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## EXPLAINING CHANGE IN THE IMPLEMENTATION OF THE DIRECTIVE ON MEDIATION: DOMESTIC POLITICS ABOVE ALL

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## Abstract

On 4 April 2008, the European Parliament adopted the Directive on certain aspects of mediation in civil and commercial matters (Directive on Mediation), which aimed to provide a policy framework for the future development of mediation as a form of ADR. However, despite the legal and political support for the policy, the Directive barely contributed to any changes on the ground in most Member States and has fallen short of achieving its objective to ensure a balanced relationship between mediation and judicial proceedings.

This study attempts to understand the reasons for the limited practical impact of the Directive by identifying the key factors in the process of its implementation at the national level. In order to address this question, this study examines the dynamics of the implementation of the Directive in Italy and Sweden. Based on the analysis, the study concludes that change was determined by domestic change agents and their ability to frame the reform in the light of a domestically salient problem, thereby increasing the likelihood for change.

The findings of this study place EU-pioneered reforms in civil justice in the area of domestic politics and highlight the need for future EU policies to empower change agents at the domestic level and provide a stimulus for change beyond formal compliance.

## List of Abbreviations

<b>ADR</b>	Alternative Dispute Resolution
<b>CJEU</b>	Court of Justice of the European Union
<b>CJP</b>	(Swedish) Code of Judicial Procedure
<b>EU</b>	European Union
<b>EP</b>	European Parliament
<b>OUA</b>	Organismo Unitario dell'Avvocatura (Italian Advocates Union)
<b>RCI</b>	Rational-choice institutionalism
<b>SCC</b>	Stockholm Chamber of Commerce
<b>SI</b>	Sociological institutionalism

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# Explaining Change in the Implementation of the Directive on Mediation: Domestic Politics Above All

## 1. Introduction and problem specification

On 4 April 2008, the European Parliament adopted the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Directive on Mediation)<sup>1</sup>, which marked the highlight of the increasing legal and political support that methods of alternative dispute resolution (ADR) have gained in the EU over the last decade. The act aimed to provide a policy framework for the future development of mediation, which has often been praised for its benefits against litigation as the standard method of dispute resolution, among which are time- and cost-related efficiency gains, procedural flexibility and confidentiality (see De Palo (2012); Alleweldt and al. (2009); Hoffmann (2007) De Palo, et al. (2011)). In the case of the EU, this reform was also motivated by concerns about the varying practices in length and quality of dispute resolution across the Single Market, which lead to extreme court congestion and put a worryingly high fiscal burden on certain Member States amidst the 2008 global economic downturn (De Palo, 2012) (De Palo, et al., 2011).

Whereas mediation developed relatively quickly in common law jurisdictions, as it seemed compatible with the existing practices of dispute resolution, this has been not the case for civil law jurisdictions in continental Europe, invariably whether they were part of the Roman, Germanic or Nordic legal cultures (Hoffmann, 2007, p. 505) (Nolan-Haley, 2011). The implementation of the Directive on Mediation barely contributed to any changes on the ground in most Member States and has fallen short of achieving the

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<sup>1</sup> Directive 2008/52/EC of the European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters, 2008, L 136/3

objective stated in its Article 1 to ‘facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings’. Hence, mediation is used in less than 0.05% of civil cases brought before courts across the EU and unofficial estimates show that no more than four Member States (Germany, Italy, the Netherlands and the UK) administer more than 10,000 mediations annually (see Table 1). Among these, the implementation efforts in Italy stand out as the most successful, as a groundbreaking reform produced almost 200,000 mediations annually and an overall transformative turn in the resolution of disputes in civil law.

