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Research Article

FREE MOVEMENT OF MEDIATORS ACROSS THE EUROPEAN UNION: A NEW FRONTIER YET TO BE ACCOMPLISHED?

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ABSTRACT

Background: *This article explores the challenges that stem from the existing national legislation in the field of mediators' profession regulations on an EU level. It identifies some professional and training requirements in this area and analyses their impact on the freedom and quality of the mediation services offered from one Member State to the other. It further outlines the variety of regulatory models and accreditation practices that apply towards mediators having been certified in the Union or third countries and puts this in the context of spreading mandatory mediation models. The authors explore the different procedures that apply to training and accreditation to see the similarities and differences in the professional standards that apply and their impact on the mediation settlement agreements reached.*

Methods: *Research commenced with a review of the existing scientific literature, a brief overview of the national regulation on the mediators' profession, and a document analysis concerning the recognition and accreditation of mediators in the EU. This was followed by a comparative study of training requirements and court-related mediation procedures that exist in a number of jurisdictions like Bulgaria, Lithuania, and Italy to highlight some of the main differences.*

Results and Conclusions: *The analyses of the existing national legislation in the field of mediators' profession regulations on an EU level showed that it is hard or nearly impossible for mediators trained in one EU Member State to render mediation services in other Member States. The existing regulations, coupled with the diverse national training requirements, call for adopting uniform training standards with a synchronised and applicable curriculum across all states. The authors see this as one of the ways to increase the trust in the quality of the mediation service to be of a certain fixed standard and to support the numerous mandatory mediation schemes which in cross-border disputes raise the question of the suitability of the mediator assisting parties in such a dispute resolution process.*

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1 INTRODUCTION

Despite a universal recognition that mediation is an effective tool to resolve various kinds of disputes, on the European continent, this alternative to litigation has been struggling to find its place in most national judicial systems for decades. The Council of Europe has provided active support for mediation in its numerous recommendations dating back to the 90s,[1] which aimed to boost the awareness and voluntary uptake of the process. These recommendatory measures eventually were reflected in the European Union (EU) legislation. In summary, mediation within the EU has had three main separate strands of development: (i) family disputes, including those involving children,[2] (ii) civil and commercial disputes,[3] and (iii) conflicts involving consumers[4] and their online resolution.[5] Numerous regulatory acts have been enacted considering these developments, supporting the notion that Member States should be given the discretion to top-up and provide additional measures to increase recourse to mediation.

A continuing debate has been accompanying this as to the desirability and efficacy of introducing mandatory mediation schemes whereby parties are obliged to attend,

1 Recommendation No R(98)1 of the Committee of Ministers to Member States On Family Mediation (21 January 1998) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804ecb6e> accessed 24 October 2023; Recommendation No R(99)19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters (15 September 1999) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168062e02b> accessed 24 October 2023; Recommendation No R(2001)9 of the Committee of Ministers to Member States On Alternatives to Litigation between Administrative Authorities and Private Parties (5 September 2001) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2b59> accessed 24 October 2023; Recommendation No R(2002)10 of the Committee of Ministers to Member States On Mediation in Civil Matters (18 September 2002) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e1f76> accessed 24 October 2023.

2 Art. 55 e) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000 [2003] OJ L 338 <http://data.europa.eu/eli/reg/2003/2201/oj> accessed 24 October 2023.

3 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 <http://data.europa.eu/eli/dir/2008/52/oj> accessed 16 May 2023.

4 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 On Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304 <http://data.europa.eu/eli/dir/2011/83/oj> accessed 16 May 2023.

5 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165 <http://data.europa.eu/eli/reg/2013/524/oj> accessed 16 May 2023.

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at minimum, an information session on the principles and potential mediation holds within the context of their specific dispute.[6] Notwithstanding such rather academic discussions, there is a tendency to adopt various models of mandatory mediation nationally, which are diverse and country-specific.[7] Such movements, unfortunately, segregate the EU map into rather stand-alone jurisdictions within which ADR and especially mediation are practiced differently. The latter directly affects the opportunities for licensed mediators based in one Member State to practice in another. The problem is further magnified when considering the numerous cross-border disputes that naturally occur because of the creation of a single EU market and the need for their timely and adequate addressing. Those conflicts ask for well-prepared and trained professional mediators from different Member States who can support parties navigating conflict. Ensuring high-quality process outcomes necessitates high professional expertise that is warranted across the EU and only which would ensure the desired mediation quality across the Union.

This article focuses on existing challenges that stem directly from the lack of unified requirements for practising mediation within the EU, the lack of a 'single European mediators market' and some of the implications this leads to. Specific attention is paid to the differences that exist today between a few Member States in terms of their qualification requirements and the various existing recognition and accreditation processes. The ultimate goal of this is to confirm the research question that the lack of uniform requirements towards the practice of mediation impedes the freedom of mediators' movement in the provision of their services across the EU and has a negative impact on the development of cross-border mediation. Based on the above and the analysis of some of the most common challenges in the field, the authors suggest starting a discussion on further consideration of the adoption of unified minimum requirements towards mediators and common EU guidelines on the standards of mediation practice across the Union. This might be further supported by the need to create a single registry of mediators and mediation service providers that consolidates the available mediation expertise in the EU and ensures that the latter meets a certain standard of professionalism.

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6 Nadja Alexander, 'Global Trends in Mediation: Riding the Third Wave', in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law Intl 2006) 1, 7; Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) UNSW Law Journal 929; Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 485-7.

7 Indre Korsakoviene, Julija Branimirova Radanova and Agnė Tvaronavičienė, '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.

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2 EXISTING EU STANDARDS AND LEGAL REQUIREMENTS FOR ENTERING THE MEDIATOR'S PROFESSION

2.1. The mediator as a service provider: the EU concept of mediator and the peculiar specifics of this term

One of the earliest documents issued by the European Commission was the recommendatory European Code of Conduct for Mediators. The preamble of this Code of Conduct defined mediation as '<…> any structured process, however, named or referred to, whereby two or more parties to a dispute attempt by themselves, voluntarily, to reach an agreement on the settlement of their dispute with the assistance of a third person – hereinafter 'the mediator'[8].

It should be noted that this definition also involves the notion of the mediator, though it is very broad and does not focus on the specifics of his role in the process. It merely titles any third party that assists the disputants as a meditator. The term mediator has been given a more explicit definition in Art. 3, para. 2 of the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters ('**Mediation Directive**'). It stipulates that a mediator shall be '*any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation*.'[9]

Returning to the Code of Conduct, Art. 1, para 1.1. proclaims the necessity of the meditator's competence of the mediator: 'Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.'[10] Upon pure language interpretation, though, it can be established that the specific requirements and professional qualifications for practising mediation are left at the discretion of the Member States. From an EU perspective, the only specification that is provided for mediators is to conduct themselves in an effective, impartial, and competent manner without further eliciting what this may entail.

