long as they do not make the exercise of consumer rights significantly more difficult.

The most recent ruling in this field was delivered in *Investcapital Ltd v TK*.[31] The CJEU reaffirmed that national laws may introduce MM either before or after legal proceedings, provided that the right to justice is preserved. It has also stated an important clarification, noting that:

> "Article 5(2) of Mediation Directive read in conjunction with the principle of primacy of Union law, must be interpreted as meaning that: it does not preclude the courts of a Member State from disapplying a decision of the Constitutional Court of that Member State invalidating national legislation under which the admissibility of certain actions, which may fall within the scope of that directive, is subject to compliance, by the applicant, with the obligation to attend an information meeting on the advantages of mediation, where such a decision does not fall within the scope of that provision and cannot therefore be contrary thereto."[32]

Such an approach of the CJEU, according to Romanian and Bulgarian scholars, "<...> empowers Member States to adopt MM frameworks. The court indicated that requiring

30 Case C-35/22 *CAJASUR Banco SA v JO and IM* (CJEU (Fourth Chamber), 13 July 2023) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0035> accessed 4 April 2025.

31 Case C-658/23 *Investcapital* (CJEU (Seventh Chamber), 3 September 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202406067> accessed 4 April 2025.

32 ibid, para 1.

participation in an information session about mediation does not inherently conflict with EU law, thus encouraging a reconsideration of previously dismissed models."[33]

To sum up, CJEU case law confirms that MM may be applied in national legal systems if the adopted national models comply with the established criteria designed to ensure a balance between the mandatory nature of ADR procedures and the right to justice.

2.4. ECtHR Jurisprudence on the Admissibility of Mandatory Mediation

The ECtHR has consistently affirmed that the right of access to a court under Article 6(1) of the ECHR is fundamental, yet not absolute. Mandatory forms of ADR, including mediation, have been analysed as one of the possible restrictions to it.

In this case law, the ECtHR consistently stated that a lawful restriction on access to court may be imposed as long as it: 1) has a legitimate aim and 2) is proportionate. In *Ashingdane v. UK case*,[34] it was explained that legitimate limitations of the right of access to the courts must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. It was stated that: "Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[35]

The concept of legitimate aim and the principle of proportionality in relation to mandatory ADR procedures in case law were systematically related to the proper administration of justice.[36] In *Momcilovic v. Croatia*, the Government of Croatia stated that "the purpose of the requirement to institute the friendly settlement procedure before bringing a claim for damages against the State in the competent civil courts aimed at allowing the parties to settle their dispute without the involvement of courts and to avoid long and expensive court proceedings with an intended effect of reducing the number of cases pending before the courts."[37]

ECtHR accepted that requiring a mandatory attempt to settle before filing a claim, pursued a legitimate aim of securing judicial economy and opened the possibility for the parties to settle their claims without the involvement of courts efficiently.[38] Settlement

33 Constantin-Adi Gavrila, Leonardo D'Urso and Julia Radanova, 'The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJUE Decision' (*Kluwer Mediation Blog*, 14 October 2024) <https://mediationblog.kluwerarbitration.com/2024/10/14/the-italian-opt-out-model-a-soft-mandatory-mediation-approach-in-light-of-the-recent-cjue-decision/> accessed 4 April 2025.

34 *Ashingdane v the United Kingdom* App no 8225/78 (ECtHR, 28 May 1985) <https://hudoc.echr.coe.int/eng?i=001-57425> accessed 4 April 2025.

35 ibid, para 57.

36 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (FRA 2016).

37 *Momčilović v Croatia* (n 9) para 46.

38 ibid, para 46.

procedures paused the limitation period and caused minimal delay. Summing up, this restriction on the right to a court did not impair Article 6, as it was legitimate and the adopted measures were proportionate.

A significant case for the development of ECtHR jurisprudence in the field of MM *was Popadić v. Serbia*, concluded with a final decision in 2022.[39] Serbian law mandated mediation in divorce disputes, and in this case, the Court emphasised the importance of the timeliness of mediation. The ECtHR did not condemn the application of mediation per se, respecting parties' autonomy in the process, but it criticised the excessive length of the procedure.

Specifically, the first court hearing was scheduled eight months after the filing was filed, largely due to the compulsory referral of the parties to mediation. The ECtHR concluded that, while the first-instance court could not be held responsible for the time dedicated to mediation, it was unacceptable that the court delayed taking further procedural steps for such an extended period.[40] This ruling implies that mediation should be integrated into judicial proceedings in such a way that does not cause undue delay. Moreover, where mediation is mandatory, the State has a duty to ensure a prompt process.

In *Vujica v. Croatia,*[41] the ECtHR examined a situation where Croatian courts failed to refer the parties to MM before deciding a family dispute. The applicant argued that this omission harmed the judicial process. The Court proclaimed that the purpose of MM before divorce is not only to reconcile spouses with the help of a trained professional but also to facilitate an agreement on the legal consequences of the divorce. The Court stated:

> "*In view of the importance of mandatory mediation before divorce for the (future) welfare of the children, the Court cannot accept that this procedure could be dispensed.*"[42]

Accordingly, national courts must comply with laws requiring MM and refer parents to mediation.