Table 1: Estimated number of mediations/year. Source: De Palo, et al. (2014)

Number of mediations	Member States
More than 10.000	Germany, Italy, the Netherlands, UK
Between 5.000 and 10.000	Hungary, Poland
Between 2.000 and 5.000	Belgium, France, Slovenia
Between 500 and 2.000	Austria, Denmark, Ireland, Romania, Slovakia, Spain
Less than 500	Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Luxembourg, Malta, Portugal, Sweden

The difficulties in the process of implementation of the Directive received wide attention in the legal literature, where based on comparative analysis and empirical research legal scholars attempted to identify the best practices in the regulation of mediation and gave recommendations to promote and increase its popularity (see De Palo et al. (2012); Hopt, et al. (2013); Ervo, et al. (2014); Alleweldt, et al. (2009); Alexander (2012), De Hoon (2014), Smits (2007) and Hoffmann (2007)). However, the topic of Europeanization of civil procedure, or more precisely, the introduction of mediation as a form of ADR in European systems of civil justice has received a rather limited attention in the political science literature. Some studies (see Nylund (2014, p. 31)) have explicitly suggested that “the lack of discussion on the Europeanization of [...] civil procedure has been striking”, especially considering that it has affected many

aspects of the national civil procedure, including mechanisms of dispute resolution, professionalization, the structure of civil procedure and the overall idea of civil justice.

The empirical evidence from the implementation of the Directive suggests that successful implementation which led to a significant change in the use of mediation was not determined by the regulatory style, the legal culture tradition and culture, the previous experience with mediation, nor the overall implementation record of a given Member State across other policy areas. Thus, mediation was established as a relatively successful mechanism of dispute resolution in the Netherlands, where regulation is scarce and mediation is administered following market-based regulation and Italy, Slovenia and Austria, where the government adopted advanced regulative framework of mediation. The successful implementation efforts of Italy contrast those of Spain, but both are part of the Roman legal culture. Similarly, the implementation of the Directive in Sweden failed to change the use of mediation, unlike Finland, where its practice is steadily rising. Finally, the Directive opened a policy window to reform the existing policies and produce change both in the countries with tradition in the use of ADR like the UK and the Netherlands, and Italy, where mediation was scarcely used before the Directive. Therefore, this empirical puzzle begs an explanation beyond these categories.

This study will focus on the process of Europeanization initiated through the Directive on Mediation and the driving factors in the process of implementation at the national level. In particular, this study aims to explain *why the process of implementation of the Directive produced change in the practice of mediation in civil and commercial disputes in certain Member States* and identify *the determining factors for change in the process*. The main hypothesis explored here is that change was reliant on the capacity of domestic actors favoring change and/or advocating for a certain policy to present the reform in the light of a domestically salient problem. The salience of the problem, in turn, constrained or stimulated the capacity of change agents according to the degree of salience and scale of the problem and had an overriding



influence over other constraining factors. In other terms, the reform led to an increased use of mediation in Member States where it was integrated in the wider system of dispute resolution, and domestic change agents and epistemic communities played the key role in framing the policy in the light of the most pressing domestic issues, thereby increasing the likelihood for change.

The independent variable in this study is adaptational pressure stemming from the EU policy and the new conceptualization of dispute resolution in civil and commercial disputes, whereas the degree of change in domestic policies and institutions will serve as the dependent variable.

In the following, the study will first present the methodological framework and then briefly examine the most important aspects of the Directive on Mediation. After that, the study will provide an overview of competing explanations grounded in the theory of Europeanization, which will be followed by in-depth analysis of the selected case studies. Finally, the findings from the case studies will be brought together with the conclusions and policy implications of the study.

## 2. Methodological framework

In order to pinpoint causal mechanisms between different factors of Europeanization and domestic change, this study makes use of the method of process-tracing through focused comparison of two case studies. Van Evera (1997) describes this method as useful for breaking down the relationship between the independent and the dependent variable, whereby the investigator can identify evidence in each step of the process. Haverland (2008) points out process-tracing as the most commonly used method in the Europeanization literature and highlights its value in theory-testing against empirical evidence identified by the case studies. This study utilizes process-tracing in two variants identified by Beach and Pedersen (2011): first, to explain the outcome of the implementation process and second, to examine whether the causal mechanisms are present and function as theorized in the mainstream literature on Europeanization.