Taking an alternative interpretation, mediators should be deemed service providers of the mediation service. As such, all auxiliary rights to such service as per Art. 56 and 57 of the Treaty of Functioning of the European Union (TFEU or Treaty)[11] shall apply. According to these provisions, there are three alternative scenarios that may be envisioned as included

8 European Code of Conduct for Mediators (Code of Conduct) <https://imimediation.org/wpfd_file/annex-european-code-of-conduct-for-mediators/> accessed 16 May 2023.

9 Directive 2008/52/EC (n 3) art 3, para 2.

10 Code of Conduct (n 8) art 1, para 1.1.

11 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (13 December 2007) [2012] OJ C 326 <http://data.europa.eu/eli/treaty/tfeu_2012/oj> accessed 18 May 2023.

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thereby: the freedom to travel to provide the service, the freedom to travel to receive the service and the freedom of service to travel.[12]

Within the mediation context, this ultimately translates to the right of mediators to provide their mediation services offline or online to residents of another Member State and the right of parties of another Member State to travel to where the mediator is located. In all those scenarios, the services to be rendered should be recognised as mediation, irrespective of the location they are provided from and the national certification the mediator has been subjected to. It is established case law of the CJEU[13] that any rule that hinders access to the market for the out-of-state service provider is caught by the Treaty prohibition on restrictions on the freedom of movement, even if not discriminatory on the grounds of nationality. Such reasoning should equally apply to the provision of mediation services, which in no way differs from other services, all of which fall under the provisions of Directive 2006/123/EC on services in the internal market.[14]

Such interpretation is also supported by the fact that the only exception, explicitly recognised as such in the field of legal services, is for notaries and bailiffs that are excluded from the scope of the Directive.[15] Namely, all other legal professions, which may include the profession of the mediator, should be recognised as falling under the Directive. As such, the latter should be entitled to the free establishment and free provision of their services in a Member State other than that in which they are established, without making the access to or exercise of such service activity subject to discriminatory or disproportionate measures. The only exceptions to the otherwise unlimited right to offer services should be justified for public policy, public security, public health or the protection of the environment and, in all cases, should be proportionate to the objective they pursue.[16]

Such an approach provides service providers, including mediators, a powerful tool to challenge any obstructive national rule. States are, however, able to justify their national rules, which, in principle, breach Art. 56 TFEU either on the grounds provided by the Treaty (public policy, public security or public health) or by reference to so-called 'public interest requirements' which are, essentially, good reasons recognised by the Court of Justice of the EU (CJEU).[17]

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12 *Mary Carpenter v Secretary of State for the Home Department* C-60/00 (CJEU, 11 July 2002) [2002] ECR I-6279 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0060> accessed 18 May 2023.

13 *Alpine Investments BV v Minister van Financien* C-384/93 (CJEU, 10 May 1995) [1995] ECR I-01141 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0384> accessed 18 May 2023.

14 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 'On Services in the Internal Market' [2006] OJ L 376 <http://data.europa.eu/eli/dir/2006/123/oj> accessed 20 October 2023.

15 ibid, art 2, para 2 (l).

16 ibid, art 16, para 1 (b).

17 *Criminal proceedings v Piergiorgio Gambelli and Others* C-243/01 (CJEU, 6 November 2003) [2003] ECR I-13031 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0243> accessed 20 October 2023.

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In both cases, the level of protection provided by the home state must be taken into account. Depending on the sensitivity of the sector, CJEU has been more or less willing to acknowledge public interest advocated by the defendant state and may find it proportionate. In this respect, though, it is worth pointing out that no public policy exceptions were deemed acceptable regarding the national requirements towards lawyers practising in the Union. This area has not been harmonised.

Though different qualification requirements apply nationally, lawyers registered at a European bar should be able to benefit while delivering services that require interaction with the courts or public authorities from the same conditions as local lawyers without any additional obligations. Such a position has been supported by the European Court of Justice in Case C-20/92 Hubbard/ Hamburger.[18]

The CJEU has not yet had the chance to interpret whether any limitations to the mediation profession practice may be justifiable. However, the authors suggest that the rationale adopted for allowing lawyers to practice freely in the EU should apply by analogy. This is supported by the apparent similarities that can be drawn between the two professions. The regulation of the legal profession in the EU is not harmonised by EU law, which is similar to the role of the mediator. The exercise of both professions is subject to national law regulation. However, European lawyers wishing to exercise their profession permanently from another Member State can choose between two different routes, both acknowledging their previous legal education gained or recognised in the Member State of origin. Hence, they are not required to undergo professional training in another Member State from scratch.

One of the paths that can be followed is the recognition of qualifications as provided for in the Professional Qualifications Directive,[19] which requires passing an aptitude test or an adaptation period. The second alternative is provided specifically under Directive 98/5/EC to facilitate the practice of the profession of lawyer permanently in a Member State other than that in which the qualification was obtained[20] (“**Establishment Directive**”). It enables lawyers to be admitted to practice their profession and use their professional title by means of registering with the competent authority in the host Member State.

In this respect, it should be noted that Art. 1, para. 2, letter a) from the aforementioned Directive explicitly provides a uniform definition of the lawyer profession. It stipulates that

18 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* C-20/92 (CJEU, 10 March 1993) [1993] ECR I-03777 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CC0020> accessed 20 October 2023.

19 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 On the Recognition of Professional Qualification (Text with EEA relevance) [2005] OJ L255 <http://data.europa.eu/eli/dir/2005/36/oj> accessed 20 October 2023.

20 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State other than that in which the Qualification was Obtained [1998] OJ L 77 <http://data.europa.eu/eli/dir/1998/5/oj> accessed 20 October 2023.

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a lawyer is any person who is a national of a Member State and is authorised to pursue such professional activities in that Member State. Following the above, all lawyers are entitled to practice using their home country's professional title in a host Member State.

To ensure high-standard professional conduct, though, and irrespective of the rules to which a lawyer is subject in their home Member State, such lawyers must abide by the same rules of professional conduct as those practising under the relevant professional title of the host Member State. The provision for such higher standards *de facto* establishes blended professional requirements towards EU lawyers and paves the way for quick and facilitated access to their services across borders. The same approach should be adopted towards mediators, allowing their services to freely move from one Member State to another.