It may be concluded that ECtHR case law indicates that MM can be applied before or during the judicial procedures, provided it pursues a legitimate aim and is proportionate. In ECtHR jurisprudence, the legitimate aim of mandatory ADR is primarily grounded in its role as a measure to improve the administration of justice and to promote amicable settlements.

Proportionality can be tested by identifying a few simple criteria. Such processes should not: 1) have a binding effect, 2) cause excessive delay, or 3) impose prohibitive costs. This implies that MM as such does not contradict Article 6 of the ECHR, but certain procedural aspects of the MM models may raise doubts if they fail to meet these criteria.

39 *Popadić v Serbia* (n 9).
40 ibid, para 90.
41 *Vujica v Croatia* App No 56163/12 (ECtHR, 8 October 2015) <https://hudoc.echr.coe.int/eng?i=001-157536> accessed 4 April 2025.
42 ibid, para 91.

MM stands at the intersection of improving the efficiency of justice and preserving fundamental rights. The balance can only be achieved by ensuring that MM complements the judicial process rather than undermines it. When designing new models of MM, it is necessary to clearly define their aim and ground their legitimacy. Having done so, it is vital to scrupulously assess whether the measures used to achieve this aim are proportionate to the restrictions applied. In other words, it is important to consider whether the social value of the expected result will outweigh the reservations made for the full realisation of the right to judicial protection.

3 COMPARATIVE ANALYSIS OF NATIONAL CONSTITUTIONAL COURT PRACTICES ON MANDATORY MEDIATION MODELS IN ITALY, ROMANIA, AND BULGARIA

In addition to being subject to international judicial review, in several European countries, MM models have also been scrutinised by national Constitutional Courts for their compliance with the constitutional provisions. Italy, Romania and Bulgaria have introduced MM schemes that faced significant criticism from the public, especially the legal community, primarily due to the potential violation of the access to courts. These concerns prompted referrals to the respective Constitutional Courts for examination. Analysing this national case law is particularly valuable, especially considering that it has developed alongside the jurisprudence of the ECtHR and the CJEU analysed in the previous chapter.

3.1. Italian Experience

The Italian model[43] referred to MM before court proceedings for a broad range of civil and commercial disputes, including property, inheritance, family business, banking, insurance, medical liability, landlord-tenant conflicts, consumer and other disputes. This MM in Italy faced criticism not only for the possible violation of the right of access to justice but also for excessive privatisation and concentration of dispute resolution within private mediation centres, as well as concerns about the quality of mediators' services. Mediators were granted the possibility, if parties failed to reach an agreement, either at their own discretion or upon request, to make proposals on the dispute's outcomes. Additionally, the system imposed highly punitive sanctions on parties who objected to the mediator's proposal but later succeeded in court.

The MM introduced by Legislative Decree No 28/2010 was annulled by the Constitutional Court in 2012 as unconstitutional on the grounds that the Government had exceeded its

43 Legislative Decree of the Italian Republic No 28 of 4 March 2010 'Implementation of Article 60 of Law No 69 dated 18 June 2009, Regarding Mediation Aimed at the Conciliation of Civil and Commercial Disputes' [2010] Gazzetta Ufficiale 53/1.

legislative powers. The Constitutional Court ruled that Parliament did not provide the Government with an explicit mandate to introduce MM as a prerequisite before going to court. Thus, although the decision regarding the unconstitutionality of MM was primarily based on formal grounds, the Constitutional Court also relied on other arguments. It recognised that the European institutions explicitly support mediation as an effective voluntary ADR procedure, but not specifically MM. The Mediation Directive, therefore, could not be interpreted as supranational legislation authorising or obliging Member States to implement mandatory MM schemes. Moreover, while MM had been applied to a narrow range of civil disputes in Italy before and was not found to be unconstitutional, the broad scope introduced by Decree No. 28/2010 raised fresh constitutional concerns. These arguments were sufficient to declare the existing mediation regulation as unconstitutional. However, the Constitutional Court recognised that mediation could coexist with litigation, provided that the parties retain the ultimate right to pursue their claims in court.

Following this constitutional rejection in 2012,[44] the Italian MM model was revised to address the potential infringement of the right to court access. Law No. 98 of 9 August 2013[45] introduced significant changes: the obligation to participate in mediation became an obligation to initiate a mandatory initial mediation session, with nominal fees of €40 or €80 per party; the mediation process was limited to 30 days; parties were granted the right to apply to the court after an unsuccessful initial mediation meeting; participation of legal representatives in mediation was mandated; and mediated agreements, once approved by lawyers, were enforceable.

The resistance to the Italian MM model largely stemmed from intense opposition by lawyers, which eventually led to constitutional challenges.[46] As noted by G. Conte, the Italian experience demonstrated that to fully exploit the potential of mediation, it cannot be achieved by merely legislating MM.[47] It demands the engagement of key stakeholder groups—lawyers, enterprises and the public—to raise awareness of the benefits of ADR. The Constitutional Court's previous decision was not against MM per se. Alongside emerging international CJEU jurisprudence, these developments signalled to the Parliament of Italy the need to navigate formal legal obstacles while continuing to develop the MM regulatory framework.