The selected case studies are Sweden and Italy, due to the similar extent of misfit but different degree of change, which allows to explore the factors of change proposed by the main hypothesis (also see Table 2). The selection was also influenced by Falkner and Treib's (2008) typology of 'worlds of compliance' which categorizes Member States according to their record in terms of transposition and practical implementation of European policies. The outcome of this implementation process went against Italy's record of successful transposition but lack of practical implementation and Sweden's positive record in both categories. In order to enhance reliability, the study will also refer to examples from the implementation process in other Member States, as well.

In order to gather empirical evidence, this study relied on official policy documents and research produced by local researchers in practitioners from the selected case-studies. To complement these findings and ensure validity of the evidence, the study consulted practitioners working in Italy and Sweden through written surveys and interviews. Surveys with five open-ended questions (see Appendix section) were sent out to a total of 20 individuals and organizations in Sweden and Italy which subscribe to the European Code of Conduct for Mediators (European Commission, 2009). Unfortunately, only three respondents were open to answer the questionnaire. Based on the same set of open-ended questions, one interview was conducted with a representative from the ADR Center in Italy and one from the Arbitration Institute of the Stockholm Chamber of Commerce, as the biggest providers of ADR services in the selected case studies.

An important caveat of data-gathering in this research (which was also highlighted in the EU Justice Scoreboard tool (European Commission, 2013)) concerns the availability of official statistics on the number of cases handled through mediation in most Member States, including Sweden, given the confidential character of the procedure and the absence of an obligation for mediators to report cases in most Member States. In Italy, the official statistics on mediation only concern the numbers of mediations covered by the policy on mandatory mediation, which excludes the share conducted in other types of disputes. In absence

of official statistics, this study made use of estimates and reports found in earlier research in English (see Dahlqvist (2014), Martuscello (2011), De Palo, et al. (2014)).

### 3. Brief overview of the Directive on Mediation

EU's push for ADR dates from the 1998 European Council in Vienna where the possibility for mediation as a non-judicial mechanism in cross-border family disputes was first considered (European Council, 1998) and the 1999 European Council in Tampere, which appealed to Member States to create extrajudicial dispute resolution mechanisms (European Council, 1999). A more systematic effort was presented through the Green Paper on ADR in civil and commercial matters<sup>2</sup>, which recognized the development of ADR as a 'political priority' and saw it as means to mitigate difficulties of access to justice across due to the congestion of caseload in national courts and the increasing length and costs of litigation (European Commission, 2002, p. 7). The pinnacle of political goodwill in favor of ADR came in May 2008, when the European Council and the Parliament adopted the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Directive on Mediation, Mediation Directive) at its second reading. The Directive was due to be transposed into national legislation by 21 May 2011.

The Directive on Mediation aims to promote mediation as an out-of-court means of dispute resolution by regulating a wide array of issues concerning this mechanism, including a common definition for the process of mediation and the profession of mediators, codes of conduct by providers of mediation services, access to mediation, enforceability of mediation settlements, confidentiality of the mediation process, the effect of mediation on limitation and prescription periods and dissemination of information on mediation among the general public.

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<sup>2</sup> Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, at 5, COM (2002) 196 final (Apr. 19, 2002).

Firstly, the Directive sets out the objective of promotion of ADR and obliges each Member State to ensure the quality of mediation and encourage the training of mediators. Secondly, it provides that courts can invite parties to mediation whenever found appropriate. Thirdly, the Directive simplifies the enforcement of mediation settlements by upon request of the parties, as long as this is not contrary to the law of the Member State where the request is made. Fourthly, confidentiality is reinforced by providing that both the mediator(s) and the parties are exempted from the responsibility to give evidence in court regarding information arising from or in connection with the mediation process. Finally, to protect the right to judicial protection, the Directive prescribes that the initiation of the process of mediation halts the expiry of limitation or prescription periods during the mediation process.

The scope of the Directive is purposefully limited to disputes in civil and commercial matters<sup>3</sup> with a cross-border dimension, but does not prevent Member States from extending the scope to domestic disputes. This did not seem to limit the scope of the Directive, given that most Member States opted to apply the Directive in both domestic and cross-border disputes, with the exception of the UK, where it only applied in cross-border disputes. Denmark opted out of the Directive.