Moreover, the very nature of mediation, its voluntary character and the lack of the mediator's authority to impose decisions make the curtailment of the freedom to provide their services unjustifiable on grounds of public policy, security or health. Under this, mediators should be allowed to practice their profession freely in the EU upon ensuring they meet certain unified standards in their qualifications and expected conduct. The need for this is further rooted in the growing EU migration rates whereby in 2021, only 1.4 million people previously residing in one EU Member State migrated to another Member State, an increase of almost 17 % compared with 2020.[21] Such figures indicate that the substantial cross-border movements that take place in the EU require easier and facilitated access to mediation services offered by people with various cultural backgrounds to settle the conflicts that inevitably accompany such massive migration.

2.2. National mediators' qualifications and training requirements: existing EU models and developing tendencies within the context of mandatory mediation

The existing legal regulations[22] that have been developing in the EU are country-specific and vary from numerous extremes: from full state regulation of the educational programs that apply towards mediators to laxed provisions allowing for broader entry into the mediation profession.[23] The prevailing tendency that has been depicted, though, is characterised by the following peculiarity: the more extended mediation is established in the specific country, the more comprehensive and intensive mediators' regulations are.[24] The reasons for this are two-fold: on the one hand, new regulations are created in response to the specific problems

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21 'Migration and Migrant Population Statistics for 2021' (*Eurostat Statistics Explained*, March 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics#Migration_flows:_Immigration_to_the_EU_was_2.3_million_in_2021> accessed 1 November 2023.

22 Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Kluwer Law Intl 2017).

23 Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013).

24 ibid 79-81.

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that occur with the unfolding of the mediation practice, while on the other hand, such new rules applicable towards mediators seek to ensure the quality of the mediation service and ultimately, to increase parties' trust into the process by warranting certain standards that they need to abide by.

However, this "rule" should not lead to absolution, claiming that the end goal of such processes is to regulate the profession fully. Several contributing factors should be accounted for in this respect – such as the cultural specifics, social amenability to the mediation process and existing mediation traditions. Concrete samples of the lack of such proportionality between the widespread ADR and density of regulation of the mediation professions are the systems in the UK and the Netherlands, where minimal regulations apply towards the mediators' profession. At the same time, the legislation over the actual process is intense.[25] The academic literature divides the regulation applicable towards mediators into three main categories:

(i) Authorisation model – which provides for a state admission and mediators' registration to allow the practice of mediation. An example depicting such a model is Italy, Hungary, Lithuania, Bulgaria and other countries, whereby mediation may be rendered only by service providers listed in the mediators' registry maintained by the Ministry of Justice or other designated public body and having passed training under licensed by the Ministry program. A subcategory to this model is regulatory models that prescribe for explicit registration and additional requirements applicable towards court-annexed mediators;

(ii) Incentive model – whereby anyone can practice mediation, but only licensed mediators may conduct mediation procedures whose final settlements are subsequently binding. Austria exemplifies such a model whereby non-registered mediators may exercise mediation without a potential settlement, resulting in the same effect as a mediated settlement agreement. Germany also adheres to the very same model, which provides for naming explicitly as certified mediators only those that have undergone certified mediation training;

(iii) Market model – whereby the market naturally regulates the mediators' profession, allowing the highest degree of freedom and autonomy without the state intervening. An example of this model is developed in England, whereby the mediators self-determine their training content and subsequent professional conduct.[26]

The mediators' regulatory categories depicted above are equally valid and applicable regardless of whether mediation takes place as purely voluntary or pursuant to a mandatory mediation model. Simultaneously, though, there is a growing trend, especially in the EU and

25 Felix Steffek, 'Mediation in the European Union: An Introduction' (*European e-Justice*, 2012) <https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f> accessed 1 November 2023.

26 Hopt and Steffek (n 23) 80.

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in the field of family disputes,[27] for creating various mediation programs that coerce parties into a mediation process without requiring a specific outcome thereof.[28] Such initiatives are taken to increase the number of mediations conducted annually and advocate for better use of the entire mediation institute.[29] The trend is likely to have been encouraged by the successful example of other non-EU countries and the efforts to respond to the European Parliament's call to 'review of the rules, to find solutions to extend effectively the scope of mediation.'[30]

Although, within the context of the current article, it can be concluded that the creation of various mandatory mediation models *de facto* creates additional requirements towards nationally accredited mediators, which would be bound to follow the specific predicaments such programs have. Given the lack of harmonisation in the field of mediators' regulations, such tendencies further facilitate the patching of regulatory frameworks. This ultimately limits the market of mediators to only cases arising from their home jurisdiction and opens the door for *forum shopping* initiatives. The above justifies the conclusion that with the development of mandatory mediation models, there is a growing need to adopt a unified minimum standard for all mediators whose responsibility for building a positive image of the entire institute of mediation cannot be but recognised. This is further so within the context of the risk of forum shopping whereby parties choose jurisdictions known for the lack of lenient requirements towards mediators and their involvement as part of the national dispute resolution system. However, no single or harmonised approach exists in this respect, and neither is such required under the provisions of the Mediation Directive. Upon close examination of the various training requirements, it can be established that the training *per se* does not specify any explicit particularities towards mediators offering their service within the context of a mandatory mediation model. Mandatoriness of the mediation processes is designed to raise the number of mediated cases and create a higher demand for the services offered by mediators without influencing the mediation process itself. Despite the mandatory initiation of the process, mandatory mediation remains the same structured process, where disputing parties are assisted by the professional mediator, whose only additional knowledge should be in the field of the specific steps required from the respective mandatory model.

27 Celine Jaspers, 'Mandatory Mediation from a Europen and Comparative Law Perspective' in K Boele-Woelki and D Martiny (eds), *Plurality and Diversity of Family Relations in Europe* (Intersentia 2019) 341, doi:10.1017/9781780689111.016.

28 Such position is further taken in Korsakoviene, Radanova and Tvaronavičienė (n 7).

29 Roman Rewald, 'Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution' (2014) 2 World Arbitration Report 14.

30 European Parliament Resolution of 12 September 2017 On the Implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)) [2018] OJ C 337 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017IP0321> accessed 20 October 2023.

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Referring to the three models of entering into the mediators' profession, it should be noted that the application of each has different outcomes regarding the free movement of the mediators. In fact, countries that apply the authorisation model fully restrict the possibilities of mediators from other Member Countries to provide mediation services without being accredited according to the legal regulation of that country. In the case of the application of the incentive model, in general, mediators from other countries can practice, but their activities are limited to those allowed for non-licensed mediators. In most cases, this might not be a big loss as not many EU Member States award *res judicata* power for mediation settlement agreements. Settlement agreements usually are binding parties as contracts in general, or there is an additional option of providing mediation settlement agreements for confirmation by the court. In the case of countries that apply the market model, mediators from other member Countries are not restricted to providing services as there are no state qualification requirements for entering the mediation profession.