The Italian experience highlights that not only the content and form of the MM model are important, but also the manner in which it is introduced to society. To avoid widespread opposition, it is necessary to collaborate with lawyers during the legislative process and

44 Giuseppe Conte, 'The Italian Way of Mediation' (2014) 6 Yearbook of Arbitration & Mediation 180.

45 Law of the Italian Republic No 98 of 9 August 2013 'Conversion into Law, with amendments, of Decree-Law No 69 dated 21 June 2013, Containing Urgent Provisions for the Relaunch of the Economy' [2013] Gazzetta Ufficiale 194/1.

46 Andrea Zappalaglio, 'Recent Developments Concerning Mandatory Mediation in Italy: Some Comments on a Troubled History' (*SSRN*, 11 August 2013) doi:10.2139/ssrn.2478268 <https://ssrn.com/abstract=2478268> accessed on 12 April 2025.

47 Conte (n 44).

address their concerns early on. Additionally, safeguards must be employed to ensure the procedure does not result in a binding decision unless the parties explicitly agree. The possibility to withdrawing from mediation without consequences should be provided at the earliest possible stage of the mediation. Furthermore, the process should not become prohibitively costly and should guarantee the right to a legal representative.

To further the above conclusions, Italy has currently adopted some further adjustments to its MM model through Legislative Decree 149/2022, popularly known as the "*Cartabia Reform*".[48] Entering into force on 30 June 2023, this reform expanded the dispute categories subject to mandatory initial mediation meetings to include association-in-participation agreements, consortium contracts, franchising agreements, contracts for work or services, network contracts, continuous-supply agreements, partnerships, and sub-supply (sub-contracting) contracts.[49] Separately, the Cartabia Reform introduced digital filing for mediation requests, and capped session fees at €30 per party for claims under €50 000. Early Ministry of Justice statistics (Q1 2024) show a 21 % increase in mediated settlements compared with the same quarter of 2023, while the average time-to-first-hearing in civil courts fell by two months.[50] These figures suggest that the reform has partially met its twin objectives of decongesting courts and promoting consensual dispute resolution,[51] and proves the argument that once all stakeholders endorse a particular model of mandatory mediation, its beneficial effect is strengthened over time.[52]

3.2. Romanian Experience

In Romania, the Mediation Act (2006)[53] was initially amended in 2012 and 2013 to include MM requirements for plaintiffs. Specifically, the law required plaintiffs to attend a cost-free information session with a mediator before proceeding with litigation in family, neighbourhood, property and inheritance disputes, contractual disputes related to payment

48 Legislative Decree of the Italian Republic No 149 of 10 October 2022, 'Implementation of Law No 206 dated 26 November 2021, Delegating the Government to Improve the Efficiency Of Civil Proceedings and to Review the Rules on Alternative Dispute Resolution Tools and Urgent Measures to Streamline Proceedings Regarding the Rights of Individuals and Families as Well as Enforcement Proceedings' [2022] Gazzetta Ufficiale 243/1.

49 Giovanni Matteucci, 'The Trilogy of the Italian Mandatory Mediation Law from the 7th century BC to 2025, including Artificial Intelligence' (*Mediate*, 2 April 2025) <https://mediate.com/italian-mandatory-mediation-law/> accessed on 12 April 2025; G Caporale, 'La riforma Cartabia e la mediazione obbligatoria: primi spunti applicativi' (2024) 12 Rivista di Diritto Processuale 215.

50 Direzione Generale di Statistica e Analisi Organizzativa (DgStat), *Mediazione civile ex D.Lgs 28/2010 – 1 gennaio–31 dicembre 2024* (Ministero della Giustizia 2025) <https://datiestatistiche.giustizia.it/cmsresources/cms/documents/Relazione_mediazione_2024.pdf> assecced 27 May 2025.

51 Giovanni Matteucciorcid, 'Mandatory Mediation, the Italian Experience, a Case Study–2025' (2025) 16(1) Beijing Law Review 353, doi:10.4236/blr.2025.161017.

52 Gavrila, D'Urso and Radanova (n 33).

53 Law of Romania No 192 of 16 May 2006 'On Mediation and Organisation of the Profession of Mediator' [2006] Monitorul Oficial 441.

claims, performance or damages, consumer protection cases and professional liability disputes. If plaintiffs failed to provide proof of attending such a session, their case would be considered inadmissible by the courts, effectively preventing further legal action from proceeding until compliance was met.

The intention behind this legislation was to promote mediation and alleviate the burden on courts; its implementation faced several difficulties. One major criticism was the lack of incentives or sanctions for defendants to participate in the mediation information session. The focus was solely on the plaintiff, which created an imbalance between the parties to a dispute. Since the sanction of case inadmissibility applied only to plaintiffs, defendants had little incentive to engage in mediation efforts, and their non-participation in the process often rendered the session ineffective.

Although participation in the initial mediation session was supposed to be free for individuals involved, mediators incurred expenses related to organising these sessions, such as sending invitations to the other party, preparing documentation, and issuing certificates confirming attendance at the session. These additional costs effectively turned the "free" session into a paid service, creating an unexpected financial burden for the parties involved.[54] This distorted the essence of the proposed MM model, ultimately turning it into a formalistic and expensive mechanism for reaching the court, rather than a method of educating the parties on the benefits of the mediation.