The Directive explicitly states (and arguably, encourages Member States<sup>4</sup>) that it does not preclude Member States from introducing compulsory use of mediation or making it subject to incentives or sanctions, as long as this does not prevent the disputants from accessing the judicial system (Article 5). In

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<sup>3</sup> This excludes some areas of law where mediation is also commonly used, such as criminal and administrative matters, non-contentious civil cases, consumer disputes, collective bargaining, insurance disputes etc. The Directive does *not* apply to pre-contractual negotiations or certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or processes administered by persons issuing formal recommendations.

<sup>4</sup> "I call on Member States to be ambitious in putting the EU rules on mediation in place swiftly: the bare minimum is to allow cross-border disputes to find amicable settlements. But why stop there? Why not make the same measures available at national level?" a statement by then-Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding (European Commission, 2010)

the case *Rosalba Alassini v Telecom Italia SpA*, [2010] E.C.R. I-02213<sup>5</sup> the Court of Justice of the European Union (CJEU) upheld Italy's policy of making mediation a precondition for admissibility of certain types of disputes and did not find violation of the right to effective judicial protection enshrined in the Article 6 of the European Convention on Human Rights.

#### 4. Theoretical framework

For the use of this study, Europeanization will be purposefully limited to its notion as a top-down process, which focuses on 'the domestic impact of the public policy of the EU' (Radaelli, 2003, p. 28), which in the case of Europeanization of civil law, pertinent to the policy at hand, is triggered by legislation, court decisions and other binding legal documents (Smits, 2007). This is without prejudice to the understanding of Europeanization as a process of mutual interaction between the Member States and the supranational European polity (Radaelli & Pasquier, 2008, p. 37).

The mainstream authors in the Europeanization literature construct the process of domestic change under the influence of European policymaking through a two- or a three-step model whereby the process is initiated by policies adopted at the European level which generate pressure to adjust upon member states, which in turn is facilitated by favorable domestic institutions that ultimately contribute to specific types of outcomes (see (Börzel, 1999) (Börzel & Risse, 2000) (Börzel & Risse, 2003) (Cowles, et al., 2001) (Heritier & Knill, 2001) (Heritier & Knill, 2001) (Versluis, 2004)).

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<sup>5</sup> Joined Cases C-317-320/08 *Rosalba Alassini v. Italian Telecom SpA* [2010] E.C.R. I-02213

#### 4.1. Misfit

Börzel and Risse (2000), Knill and Lenschow (1998), Héritier *et al.* (2001) and Verslius (2004) argue that Europeanization can only lead to domestic change if it is ‘inconvenient’, and highlight that misfit between domestic and European policies, processes and institutions is the necessary condition for change. Börzel & Risse (2000) distinguish between policy misfit, which causes problems of compliance due to the incompatibility of domestic policies with those prescribed in the Directive, and institutional misfit, which challenges domestic institutions and the collective understandings attached to them. In the context of this study, the deviation between domestic legislative framework and the content of the Directive gives rise to a policy misfit, whereas the existence of the institutional framework (providers of ADR services, domestic supervision bodies, etc.) determined the level of institutional misfit. Other authors, like Mastenbroek and Kaeding (2006), contest the utility of the concept of misfit in the analytical framework on Europeanization altogether and argue that it is too static and spurious, as both the status quo and the domestic response to the EU policy are determined by domestic policy actors.

In the case of the Directive on Mediation, policy misfit did not present a problem in Most Member States, as most of them transposed the Directive correctly and in time (see Appendix A in De Palo, et al. (2012)), because they had already formally introduced mediation under the influence of earlier non-binding legislation issued by the EU<sup>6</sup> and the Council of Europe<sup>7</sup>. Thus, Italy introduced mediation in civil and commercial matters in 1993 and the Swedish Code of Judicial Procedure featured the possibility to use a ‘special mediator’ appointed by the court since 1948. Moreover, a number of service providers were

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<sup>6</sup> The European Code of Conduct for Mediators and a proposed Directive on Mediation for civil and commercial matters were issued in 2004.