Entering the mediator's profession is closely connected with initial mediation training. The internationally recognised minimum recommended length of the basic mediation training is 40 hours, as prescribed by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe.[31] Thus, EU member states are applying different qualification requirements in regard to the length of the training. Starting with basic 40 hours in Lithuania,[32] 50 hours of basic training applicable for Italy with refresher mediation courses of 18 hours every 2 years for civil and commercial mediators, 60 hours of training in both Belgium and Bulgaria, continuing to Germany requirements to have at least 120 hours of basic training[33] or Portugal's diversity of requirements that each mediation training organisation sets on its own,[34] and finalising with the Maltese requirements for a person to hold a Master of Arts in Mediation degree from the university.[35] Such huge disparities between the basic mediation certification training and their minimal length highlight the disparities in the national standards of entering the mediation profession across the EU. This also means completely different quality standards and expectations from the professional mediators.

31 Guidelines on Designing and Monitoring Mediation Training Schemes (adopted by CEPEJ on 14 June 2019) art 7 <https://rm.coe.int/cepej-2019-8-en-guidelines-mediation-training-schemes/168094ef3a> accessed 20 October 2023.

32 Law of the Republic of Lithuania No X-1702 of 15 July 2008 'On Mediation' art 6, para 2 [2008] Valstybės žinios 87-3462 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> accessed 25 October 2023.

33 Order of the Federal Minister of Justice and Consumer Protection of 21 August 2016 'On the Training and Further Education of Certified Mediators (ZMediatAusbV)' para 2 (4) [2016] Bundesgesetzblatt 42/1 <https://www.gesetze-im-internet.de/zmediatausbv/BJNR199400016.html> accessed 1 November 2023.

34 Order of the Ministry of Justice of Portugal No 345/2013 of 27 November 2013 <https://diariodarepublica.pt/dr/detalhe/portaria/345-2013-484144> accessed 1 November 2023.

35 Laws of Malta Ch 474, Mediation Act of 21 December 2004, art 5 (d) <https://legislation.mt/eli/cap/474/eng/> accessed November 2023.

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The subsequent matter for discussion is the content of mediator training. Comparing Lithuanian training requirements as approved by the Ministry of Justice[36] and for example, those approved by the Austrian Federal Minister of Justice[37] and the Bulgarian Minister of Justice,[38] it can be noted that in their vast majority, despite differences in length, they share commonalities. Generally, they encompass topics such as:

- Concept and principles of mediation
- Procedure, methods and stages with a special focus on the numerous communication and mediation techniques applicable thereto;
- Areas of mediation particular application;
- Ethical issues of mediation;
- National requirements for the practice of mediation.

Those common characteristics do not include any particular requirements towards the educational backgrounds of the professionals entering mediation. On the contrary, different mediation programs throughout the world employ different approaches in the course of deciding the necessary mediation qualifications.[39] There is little uniformity as to the criteria necessary to qualify a mediator, and in most cases, the only specific requirement is the attendance of an additional training course. As such, the suggestion that a law degree, for example, may be sufficient to ensure high-quality services has not been endorsed in most jurisdictions.[40] In fact, the one trait that has been empirically established to have a positive correlation to the mediators' effectiveness is the mediation experience held.[41]

As a consequence of such findings, professional associations have expressly warned against requirements for an advanced degree to exercise the profession of the mediator as this would unduly restrict the numerous traits of character required by a mediator which do not per se come with the obtainment of a specific educational degree (be it legal or not).[42]

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36 Order of the Minister of Justice of the Republic of Lithuania No 1R-289 of 31 December 2018 ‘On the Implementation of the Law on Mediation of the Republic of Lithuania’ [2018] TAR 21997 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/87b2c6700d3c11e98a758703636ea610/asr> accessed 1 November 2023.

37 Federal Law of the Republic of Austria of 2003 On Mediation in Civil Law Matters (ZivMediatG) ch VII [2003] BGBI 29/1 <https://www.ris.bka.gv.at/geltendefassung.wxe?abfrage=bundesnormen&gesetzesnummer=20002753> accessed 1 November 2023.

38 Order of the Minister of Justice of the Republic of Bulgaria No 2 of 15 March 2007 ‘On the Conditions and Procedures for the Approval of Organizations that train Mediators; On the Training Requirements for Mediators; On the Procedure for Entry, Registration and Delete of Mediators from the Unified Register of Mediators and on the Procedural and Ethical Rules of Conduct of the Mediator’ art 8, App No 2 <https://lex.bg/laws/ldoc/2135547782> accessed 1 November 2023.

39 Fiona Furlan, Edward Blumstein and David N Hofstein, ‘Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers when Acting as Mediators?’ (1997) 14(2) Journal of the American Academy of Matrimonial Law 327.

40 Carole Silver, ‘Models for Third Parties in Alternative Dispute Resolution’ (1996) 12(1) Ohio State Journal on Dispute Resolution 42.

41 Rosselle L Wissler, ‘Court-Connected Mediation in General Civil Cases: What we Know from Empirical Ressesarch’ (2002) 17(3) Ohio State Journal on Dispute Resolution 678-9.

42 SPIDR Commission on Qualifications, ‘Qualifying Neutrals: The Basic Principles’ (Dispute Resolution Forum, May 1989) < https://www.aboutrsi.org/library/qualifying-neutrals-the-basic-principles > accessed 25 October 2023.

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The same rationale as the one depicted above ultimately applies to mediators participating in mandatory mediation programs across the EU. Different jurisdictions have adopted different regulatory models to ensure that mediators' training covers all aspects of the particular mandatory mediation model practiced in a given jurisdiction. This can be exemplified by the Lithuanian training model, which includes as a separate obligatory subject the specifics of mandatory mediation and basic legal knowledge integrated as an intrinsic part of the entire curriculum.[43] A different approach to the topic is currently under establishment in Bulgaria, where the newly introduced mandatory mediation model to enter effect on 1 July 2024 would require court-annexed mediators also to have legal education on top of their registration in the list of mediators administered by the Ministry of Justice.[44] The rationale of the legislator for including such a requirement is to warranty that potential settlement agreements resulting from the court-annexed mediation procedures are adequately framed with the additional assistance of the parties' lawyers. Whether the law's acclaimed purpose can be achieved by the mere introduction of such educational requirements is yet to be verified, though, and clearly contrasts with the prevailing regulatory models in the Union.