This approach was found unconstitutional by the Constitutional Court in 2014.[55] The Court ruled that the harsh sanction of case inadmissibility for non-compliance was disproportionate and undermined the right to judicial protection. In other words, the legal instrument used to enforce the mandatory requirement–sanctioning the plaintiff with case inadmissibility–would not be balanced with the purpose sought, i.e., decreasing the heavy caseload in the courts. The Court emphasised that while awareness of mediation is essential, coercing parties like this undermines their right to judicial protection.

A similar conclusion by the Constitutional Court was reached in 2018.[56] The decision was based on the contested provision stating that "the parties shall attempt to settle the dispute by mediation" which led the Court to infer that this created an inherent obligation for the

54 Constantin Adi Gavrila, 'Role of Mediation for Justice Reforms and an Increased Access to Justice' (2022) 2(74) Revista de Științe Politice 19.

55 Decision No 266 (n 13).

56 Decision No 560 'On the unconstitutionality of the provisions of Article I (6) with reference to Article 18 (11) of Law No 192/2006, of Article I (10) with reference to Article 43 (21) of Law No 192/2006, of Article I (12) with reference to Article 58 (3) of Law No 192/2006, of Article I (16) with reference to the introductory part of Article 601 (1) of Law No 192/2006, of Article I (18) with reference to Article 61 (3) and (4) of Law No 192/2006 and of Article I (21) (with reference to Article 76 of Law No 192/2006) of the Law amending and supplementing Law No 192/2006 on mediation and organisation of the profession of mediator' (Constitutional Court of Romania, 18 September, 2018) [2018] Monitorul Oficial 957.

parties to engage in mediation, leaving no room for discretion on how they should proceed. This was seen as an obstacle to the right to effective access to the courts. Additionally, the provisions allowing judges to refer parties to MM in certain cases were deemed inconsistent with the prior ruling in Constitutional Court Decision No. 266 from 7 May 2015 as they stipulated an obligation for the judge to order the referral of the parties to mediation, which limit the free access of the parties to justice and as such were deemed to contradict the Romanian Constitution guaranteeing citizens with effective court protection.[57] As a result, this decision effectively brought an end to the debate over MM in the country.

In conclusion, the Romanian attempts to promote mediation through mandating parties to participate in a cost-free information session were all found unconstitutional. The core issue was the harsh sanctions—case inadmissibility—that barred access to justice until parties complied. Such obligations to participate in the information session on the advantages of mediation were deemed to represent a limitation on the right to access justice freely. Through the sanction of the inadmissibility of the claim having been filed without an attempt to mediation, the right to effective legal protection was regarded not only as limited, but even as prohibited.

3.3. Bulgarian experience

The Bulgarian MM model was designed to promote mediation as a means of reducing court congestion and providing an alternative to the traditional litigation process. This objective was specifically outlined in the explanatory notes accompanying the legislative amendments, which emphasised that introducing MM would seek to overcome the uneven workload of the courts, thus leading to savings of resources and time and reducing the administrative burden of proceedings.[58] Transitioning to an MM model and strengthening the role of ADR was further substantiated by the need to unlock the full potential of mediation in Bulgaria, as noted in the CEPEJ's first appraisal and recommendations from 2017.

Additionally, the need to adjust the national legal framework to incorporate MM was further outlined in Bulgaria's National Recovery and Resilience Plan,[59] aimed at mitigating the negative impact of COVID-19.

Set to enter into force on 1 July 2024, the Bulgarian MM model required parties involved in a legal dispute to attend a mandatory initial information session during a pending litigation within two months of being explicitly required to do so by the judge. The session was to be

57 Decision No 266 (n 13).

58 National assembly of Bulgaria, 'Motives for the Draft Law Amending and Supplementing the Mediation Act No 48-202-01-20' (28 October 2022) <https://mjs.bg/api/part/GetBlob?hash=FBF7F0C6B5F73549DA646D82A78B9EC4 > accessed 1 April 2025.

59 Alina Dobreva and Velina Lilyanova, *Bulgaria's National Recovery and Resilience Plan: Latest State of Play* (EPRS 2024) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733662/EPRS_BRI(2022)733662_EN.pdf> accessed 1 April 2025.

conducted by mediators working in newly established court-annexed mediation centres. The mandatory session was to inform parties about the benefits of mediation and its potential to resolve disputes amicably. Participation in this session was free of charge for the parties involved, with the state covering the costs of the initial session for up to three hours of mediation at an hourly rate of €50.

If one party refused to attend the information session or participate in the mediation attempt, they would be sanctioned by being required to pay the entire costs of the case, regardless of the case outcome. This penalty was designed to encourage both parties to engage with the mediation seriously.

However, the Bulgarian Constitutional Court was petitioned by the national Bar association to challenge the constitutionality of the MM model, claiming it infringed on parties' right to effective access to justice. A key argument was that the penalty imposed on a party for not attending the MM information session—specifically, requiring them to pay the full legal costs of the case, regardless of the case's outcome—was too severe.