<sup>7</sup> The first activities of the CoE date as early as 1981, when the Recommendation n° R (81) 7 of the Committee of Ministers on access to justice proposes a simplified process among others of “*conciliation of parties and amicable resolution of conflicts, before trial or during a trial*”. In 2002, the Committee of Ministers adopted Recommendation R (2002) 10 to encourage the use of mediation in civil law matters.

already present before the transposition of the Directive, such as the ADR Center and Concilia in Italy and the Swedish National Board for Consumer Complaints, Rent and Tenancy Tribunals and the Arbitration Institute at the Stockholm Chamber of Commerce.

However, this study is interested in the factual impact of the Directive on the practice of mediation, which necessitates looking beyond formal compliance. In that regard, it is useful to conceptualize misfit beyond policies and institutions alone, and in the light accomplishing the objective of establishing a ‘balanced relationship between litigation and mediation’, found in Article 1 of the Directive. Such understanding of misfit, in addition to policies, considers change along the legal culture and practice of mediation and thereby accounts for the practical impact of the Directive.

Changes in terms of a particular legal culture encompass change in both its ‘physical’ structure (comprising of legislative and adjudicative bodies, legislation and case law) as well as in its ‘intellectual’ structure (which features the idea of justice, legal methods, professionalization, etc.) (Sunde, 2010, pp. 20-24). In the case of the implementation of the Directive on Mediation, such change would practically convert into an increased number of cases handled through mediation in contrast to litigation, proliferation of providers of mediation services and training for mediators and an overall change of the notion of dispute resolution.

The Directive does not prescribe specific indicators to define the objective of ‘balanced relationship’, but if read in the context of the remainder of the Directive as well as official statements and studies originating from Brussels<sup>8</sup>, it implicitly suggests that the goal of balanced relationship requires that the use of mediation increases well above the then-current level. Thus, Member States like Sweden and Italy faced a relatively high level of misfit, given that according to unofficial estimates mediation was used in no more

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<sup>8</sup> During a debate in the European Parliament over the challenges in the implementation of the Directive on Mediation, Viviane Reding, then-Commissioner on justice, fundamental rights and citizenship stated that in order to achieve the ‘balanced relationship between mediation and litigation’, mediation needs to become ‘*a cultural choice*’ (European Parliament, 2012).

than 500 cases annually before the implementation of the Directive on mediation (De Palo & Keller, 2012) (Dahlqvist, 2014).

Hopt and Steffek (2013) suggest that the target of ‘balanced relationship’ would be met when a given system of dispute resolution ‘does not favor one conflict resolution mechanism over another’, but ensures that different types of disputes are allocated to be resolved through the most suitable method. In that regard, achieving change in the light of establishing this balance depends decisively on the institutional integration of mediation in the various procedures of dispute resolution and in substantive law (*ibid*). In successful cases, integration of mediation in the wider system of dispute resolution has practically been converted into obligations on the parties and lawyers which aim to restructure the demand and supply in dispute resolution, such as mandatory pre-action mediation, investigation, advice and orders issued by the courts, as well as various cost incentives, sanctions and legal aid. This process should ensure that mediation is fully integrated in the wider system of dispute resolution and that all participants in the procedure (the parties, their lawyers and wherever applicable, the court) have it in full consideration as a viable alternative, should it meet the needs of their case.

In the case studies analyzed in this study, the existence of policy misfit provided domestic policymakers with a policy window to revise domestic policies. However, contrary to the notion that high level of incompatibility which requires fundamental changes is unlikely to result in domestic change as argued by Knill & Lenschow (1998) and Duina (1997), this was not decisive for the change observed at the domestic level. Instead, the mere existence of misfit provided an impetus for change, whereas the degree of change depended on the capacity of domestic agents to initiate reform and whether the proposed policy was presented in the light of a domestically salient problem.