Although no such requirements can be tracked in the other Member States, the overall tendency is that mandatory mediation does not necessitate extra training requirements or qualifications to be exercised by parties. At the same time, it should be clearly outlined that in most of the Member States, the mere requirement for undertaking a mediation training course is also coupled with the need to pass a specific examination certifying that the necessary theoretical knowledge has been obtained and that the basic mediation skills have been acquired. The way this examination is organised differs from country to country, with some jurisdictions having this undertaken by the respective Ministry of Justice,[45] others – vesting the powers for this to a specific regulatory body in charge[46] and still others – providing the training bodies with the power to run the examination themselves.[47]

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43 Order of the Minister of Justice of the Republic of Lithuania No 1R-411 of 8 December 2020 'Program of Qualification Examination for Mediators' [2020] TAR 26510 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/82b06242399511eb8c97e01ffe050e1c> accessed 25 October 2023.

44 Law of the Republic of Bulgaria No 110 of 17 December 2004 'On Mediation' art 20, para 1 <https://lex.bg/laws/ldoc/2135496713> accessed 25 October 2023.

45 In the Czech Republic all examination powers have been vested in the Ministry of Justice which is in charge of organizing and holding the mediators' examination according to the Law of the Czech Republic No 202/2012 Coll of 2 May 2012 'On Mediation and Change of Some Laws (Law on Mediation)' S 2 § 23 <https://esipa.cz/sbirka/sbsrv.dll/sb?DR=SB&CP=2012s202> accessed 1 November 2023.

46 For example in Greece there is a special body – the Central Mediation Board which acts as an examination board for mediators according to Law of the Greek Republic No 4640/2019 'Mediation in Civil and Commercial cases and further harmonization of Greek Legislation with the EU Directive 2008/52/EC of21 May 2008 and other provisions' <https://www.kodiko.gr/nomothesia/document/580509/nomos-4640-2019> accessed 1 November 2023.

47 Under the Italian model each training entity is allowed to hold its own examination according to Decree of the Ministry of Justice of the Italian Republic No 180 of 18 October 2010 'Regulation Establishing the Criteria and Methods for Registration and Maintenance of the Register of Mediation Bodies and the List of Mediation Trainers, as well as the Approval of the Compensation Due to the Bodies, Pursuant to Article 16 of the Legislative Decree of 4 March 2010, No 28 (10G0203)' <https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2010-11-04&atto.codiceRedazionale=010G0203&elenco30giorni=false > accessed on 1 November 2023.

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In light of the above, the examples from different regulations evidence the diversity in regulations in both training and examination requirements and, hence, the impossibility of practising mediation across borders without undertaking additional accreditations to fill in the gaps that arise from the various training requirements.

2.3. Recognition and accreditation of mediators from other Member States and Third Countries

The recognition process of mediators licensed in a particular Member State to practice the profession in another State is national-specific and subject to compliance with the peculiarities. As much as the principle of free movement of services should prevail, in most cases, its application is limited to temporarily providing the service. For example, such general understanding can be established in Art. 4, para. 7 of the Lithuanian Law on Mediation, which provides the following:

> *Persons who have been granted the right to provide mediation services by the competent authority of that state in accordance with the legislation of a member state of the European Union or a state of the European Economic Area, have unlimited freedom to temporarily provide mediation services in the Republic of Lithuania.*[48]

The aforementioned article confirms the Lithuanian legislator's understanding that the freedom to provide services within the mediation context should be temporarily deemed allowed. The term temporarily shall be assessed on a case-by-case basis in line with the definition given in Art. 5, para. 2 of Directive 2005/36/EC on the recognition of professional qualification.[49] Namely, such assessment should acknowledge in particular, the duration of the services being offered, their frequency, regularity and continuity, and this may well be subject to various interpretations. Such assessment may mean that temporary provision of mediation services should be limited to the three months that EU citizens may freely reside in other Member States without undergoing a permanent/long-term residency process. Another possible interpretation of the temporary requirement may include the occasional provision of services on a case-by-case basis from a permanently established resident from another State, which still, though, would necessitate notifying the State Guaranteed Legal Aid Service.

With the ongoing war in Ukraine, though, the scope of application of Art. 4, para 7 above has been expanded to provide Ukrainian mediators who have been granted temporary protection in Lithuania with the right to practice their profession. The exact new wording of Art. 4, para. 7 includes the following:

> *The freedom to temporarily provide these services in the Republic of Lithuania is also not limited to persons who have arrived (moved) from other foreign countries and who, according to their relevant state, have been granted the right to provide legal mediation services when they are governed by the Law of the Republic of Lithuania 'On the Legal Status of Foreigners', granted a temporary protection Articles 6, 7, 8, 9, 10 and 11 of this law shall not apply to the persons specified in this part, who temporarily provide mediation services in the Republic of Lithuania on behalf of a mediator granted by their state.*

48 Law of the Republic of Lithuania No X-1702 (n 32) art 4, para 7.

49 Directive 2005/36/EC (n 19) art 5, para 2.

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Such amendment in the law comes into effect on 1 March 2024 and expands the group of people eligible to practice mediation in Lithuania. At the same time, this change is also indicative of the mutual trust that should prevail in the quality of national training requirements. This trust extends not only among EU Member States but also to European countries that are members of the Council of Europe, all of whom are recipients of the various regulatory acts adopted by the Council in the mediation field. While such a provision could be perceived as a good practice, its potential extrapolation to other Member States is yet to be seen. For this to occur, there should be a general understanding of the language in which a certified mediator may render his/her services when offering them in cross-border cases and establishing in host Member States whose language he/she does not speak.

Today, language requirements and practical barriers imposed from offering mediators' exams only in the native language of the Member State where certification is sought pose additional obstacles to the free movement of services within the Union. This situation opens the debate as to whether, given the active role of the European Commission for the Efficiency of Justice (CEPEJ) in the field of mediation, the training and certification of mediators across the Member States of the Council of Europe should not be automatically recognised and be allowed to be provided across Europe in the native language of the mediator, thus strengthening the multiculturality of the available mediation services from which citizens can benefit.