The Constitutional Court intervened at a crucial moment, striking down the newly introduced mediation legislation just before it came into effect through its decision dated 1 July 2024.[60] The court's ruling was based primarily on the fact that the MM would result in delaying access to justice by adding an extra procedural step to an already lengthy and potentially complex litigation process, thereby hindering the timely resolution of disputes.

The Court also found a violation of the principle of voluntariness, finding that compelling parties to participate in mediation under threat of severe financial sanctions undermined the voluntary nature fundamental to mediation. This was deemed to further breach the rule of law as the legislation could disproportionately affect parties' rights.

In summary, the Bulgarian MM model—while aimed at promoting ADR, easing court congestion, and streamlining legal processes—was condemned for infringing constitutional rights, specifically the right to access justice, due to its penalty for non-compliance that required one party to cover the full litigation costs regardless of case outcome. The Constitutional Court emphasised that MM delayed access to justice and undermined the principle of voluntary participation in mediation. This decision once more highlighted the importance of balancing efficiency in legal processes with the safeguarding of fundamental rights.

Discussions are ongoing on how to revise the previously introduced MM model to ensure its constitutional compliance.

60 Case No 11/2024 (n 12).

3.4. Systematic Evaluation of the Presented National Constitutional Jurisprudence

All analysed judgments of the Constitutional Courts have focused on three main challenges concerning MM. Firstly, it is inconsistent with the voluntary nature of mediation. Secondly, it relies on the use of mediation as a sufficiently proportionate measure in assessing whether it constitutes an undue obstacle to access to justice. Thirdly, the need to apply procedural safeguards to ensure fairness, including management of costs and duration, legal representation and the impartiality of the mediator. This leads to the need for further analyses of voluntariness, proportionality and procedural safeguards.

3.4.1. Voluntariness

Romanian, Italian and Bulgarian Constitutional Courts have emphasised that the Mediation Directive defines mediation as a voluntary process. However, this does not preclude national legislation from establishing MM models or providing incentives and sanctions to encourage the use of mediation—provided these measures do not violate a fundamental right of access to justice. While the Directive allows Member States to prescribe such procedures or through judicial referral, it does not require them to be binding.

All three jurisdictions unanimously uphold the principle of the voluntary nature of mediation, which serves as a safeguard and a reassurance that only the parties' voluntary engagement in mediation can enable the parties to come to a mutually agreed-upon solution and will voluntarily comply with it. Thus, the courts have not rejected the idea of MM entirely and acknowledged that it might serve as a way for a more effective judiciary.

However, these courts carefully scrutinise whether national MM models unduly restrict parties' discretion or infringe their right of access to justice. They have developed criteria closely aligned with those identified by the CJEU, emphasising that imposing MM as an absolute prerequisite before filing a lawsuit—together with imposed financial and procedural burdens on parties— hinders access to justice in terms of the proportionality and procedural safeguards.

Thus, the essence of all three judgments is not that the MM model per se is incompatible with the principle of access to justice, but that the specific national models, in terms of the procedural burdens they impose and the potential benefits they may provide, determine to violate the right to a fair and speedy trial.

3.4.2. Proportionality

The debate over the proportionality of MM is the next central argument presented during the discussions preceding its acceptance and implementation. Irrespective of the fact that proportionality has been subject to different interpretations by international courts, they still fail to offer a unified criterion for its assessment. In fact, the CJEU appears to lean

towards the position that mandating parties to participate in mediation should impose minimal or practically no expense on parties—be it in the form of costs, time or other resources. However, the CJEU's guidance remains insufficiently detailed to ensure the rigid application of the proportionality test and hence leaves Member States to navigate its interpretation in varying ways.

As the analysis of the CJEU's jurisprudence in the preceding chapter suggests, in the context of MM, proportionality requires that the mandatory obligation to participate in mediation must not impose an undue burden on the parties and restrict their fundamental right of access to a court. The essence of the proportionality, therefore, is to ensure that mediation, if encouraged or even required, must be implemented in a reasonable, fair and balanced manner.

When assessing the proportionality of national MM models, Constitutional Courts have considered the primary motivations behind introducing mediation in their legal systems. In most cases, these were either flaws in the legal system or economic crises in the country. Both have led to the need for an urgent and efficient solution that can quickly optimise litigation costs and reduce the burden posed on the courts.

When the sole reason for introducing an MM scheme is to reduce judicial costs and ease court caseloads, it becomes difficult to justify limiting the parties' voluntary choice to mediate—especially if the MM model deviates even partially from the criteria established by the CJEU. However, without clear pragmatic reasons—such as quicker and less expensive dispute resolution for participants and a way to conserve court resources—mediation can be much more beneficial to the parties and society.

Mediation is commonly praised because it allows parties to maintain control over the proceedings and the outcome, increases the likelihood of preserving relationships, and empowers parties' self-determination, which generally leads to more favourable compliance with mediated agreements.[61] Beyond dispute resolution, mediation serves as an effective tool for promoting peaceful and inclusive societies.[62] It is not only a sustainable method for resolving disputes but also a method of strengthening the bonds between community members—and even between different communities—by facilitating peaceful agreements that reduce the risk of future disputes.[63]

61 Laurence J Boulle, Michael T Colatrella Jr and Anthony P Picchioni, *Mediation: Skills and Techniques* (LexisNexis/Matthew Bender 2008) 2-6.