#### 4.2. *Facilitating factors*

Börzel & Risse (2000) have identified two distinctive mechanisms of Europeanization, whereby domestic change can be the result of redistribution of resources (rational choice institutionalism (RCI)) or socialization and learning (sociological institutionalism (SI)). According to the RCI logic, the process of Europeanization empowers certain actors whose preferences are in line with the European policy, whereas reduces the strategy options and weakens the position of others. The SI logic, on the other hand, considers change in terms of norms, ideas, discourse, etc. (Bulmer, 2008), which is induced as a result of the process of collective learning and resocialization (Börzel & Risse, 2000). In both regards, they argue that misfit is the necessary condition for change, but the presence of various facilitating factors is the sufficient condition for change. Following the RCI logic, they argue that the presence of facilitating formal institutions along with the absence of potential veto points can lead to change by presenting new opportunities for domestic actors who have the capacity to make use of them. The SI logic emphasizes the role of change agents (particularly norm entrepreneurs and epistemic communities) and consensus-oriented political culture in inducing change by collective learning and redefinition of interests and identities. However, these two mechanisms are not mutually exclusive and can be utilized to explain different phases of the implementation process (Börzel & Risse, 2000) (Knill & Lehmkuhl, 2002).

The hypothesis explored in this study highlights the need to focus on the preferences of domestic actors, and in particular pro-mediation policy actors with the preference for change. From the perspective of RCI and change as differential empowerment of domestic actors, the process of implementation (and particularly, the stage of transposition) opened up a policy window for change and empowered domestic actors whose preferences were in line with the European proposal on mediation. In both cases, domestic policymakers, members of the legal profession and domestic legal scholars, as well as business stakeholders

proved to be the leading actors whose preferences affected the outcome, and the stage of transposition unleashed a political struggle between them.

In cases where the proposal faced significant opposition through formal or informal veto points, as it was the case by Italian lawyers, the proposal pushed forth by pro-mediation actors needed to be framed in the light of an issue perceived as salient. This notion highlights that in addition to agency-centered facilitating factors, the contents of the policy are also important, in the sense of the salience of the issue addressed by the policy (Mastenbroek & Kaeding, 2006, p. 341). More particularly in the case at hand, this meant that the capacity of domestic actors favoring change and/or advocating for a certain policy to push forth their preferences was affected by the perceived issue salience and whether they were able to frame the policy in the light of a salient problem. Verslius (2004) argues that issue salience, understood as ‘the visibility of and the importance attached to a topic’ (p. 12), acts like a complementary factor to the existing facilitating factors, and has the potential to constrain or impede the influence of facilitating factors in the case of low salience or stimulate them and enhance their effectiveness in the case of high salience (p. 14). In cases necessitating significant change (as in the case-studies examined here), it was necessary that pro-mediation actors employed a convincing supportive domestic discourse and acted like change agents. In this regard, presenting mediation as panacea to the lagging judiciary in Italy and Slovenia, or highlighting the cost-efficiency character of the reform in the light of the sovereign debt crisis in Portugal and Poland empowered pro-mediation domestic actors and facilitated change.

Similarly, while discussing issue salience, Kingdon (1995) highlights the notion of policy-making as ‘a function of crisis’ (p. 95) and argues that the adoption of a certain policy is conditioned upon whether there is a problem which received major public attention; whether there is a policy solution recognized as suitable and whether politicians are inclined towards reform. The case of Italy demonstrates the importance of these dynamics.

However, the transformation of (aspects of) the legal culture also necessitated a process of collective learning and resocialization beyond the policy alone, especially in Italy, where litigation was deeply embedded, judging by the high litigation rate and the enormous judicial backlog of 5.5 million cases (CEPEJ, 2012). Therefore, the epistemic communities in Italy and Sweden (mediation experts, legal scholars, practitioners) were involved in persuading veto players and legitimating the policy before the general public.