Unlike Lithuanian, the Bulgarian Law on mediation does not include any specifics on how the recognition process of mediators from other Member States should be conducted. Such a specific procedure is neither stipulated in the regulations that have been passed on its basis, nor is listed on the official website of the Ministry. On the contrary, the only reference to EU Member States' citizens is in Art. 8, para. 2 of the Mediation Act,[50] which explicitly provides by way of exception that EU citizens should not evidence the grounds for their residence in the country when registering at the Mediators registry maintained by the Ministry of Justice. Hence, the only requirement for such citizens to register as mediators is to have completed a training course for a mediator without specifying the entity offering such a course.[51]

The aforementioned provision opens the question as to whether such a mediator training course can be any training course that is being offered regardless of the Member State where it is held as long as it passes a recognition process. Such broad interpretation, as much as it may be desirable to expand mediators' freedom of movement, cannot be supported in lieu of para. 4 of the quoted provision, which entitles the Minister of Justice with the right to authorise training organisations to certify mediators.

Hence, the joint application of both linguistic and systematic interpretation leads to the ultimate conclusion that the training of mediators refers merely to training previously recognised by the Minister of Justice of Bulgaria. Recognising the curriculum of foreign

50 Law of the Republic of Bulgaria No 110 (n 44) art 8, para 2.
51 ibid, art 8a, para 2, item 1.

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organisations offering mediation training and whether they comply with the requirements applicable towards Bulgarian mediators is not explicitly provided for, though it should not be deemed to breach the applicable legislation.[52]

Applying the same rationale *mutatis mutandis* on an EU level should lead us to the ultimate conclusion that as long as the syllabus of mediation training meets a certain professional standard that ensures acquiring both theoretical knowledge and practical conflict resolution skills, the experts having undergone such training should be allowed to practice across borders. To ensure this, though, additional requirements should be considered towards the respective training entities and their accreditation, which would ultimately result in cutting-edge training that equips future mediators with the necessary skills and ultimately leads to improving the legitimacy of the mediation profession.

A sample of those requirements that can be considered when establishing uniform rules is the Guidelines on designing and monitoring mediation training schemes adopted by CEPEJ on 14 June 2019.[53] They seek to harmonise the minimum training standard to ensure an adequate number of well-trained mediators in each Member State jurisdiction by effectively outlining the desirable practices for the training programmes, regulation of mediation trainers and training providers, incl. quality management and their accreditation, course content, unified competency framework, course duration and group sizes, teaching methodologies, performance assessment and accreditation of future mediators.

The need for moving towards greater unification of the applicable training requirements is further confirmed in point 20 of the European Parliament resolution of 13 September 2011 on the implementation of the Directive on mediation in the Member States, its impact on mediation and its take-up by the court,[54] which acknowledges the importance of establishing common standards for accessing the profession of mediator to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the Union. Achieving the above would inevitably enable the free movement of mediators whose services can be offered across the Union without encountering restrictions stemming from the divergent national regulations.

The lack of a specific accreditation process, whether deliberate or a legislative gap, on a national level (as evidenced in the example of Bulgaria) may be interpreted as an indirect hindrance towards the provision of mediation services from mediators established in another Member State. Indeed, it may be argued that upon triggering the direct effect of the right to provide services, mediators may still be able to render their services across borders.

52 Order of the Minister of Justice of the Republic of Bulgaria No 2 (n 38) art 15.

53 Guidelines on Designing and Monitoring Mediation Training Schemes (n 31).

54 Directive on Mediation in the Member States P7_TA(2011)0361, European Parliament Resolution of 13 September 2011 on the Implementation of the Directive on Mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)) [2013] OJ C 51E <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011IP0361> accessed 4 November 2023.

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Notwithstanding the above, though, the obstacles that practically are in place would serve rather as a discouraging factor for the professionals willing to exercise this right and, as such – lead to the distortion of the common mediators' market.

3 CHALLENGES UNDER THE EXISTING PATCHED REGULATIONS ON PRACTICING MEDIATION IN THE EU

The above national regulatory discrepancies highlight the absence of a single EU mediators' market, preventing certified meditators from one Member State from automatically having the right to render their services in another state. This notion can further be reaffirmed by the lack of unified standards and regulatory requirements that apply across borders. In fact, the only attempt to amalgamate these existing differences has been the adoption of the European Code of Conduct for Mediators,[55] as promulgated with the support of the EU Commission. The Code sets out a number of principles towards mediators. However, being a voluntary commitment, it functions more as a high-level policy document rather than a practical solution, especially in addressing challenges faced by mediators in cross-border situations.

Hence, despite efforts to improve regulatory coherence, the challenges faced by mediators in the EU remain unanswered or lack concrete solutions. More recently, on 4 December 2018, during its 31st plenary session, CEPEJ adopted its Code of Conduct for Mediation Providers,[56] which sets out a number of principles to which mediation centres, institutes or other mediation providers may decide to adhere to. However, the adopted provisions lack specific requirements for which training, certification and/or subsequent supervision should be bound. Even if they were more elaborate, these provisions would still lack binding force as they constitute a mere part of the soft law provisions in the field of mediation. Therefore, they do not offer immediate answers to some of the most pressing challenges experienced in the field. Those challenges can be summarised in the following subchapters.

3.1. Absence of unified international standards in regard to international mediation practice

The development of a national credentialing system for mediators has been on the rise ever since 2000.[57] Its emergence is a direct result of adopting various national mediation schemes to strengthen the promotion of ADR. Those specific models under development were

55 Code of Conduct (n 8).

56 European Code of Conduct for Mediation Providers (adopted by CEPEJ on 4 December 2018) <https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6 > accessed 4 November 2023.

57 Nadja Alexander, 'Ten Trends in International Commercial Mediation' (2019) 31(Spec) Singapore Academy of Law Journal 405.

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designed to correspond to the peculiar socio-economic environment and the legal system within which they were being established. Hence, each system introduced its own set of criteria and requirements towards practising mediators. Some schemes involve legislative regulations; others rely on promulgating soft-law measures, and still others offer a combination of those two. All these trends led to the inevitable patching of the requirements that should be met by mediators wishing to provide their services in more than one jurisdiction. The complications that stem from this are enhanced further when considering practising mediation internationally. Today, a number of international mediation service providers[58] have developed a roster of mediators based in numerous countries and from various backgrounds simply by recognising mediators' previous experience and/or acknowledging the national or institutional standards under which such individuals were trained. Notwithstanding the above, though, the shift from national to international practice is not coherent and does not provide practising mediators with a single path to follow when wanting to expand their field of practice. Najda Alexander has formulated that usually this may take one of the following four forms:

- Recognition of prior (foreign) training and/or credentials;
- Systems of cross-recognition of national or institutional mediator standards;
- Requirements that foreign and local mediators undertake the same credentialing procedure;
- Development of international standards for mediator credentialing.[59]

As evidenced by the above, the lack of a unanimous cross-recognition process makes it difficult and, in some cases, practically impossible for mediators from certain jurisdictions to practice in other countries. Analysing this issue from an EU perspective, the challenge remains as no specific regulatory or practical measures have been put in place to overcome such barriers. Trying to overcome this, certain Member States have established bilateral arrangements to tackle this issue and allow for an enhanced exchange of professionals able to render their mediation services across borders. One of the few examples of this is the arrangements reached between the German, Swiss and Austrian training organisations[60] which allows for the cross-border recognition of mediator standards between Austria and Germany at an institutional level and facilitates the enhanced movement of mediators across borders. The narrow scope of application of this, though, indicates the magnitude of the problem and the effective lack of measures to tackle it.