62 United Nations, 'The 17 Sustainable Development Goals' (*UN Department of Economic and Social Affairs, Sustainable Development*, 2025) <https://sdgs.un.org/goals> accessed 2 March 2025.

63 Agnė Tvaronavičienė and others, 'Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of Court-Connected Mediation in Lithuania' (2021) 8(3) Entrepreneurship and Sustainability Issues 633, doi:10.9770/jesi.2021.8.3(40); Natalija Kaminskienė, Inga Žalėnienė and Agnė Tvaronavičienė, 'Bringing Sustainability into Dispute Resolution Processes' (2014) 4(1) Journal of Security and Sustainability Issues 69, doi:10.9770/jssi.2014.4.1(6); Andrea Maia, 'The Importance of Mediation in ESG: Promoting Sustainability in Corporations' (*Kluwer Mediation Blog*, 8 March 2024) <https://legalblogs.wolterskluwer.com/mediation-blog/the-importance-of-mediation-in-esg-promoting-sustainability-in-corporations/> accessed 13 April 2025.

In other words, mediation is not merely a remedy to relieve pressure on an overburdened judicial system; it is, more importantly, a measure to develop a culture of peaceful dispute resolution by educating society and creating sustainable outcomes. Seen in this light, the impact of MM on the parties' self-determination may be perceived as relatively small compared to the potential benefits it could generate.

The example of Moldova perfectly illustrates the above-presented idea. The Moldavian Constitutional Court did not declare its MM model to be unduly disproportionate. On the contrary, it acknowledged the legitimacy of the objectives behind MM and emphasised that the benefits of using MM far outweigh the inconveniences suffered by the parties.[64] The Constitutional Court of Moldova concluded that MM meets the legitimate public policy goals, as it aims to achieve an efficient dispute resolution in a manner that does not unduly delay access to justice, thus ensuring a fair balance between procedural rights and the public interest. It was recognised that even if parties do not want to participate in mediation, they may discover the possibilities of reaching an amicable settlement during it, whilst retaining the right to decide on the outcomes and to withdraw from mediation at any point. Finally, the Moldovan MM does not violate the right to a hearing within a reasonable time—set at 50 days in this case—and is considered a proportional measure since the benefits of mediation outweigh the possible inconvenience, even if the parties do not reach an agreement.

3.4.3. Procedural Safeguards

The Mediation Directive introduced certain procedural safeguards to protect the parties' rights and to avoid mediation from becoming an inferior alternative to court proceedings. These safeguards include guaranteeing the confidentiality of mediation, the suspension of limitation periods, and ensuring the proper recognition of mediated agreements. This legal act encouraged Member States to employ incentives and sanctions where appropriate, while ensuring that mediation does not become an excessively lengthy, costly procedure or an unbearable procedural burden—especially for weaker parties.

The case law of the Constitutional Courts appears to align closely with the practice of the CJEU. Mediation cannot result in a binding decision imposed on the parties. If the parties' decision to participate in mediation can be limited in order to allow them to realistically assess the benefits of mediation in the particular situation, the other aspects of voluntariness must not be undermined. This means that the right to choose the mediator, the impartiality of the mediator, the right to withdraw from the process at any time without facing any consequences and the right to decide whether to enter into an agreement must be safeguarded.

64 Decision No 8 'On the Exception of Unconstitutionality of Some Provisions of the Code of Civil Procedure of the Republic of Moldova, adopted by Law no 225 of 30 May 2003 (Judicial Mediation)' (Constitutional Court of the Republic of Moldova, 26 April 2018) <https://constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=654> accessed 27 May 2025.

Furthermore, mediation must not become an excessively lengthy procedure that restricts the parties' right to access to justice; hence, there is a need to provide for a maximum duration of the mediation process and to ensure that limitation periods are suspended while the parties try to resolve their dispute amicably. Ensuring the quality of the service is of particular importance, which necessitates clear qualification requirements for mediators. While high-quality mediation must be adequately compensated, a balance should be struck—through establishing certain fees or by ensuring state funding to ensure that mandatory participation in mediation or an initial informational session does not become an undue financial burden for the parties.

To summarise, procedural safeguards are a decisive factor in determining whether a given MM model respects the right to a fair and speedy trial or instead undermines it.

3.5. Other Key Aspects of the MM Models' Success or Failure

It is worth noting that all three decisions of the Constitutional Courts were adopted in countries lacking a strategic government policy on mediation development. The need for a national strategic policy on mediation development is not required or even mentioned in the Mediation Directive, which merely outlines broad guidelines for mediation, thus allowing Member States the flexibility to adopt varying national models. However, a consistent political vision appears essential to ensure mediation becomes a viable alternative to litigation within each country's specific socio-economic context.