Table 2: Facilitating factors in the selected case studies

	Sweden	Italy
Misfit	Low use of mediation (less than 500 mediations/year), but a number of service providers	Low use of mediation (less than 2.000 mediations per year), but a number of service providers
Facilitating factors	<ul style="list-style-type: none"> <li>+ entrepreneurial executive (Duina&amp;Blithe, 1999)</li> <li>+ no veto points</li> <li>- no salient problem to be addressed, politically significant</li> <li>- epistemic community delegitimized the proposal</li> </ul>	<ul style="list-style-type: none"> <li>+ entrepreneurial executive</li> <li>- influential veto players</li> <li>+ salient problem to be addressed (extremely inefficient judiciary)</li> <li>+ change agents, supportive epistemic community</li> </ul>
Outcome	Absorption, practically no change	Slowly moving towards transformation, 200.000+ mediations per year

#### 4.3. Outcomes of Europeanization

For the purposes of this study, the outcomes of the implementation of the Directive will be identified within Radaeli's (2003, pp. 35-38) categorization which features four types of outcomes, according to the extent and the direction of domestic change: retrenchment, inertia, absorption and transformation. In that regard, whereas retrenchment signifies a form of change which brings even greater misfit between domestic and European after the process of implementation than the one there was before, inertia highlights the lack of change whatsoever. On the other hand, positive change like absorption gives rise to non-fundamental

changes (implementation in the fashion of ‘dead letters’ (Falkner & Treib, 2008)) and transformation accounts for fundamental changes. In order to account for transformation, the study will consider the change from before and after the implementation of the Directive in the *number of cases handled through mediation*, as the main indicator for transformation.

#### 4.4. Framing the introduction of mediation

As it is the case with most other policies, the introduction of mediation in civil and commercial disputes was not a goal for itself. Many considerations influenced the introduction of the policy and understanding these offers a great explanatory value for the way the policy was framed by policy actors in the domestic context and enhanced the salience of dealing with a certain issue. Garrison and Modigliani define framing as a way to provide “a central organizing idea or story line that provides meaning to an unfolding strip of events, weaving a connection among them” (1987, p. 143). The frame against which a problem is presented reveals what the presenter finds as relevant in the present context and presents it in either positive or a negative light in order to influence the preferences of others (Druckman, 2001, pp. 227-228). In the case of the implementation of the Directive, the introduction of mediation in the domestic policy arena was framed in the light of a number of considerations, which provided motivation for change and they will be considered in the remainder of this section. The frames provided here are inter-linked and mutually reinforcing and the list does not exhaust all the different frames that were used in the context of this policy.

##### a. Improving access to justice

The administration of justice is a core function of every state and the right to access to justice is a key guarantee under both the European Convention of Human Rights and the European Charter of Fundamental Rights in the EU. The idea of access to justice, understood as “an idea to empower individuals to exercise their rights in the civil justice system” (Nolan-Haley, 2011, p. 986) is increasingly used to

contextualize the introduction of mediation at the global level. The European Parliament has held the position that the concept of access to justice also entails ‘access to adequate dispute resolution processes for individuals and businesses’ (European Parliament, 2011). Cappellatti and Garth (1978) describe the introduction of mediation as the ‘third wave’ of the global reform to enhance access to justice, following the reform of introducing legal aid and the possibility to allow multiple claims to be considered in a single process, i.e. class action.

Speaking on the Directive on Mediation, then-Commissioner on Justice, Fundamental Rights and Citizenship Viviane Reding referred to the introduction of mediation as way to promote ‘an alternative and addition access to justice in everyday life’ of EU citizens (European Commission, 2010). The Directive itself makes numerous references to this notion in its preamble, including the EU’s competence to adopt measures in civil justice that are necessary for the functioning of the internal market and the importance of ADR to simplify and improve access to justice and enable EU citizens to approach courts in any other Member State ‘as easily as in their own’, a formulation which originated from the European Council in Tampere in 1999. Thus, the official framing of the introduction of mediation has been related with its potential to make justice more accessible and simplify (or even lead to convergence of) the procedure of dispute resolution in civil and commercial issues across the EU.

*b. Business-friendly dispute resolution and choice in dispute resolution:*

Markets necessitate an environment in which legal rights, especially property and contracts, are protected and enforced in an effective and efficient way (Posner, 1998). Sizeable discrepancies in length<sup>9</sup> and cost of proceedings across the Single Market and weak rule of law hamper trade, especially across borders, given

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<sup>9</sup> Length of proceedings in 2008 varied from 235 days in Finland to 1210 in Italy and 1350 in Slovenia (Doing Business, 2010, p. 100)

the value of predictable, timely and affordable systems of protection in every phase of doing business: from starting one to settling disputes and termination of business (OECD, 2013) (European Commission, 2013).