58 *International Mediation Institute* (IMI) <https://imimediation.org> accessed 23 May 2023; *Singapore International Mediation Institute* (SIMI) <https://www.simi.org.sg> accessed 23 May 2023.

59 Alexander (n 57) 421.

60 *Bundesverband Mediation* <https://www.bmev.de> accessed 23 May 2023.

3.2. Inconsistencies in the recognition process allowing mediators to practice in the EU

The challenges outlined above also lead to numerous discrepancies and inconsistencies in the cases where there is a recognition process in place to allow mediators from one jurisdiction to practice in another. One such example is the Mediators' Institute of Ireland (MII) recognition of equivalent training procedure,[61] which stipulates for recognition of all trained outside of Ireland mediators to evidence the following:

- Certificate for completion of a minimum of 60-hour mediation training;
- The close resemblance of the curriculum of the said training with those of MII.

The cost of the assessment is EUR 100 and, if successful, would allow proceeding to an in-depth MII assessment for an additional EUR 375, allowing the respective professional to receive MII membership.

Another example of a differently organised scheme is the one provided for in Portugal,[62] whereby mediators providing temporary and occasional mediation services are only required to declare such activities to the Directorate-General for Justice Policy in case the mediator shall be working as part of the national institutional framework, i.e. as a mediator equal to those registered in the list of mediators under the auspices of the Ministry of Justice or part of the public mediation system. However, in case a professional wants to permanently establish him/herself and work as a mediator, the full procedure for recognition of professional qualification should be conducted. According to the prescribed procedure, though, a mediator should be able to show the certificate evidencing mediation qualification. Given the patched EU mediation landscape, this requirement alone may prove problematic, considering that no such training is required in some Member States. Additionally, even if passing the recognition process is obtained, the mediator should be able to prove a good command of the Portuguese language.[63] This requirement of a good command of the local language, though based on the assumption that most parties to mediation would want a local, could be deemed, at minimum, discriminatory. Separately, the introduction of such an additional requirement cannot be justified on other grounds, given that no true public interest or another socially

61 'Recognition of Equivalent Training' (*Mediators' Institute of Ireland (MII)*, 28 March 2022) <https://www.themii.ie/membership/general-information/recognition-of-equivalent-training> accessed 25 October 2023.

62 'Conflict Mediator – Provision of Temporary and Occasional Services in Portugal (first time)' (*ePortugal*, 2023) <https://eportugal.gov.pt/en-GB/inicio/espaco-empresa/balcao-do-empreendedor/mediador-de-conflitos-prestacao-de-servicos-temporarios-ou-ocasionais> accessed 25 October 2023; Ana Maria Costa e Silva, and Patrícia Guiomar, 'Mediators in Portugal: Training, Status and Professional Recognition' (2023) 6(1) Journal of Social and Political Sciences 32, doi:10.31014/aior.1991.06.01.391.

63 'Lista de Mediadores Privados' (*Direção-Geral da Política de Justiça (DGPJ)*, 2023) <https://dgpj.justica.gov.pt/Resolucao-de-Litigios/Mediacao/Lista-de-mediadores-privados> accessed 25 October 2023.

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significant value could be established to be sought through this. Curtailing the existence of the internal market on non-justifiable grounds, therefore, cannot be supported and as such – it should be deemed as yet another burden before mediators wishing to exercise their profession in numerous Member States. From a practical perspective and with the increase of online mediation and the integration of technologies as means of enabling distant communication, it is not unthinkable that a highly skilled professional mediator may be providing his/her online mediation services regularly in a number of Member States irrespective of the non-command of the corresponding national language. The existing local regulations for recognition of professional qualifications, though subject to the harmonisation under the Directive on the recognition of professional qualifications, 66 have proven inefficient in solving this.

Another example of the recognition process of mediators having been certified in another Member State is the case of the Czech Republic, administered by the Ministry of Education, Youth and Sports.[64] All recognitions of professional qualifications (including those for mediators) are stipulated in Act No 18 /2004 Coll. on the recognition of professional qualifications and other competencies of nationals of the Member States of the European Union and on the amendment of some acts. According to it, however, to practice mediation in the country, the professional mediator should not only be licensed as such in another country but should also hold a Master's university degree.[65] Even if such a requirement *per se* is not unreasonable, it may hinder some mediators from other Member States who wish to practice there. For instance, this could affect mediators from Bulgaria, Latvia, Lithuania, Austria, and Italy, where no such requirement for a Master's degree exists under national rules. Therefore, they may be deprived of the chance to exercise their profession in the Czech Republic merely on such educational grounds.

The above examples prove that even when Member States are seeking to establish concrete measures to recognise mediators' qualifications gained in another jurisdiction, there is a risk of creating or deepening the already existing differences in the way the mediators' profession is 101rganized. This ultimately leads to the conclusion that the only way to overcome those barriers to the free movement of mediators in the EU is by regulating the field on a pan-European level, including by suggesting specific terms for the recognition process of mediators. As a general conclusion, though, it can be noted that for the time being, not only in the EU, but globally there has not been an unanimous understanding of the qualifications that mediators must have to be effective in their work.[66] One reason for this is that studies

64 'How to Proceed – Information for Applicants and Providers of Services' (Ministry of Education Youth and Sports, 2023) <https://www.msmt.cz/eu-and-international-affairs/jak-postupovat?lang=2> accessed 25 October 2023.

65 'Recognition of Professional Qualifications: Database of Regulated Professions and Professional Activities' (*Ministry of Education, Youth and Sports*, 2023) <https://uok.msmt.cz/uok/ru_detail.php?id=674&flet=&forg=&ftype=&fpg=1&ftxt=medi%E1tor&lang=en&dl=en> accessed on 1 November 2023.