None of the governments in the studied countries created a supportive environment for mediation by establishing funding mechanisms, ensuring proper training and certification of meditators, or fostering public awareness. In contrast, countries that have adopted comprehensive policies on mediation development seem largely immune from constitutional challenges. This can be illustrated by the example of Lithuania, where an ambitious and clear policy on the development of mediation existed prior to the adoption of MM in family disputes.[65] This prior policy indicates that extensive consultations had taken place, addressing the major concerns of all stakeholders before MM's adoption.

The introduction of MM requires continuous social dialogue and the safeguarding of the interests of all stakeholders. In all the countries analysed, MM faced resistance from key stakeholder groups. Constitutional complaints were consistently initiated by legal professionals, suggesting that the adoption of MM models was not preceded by discussions or compromises on their regulation. Bulgaria's MM model is a perfect illustration: it was developed almost entirely under the leadership of the Supreme Judicial Council, with little engagement of Bar associations or other legal professionals. As a result, those excluded from the discussion groups were the first to petition against the adoption of such an MM model.

65 Order of the Minister of Justice of the Republic of Lithuania No 1R-268 of 17 September 2015 'On the Approval of the Concept for the Development of a Conciliation (Mediation) System' [2015] TAR 13939.

The persistent tension between mediators and lawyers—rooted in fears that mediation could reduce legal fees—has shifted into the Constitutional Courts, which must then rule for or against MM models without the autonomy to constructively propose alternatives.

By contrast, Lithuania's experience illustrates a different scenario. In Lithuania, MM was first introduced as part of a government strategy in 2015,[66] accompanied by a dialogue with representatives of various legal professions (including attorneys, notaries, and bailiffs). This dialogue led to certain concessions—such as exempting these professionals from meditator qualification exams—to secure their support for the introduction of MM in family cases from 1 January 2020. An ex-post study conducted in 2022[67] showed that lawyers were aware of the upcoming changes to the Law on Mediation and some were preparing for it. Even though the changes were expected with anticipation and some scepticism by lawyers and the judiciary, the Government's choice to introduce MM as a strategic initiative and the maintenance of social dialogue with the stakeholders ensured that mediation in Lithuania was successfully established.

Constitutional Courts play a critical role in assessing the constitutionality of MM models, often challenging legislative frameworks that they deem to infringe on constitutional rights, such as access to justice or the principle of voluntariness in mediation. However, these courts often extend their powers and offer not merely an analysis of the constitutional compliance of a given norm but also adopt more of a substance-oriented approach that seeks to assess the efficiency of the proposed MM models. In this sense, the prevailing trend of Constitutional Courts evolving from negative legislators—as proclaimed by Hans Kelsen in the early 20th century—into positive legislators[68] has extended into the mediation field. Indeed, Constitutional Courts in the context of MM have effectively grown to be legislators by eliminating models they deem unacceptable. In this sense, further development of MM models scrutinised by Constitutional Courts requires an in-depth analysis to distil the underlying *ratio* that should be included in the evolving legal framework on MM. This need is especially valid in light of the CJEU's recent decision,[69] which not only affirms that national laws may mandate mediation before or after legal proceedings but also instructs national courts to disregard prior decisions of their national Constitutional Courts that conflict with this position. This ruling seems to indirectly support the hypothesis that Constitutional Courts have assumed a positive legislative role in determining whether MM should be applied within their jurisdictions.

66 ibid.

67 Order of the Minister of Justice of the Republic of Lithuania No 1R-219 of 30 May 2022 'On the Approval of the Ex-Post Evaluation Plan for the Impact of the Legal Regulation on Mandatory Mediation in Family Disputes'; Ministry of Justice of the Republic of Lithuania, 'Ex-Post Evaluation Report on the Impact of the Legal Regulation of Mandatory Mediation in Family Disputes' (30 December 2022) <https://tm.lrv.lt/lt/teisine-informacija/galiojancio-teisinio-reguliavimo-poveikio-ex-post-vertinimas/> accessed 27 May 2025.

68 Allan R Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (CUP 2011) 5-12, doi:10.1017/CBO9780511994760.

69 Case C-658/23 *Investcapital* (n 31).

4 CONCLUSIONS AND RECOMMENDATIONS

The analysis of the European and national legislation and case law on MM serves as the guidelines for developing MM models that address key constitutional concerns while aligning with international standards.

A cornerstone of any constitutionally sound MM model is the voluntariness of the mediation process—meaning voluntary participation in mediation and voluntary settlement during mediation. However, national legislators should retain their powers to refer litigants to a reasonable attempt to understand the benefits of mediation concerning their individual case, while ultimately leaving the decision to mediation to the parties themselves. Crucially, parties must always retain control over the choice of mediator, the design of the mediation process and the freedom to settle or withdraw from the process.

The labelling of the mediation as mandatory warrants reconsideration, as the connotation of "mandatory" creates misleading or incorrect interpretations of the actual procedural "obligations" that parties acquire in MM models. In all studied MM models, parties were required only to attend an initial meeting with a mediator to receive information about mediation and engage in discussions focused solely on how mediation might benefit their case.