66 Sarah R Cole and others, *Mediation: Law, Policy & Practice* (2022-2023 edn, Trial Practice Series, Thomson Reuters 2023) § 1:1.

have indicated that more qualification requirements or longer training hours do not necessarily lead to improved mediation.[67] That being said, though, is without prejudice to the earlier assertion that uniformed training requirements are needed to open the market on mediators' services and ultimately trigger the natural processes for increasing the quality fo the mediations provided.

3.3. Cross-border enforceability of mediation settlement agreements resulting from the work of mediators meeting different professional requirements

The existing polyphony of national legislation in terms of recognition and enforceability of mediation settlement agreements (MSAs) currently complicates the EU mediation landscape.[68] According to Art. 6 of the Mediation Directive, an MSA may be enforced by means of a judgement, decision or other authentic document. Namely, enforceability shall be sought of the actual instrument to which the MSA shall have been incorporated. To be able to do so, though, the agreement should have been achieved due to a mediation process conducted by a professional considered a mediator under the respective jurisdiction. In a cross-border environment, though, and if the mediation is taking place in a Member State where the mediator is not licensed, the ultimate MSA may be considered as lacking one of its main characteristics – i.e. the fact that it has been the ultimate result of mediation.[69] This additionally complicates the context for providing cross-border mediation services. At the same time, it can be perceived as a risk for the parties who may be acting under the assumption that they are receiving all benefits of the mediation service while being deprived of one of the key benefits of mediation.

The above is specifically valid within the context of an ever-growing trend for mandatory mediation models across the EU, especially family mediation. Specific examples of the problems that may occur here are depicted in the categorical mandatory family mediation models, where litigants are forced to mediate before filing their petitions. Such, by way of example, are the models applied in Lithuania, Greece, Croatia, Malta, Estonia in child access cases, and Italy in family business disputes.[70] The common characteristic of all these models is that they require litigants ahead of filing their court claim to attend mediation or a mediation information session and to furnish evidence for this to the court. The fact that other countries,[71] like Germany, Spain, Portugal, and Bulgaria, do not have such a requirement effectively leads to the risk of parties to family disputes being left with the choice to seek a more favourable forum that effectively does not require from them compliance with such procedural obligation.

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67 Kimberlee K Kovach, *Mediation: Principles and Practice* (3rd edn, West Academic 2004) 23-7.

68 Haris P Meidanis, 'Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform' (2020) 16(2) Journal of Private International Law 275, doi:10.1080/17441048.2020.1796226

69 Directive 2008/52/EC (n 3) art 6.

70 Agnė Tvaronavičienė and others, 'Mediation in the Baltic States: Developments and Challenges of Implementation' (2022) 5(4) Access to Justice in Eastern Europe 68, doi:10.33327/AJEE-18-5.4-a000427.

71 ibid.

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Given the massive migration processes that are still on the rise, this problem is not merely of a theoretical nature but may have some practical implications of turning certain jurisdictions into 'mediation heavens' with no mandatory mediation for some cases or where the provisions for its conduct are of a relaxed nature. The same risk also exists in the field of recognising mediation settlement agreements as an enforceable title in all Member States, which may result from the work of various mediators, all of whom are subjected to different national regulations. This gives the parties the chance to pursue the conclusions of settlements via mediation in jurisdictions with a more lenient regulatory framework towards mediators and to seek to subsequently enforce them in the desired jurisdiction where they would not have been enforceable in the first place. All of the above represents some of the challenges that forum shopping and bad faith use of the patched mediator regulations may result in and further stress on the need for urgent reform suggesting uniform criteria and professional regulations of all EU mediators.

4 CONCLUSIONS AND RECOMMENDATIONS

The analyses of existing national legislation in the field of mediators' professional regulations on an EU level has brought to light the consderiable challenges or nearly impossibility for mediators trained in one EU Member State to render mediation services in other Member States. Keeping in mind the essence of the mediation process and its universal nature, this limits mediators from exercising their EU-guaranteed freedom of services and, as such, ultimately leads to the shrinking of the mediators' market and indirectly decreases the quality of the mediation services due to limited competition.

However, a few tools for recognising mediation licenses and training requirements have been implemented, but in their bigger part, they fail to truly foster a single mediators' market in the Union. These tendencies are further strengthened by the uptake of mandatory mediation models, which dramatically raises the number of mediated cases and results in the additional polarisation of the requirements towards practising mediators. Considering the high number of cross-border disputes, the situation becomes even more complicated and creates additional formal obstacles to the development of mediation and its wider usage.

The existing regulatory, coupled with the diverse training requirements applicable nationally, call for a need to adopt uniform training requirements with curriculum that is synchronised and applicable across all states. Unifying the systems of mediation training and certification around the EU requires discussions as it may increase the trust that the quality of the mediation service offered in the numerous Member States meets a certain fixed standard. However, moving towards such unification shall necessitate careful deliberations within the professional community of mediators in the EU to synchronise the advancement and agree upon content specifics that need to be adopted. In addition, such a harmonised approach towards the qualification of the mediators would be highly beneficial to mandatory mediation schemes in cross-border disputes as there will be no more space for the latter discussion on the suitability of the mediator, who was assisting parties in such

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a dispute resolution process. The latter would also serve as a benchmark for the quality that needs to be maintained across accrediting organisations in the EU. The overarching objective of this would be to increase the credibility of the mediation institute by ensuring it meets an impeccable quality coupled with utmost professionalism.

Separately, the authors propose initiating a discussion about creating a uniform EU registry of mediators and mediators' service and training providers. This might be the next step towards creating a truly European single market of mediation services.

However, prior to their implementation, all of the above notions require a truly European discussion that involves all stakeholders in a process that seeks to and adopts a unified standard of mediation conduct that is applicable throughout the entire European Union.

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Summary: 1. Introduction. – 2. Existing EU standards and legal requirements for entering the mediator's profession. – *2.1. The mediator as a service provider: the EU concept of mediator and the peculiar specifics of this term. – 2.2. National mediators' qualifications and training requirements: existing EU models and developing tendencies within the context of mandatory mediation. – 2.3. Recognition and accreditation of mediators from other Member States and Third Countries.* – 3. Challenges under the existing patched regulations on practicing mediation in the EU. – *3.1. Absence of unified international standards in regard of international mediation practice. – 3.2. Inconsistencies in the recognition process allowing mediators to practice in the EU. – 3.3. Cross-border enforceability of mediation settlement agreements resulting from the work of mediators meeting different professional requirements.* – 4. Conclusions and Recommendations.

Keywords: *mediation, professional requirements, free movement, recognition, international standards.*

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