Effective MM models must be proportional and avoid imposing undue burden on the parties. This means avoiding excessive delays in accessing the courts or overburdening parties with costs or time demands. MM should be ideally positioned ahead of litigation, namely by requiring parties first to become acquainted with mediation, with associated costs either covered by the government or kept nominal. Additionally, MM must ensure fairness for parties and integrate clear procedural safeguards within predictable time limits, including access to legal services, which can be secured by including parties' legal counsel in the process, ensuring the impartiality and neutrality of the mediators, and guaranteeing confidentiality for the entire process.

Implementation of these elements should be complemented by governmental support, including the development of a national policy that encourages its use, promotes mediator training, establishes a clear institutional framework, and raises public awareness of the benefits of mediation. Importantly, before the establishment of MM, it is crucial to engage legal professionals, bar associations, judges and mediators in dialogue to ensure that the designed model is balanced and supported.

Furthermore, the implementation of MM should include mechanisms for collecting statistics necessary for monitoring and evaluating effectiveness. This enables adjustments and improvements over time, based on feedback from stakeholders and the results observed in practice.

By designing an MM model that integrates the above-mentioned elements, policymakers can establish an effective system that increases mediation uptake while safeguarding parties' rights and access to justice.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЗРОБКА ЕФЕКТИВНОЇ МОДЕЛІ ОБОВ'ЯЗКОВОЇ МЕДІАЦІЇ: КЕРІВНІ ПРИНЦИПИ МІЖНАРОДНОЇ ЮРИСПРУДЕНЦІЇ ТА НАЦІОНАЛЬНІ КОНСТИТУЦІЙНІ ОБМЕЖЕННЯ

Агне Тваронавічене*, Індре Касюлайте та Юлія Раданова

АНОТАЦІЯ

Вступ. *Загальний розвиток медіації в Європі був натхненний низкою рекомендацій Ради Європи та рішуче підтриманий Європейським Союзом. Однак чітких правил щодо обов'язкової медіації так і не було встановлено, тож за національними законодавцями залишилося право вирішувати, чи може бути запроваджена обов'язкова медіація і в якій формі. Це викликало публічні дебати протягом останніх двох десятиліть у кількох*

державах-членах, які запровадили обов'язкову медіацію як захід для сприяння медіації. Хоча деякі держави-члени, такі як Італія та Литва, вже запровадили конкретні моделі обов'язкової медіації, інші, такі як Румунія та Болгарія, продовжують висловлювати сумніви щодо співіснування обов'язкової медіації та ефективного права на правосуддя. Ця стаття має на меті порівняти міжнародні та національні підходи до обов'язкової медіації, щоб визначити рекомендації для національних законодавців, які планують запровадити моделі обов'язкової медіації.

Методи. *Основні методи, використані під час підготовки цієї статті, поєднували систематичний аналіз наукової літератури, що стосується різних форм і моделей обов'язкової медіації, з доктринальним аналізом наднаціонального правового регулювання у сфері обов'язкової медіації. Це було доповнено тематичним оглядом ключових рішень Суду Європейського Союзу та Європейського суду з прав людини. Дослідження було додатково збагачено вивченням правових баз та конституційної практики кількох вибраних країн: Італії, Румунії та Болгарії. Цей підхід містить зіставлення досліджуваних джерел відповідно до їхньої ієрархії — починаючи з обов'язкових інструментів рівня ЄС, потім рекомендаційних, і рухаючись вертикально вниз до національних законів та відповідної практики. Критерії вибору джерел, встановлені на початку дослідження, вказували на те, чи відповідне правове джерело прямо посилається на обов'язкову медіацію та чи ґрунтується воно на статті 6 Європейської конвенції з прав людини. Крім того, було проведено якісний контент-аналіз вагомої національної конституційної практики Італії, Румунії та Болгарії, щоб визначити можливий перелік критеріїв для конституційно беззаперечних моделей обов'язкової медіації, які могли б бути прийняті країнами, що шукають нові ефективні способи сприяння медіації.*

Результати та висновки. *У дослідженні було виявлено спільні занепокоєння щодо запровадження обов'язкової медіації та запропоновано набір критеріїв для забезпечення балансу між повноваженнями медіатора та правом на доступ до правосуддя. Було зроблено висновок, що за умови вузького спрямування та підтримки надійних гарантій обов'язкова або квазіобов'язкова медіація може зменшити перевантаженість судів та сприяти швидшому врегулюванню спорів без порушення основних процесуальних прав. Загальна європейська система вже забезпечує належні рекомендації щодо прав людини; однак, прогалина у впровадженні, що залишилася, полягає у виборі національних моделей щодо винятків, розподілу витрат та акредитації медіаторів. Впровадження автоматичної, але не обов'язкової першої сесії, гарантування покриття правової допомоги та послуг перекладача, узгодження правил щодо якості роботи медіаторів та відстеження дотримання вимог за допомогою цифрових інструментів управління справами зменшить ймовірність того, що медіація перетвориться на просту формальність. У майбутніх дослідженнях слід спостерігати за стійкістю врегулювань та загальною задоволеністю користувачів, щоб гарантувати, що підвищення ефективності не підриває реальний доступ до правосуддя.*

Ключові слова: *медіація, обов'язкова медіація, доступ до правосуддя, антиконституційність.*