The introduction of mediation has been also advertised as especially beneficial for businesses across the Single Market, given the notion that it provides relatively faster dispute resolution in comparison to traditional litigation. A survey targeting SMEs across the Single Market revealed that cost- and time-related efficiency gains are the top reasons for businesses to use mediation, as well as the possibility to preserve business relations, unlike the adversarial character of litigation (Tilman, 2011, p. 6). Thus, the introduction of mediation can be also interpreted as an attempt to establish a business-friendly environment in the light of the market-making mandate of the EU, which also initiated other reforms, including the mutual recognition and enforcement of civil judgments across Member States, improvements in consumer standards and consumer protection and consumer ADR and ODR.

Providing businesses an alternative to the costly and lengthy litigation also entails breaking the monopoly of courts in the 'market' of dispute resolution, or simply put – providing a choice. Botero et al. (2003) point out that in the absence of competing providers of services of dispute resolution, courts have no incentives to be competitive by improving the efficiency and quality of their services and they treat litigants like any other captive market (p. 62). The case of Netherlands can be used as an example of framing the introduction of mediation as introducing competition in the provision of dispute resolution services, which ultimately contributed to a rising use of mediation (Albers, 2012).

*c. Reducing judicial backlog and length of proceedings:*

Mediation became especially appealing in the EU in the light of increasing court congestion and lengthy proceedings, which have reached extreme values in certain Member States (Martuscello, 2011) (Nolan-Haley, 2011). The 2002 Green Paper on ADR in civil and commercial disputes, which started the discussion

over introducing relevant policy measures in the EU, considered that the length of proceedings, the overwhelming caseload and the high costs of litigation threatened the right to access to justice, as prescribed in Article 6 of the European Convention on Human Rights (European Commission, 2002). For example, at the time of the introduction of mediation, the Italian judiciary had (an increasing) backlog of over 5.5 million pending civil and commercial cases and it took on average 1210 days to resolve a commercial dispute in Italy in 2008 (Doing Business, 2010, p. 100). Similarly, a significant drop in the clearance rate (-17%) by courts working with civil cases between 2006-2010, made German policy makers more accepting of mediation and other forms of ADR (Jean & Jorry, 2013, p. 35) (Hoffmann, 2007).

The length of the proceedings can be considered as the result of the interaction between the demand and supply of judicial services, whereby the inability of the system to meet the demand for dispute resolution contributes for the increase in the case backlog and delays (OECD, 2013) (Palumbo, et al., 2013). In that sense, the supply of justice depends on the quality and quantity of financial and human resources, the efficiency of the process of service provision and governance structure and the structure of incentives of the service providers (judges and judicial staff) (OECD, 2013). The demand side, on the other hand, is determined by a set of *external* factors, such as cultural traits, the stage of economic development and the business cycle, the quality and quantity of legislation and a number of *internal* factors, such as the costs of dispute resolution and rules over their allocation between the parties, the incentives affecting lawyers (fee regulation, pricing transparency and the structure of legal services) and the availability of ADR mechanisms (*ibid*). Thus, when considered in the context of lengthy proceedings and judicial backlog, the introduction of mediation should on one side, affect the supply of dispute resolution services by increasing the infrastructure of service providers and by introducing competition on the market. On the other side, such reform should also have a positive effect on the demand for dispute resolution services by redirecting a share of disputes away from the judicial system. In particular, the introduction of coercive or ‘nudging’ elements in mediation, which aim to filter cases which can be settled or easily resolved outside the court,

has been successful at altering litigation strategies and compelling parties to consider the alternatives (De Palo & Keller, 2012). Moreover, the length of proceedings is inversely related with the confidence in the judiciary (Palumbo, et al., 2013, p. 9), which should have a reinforcing effect on the cross-elasticity between litigation and mediation.

*d. Austerity and privatizing the day in court:*

Lengthy proceedings are regularly linked with high costs which pose a significant burden on both the public budget and the budget of parties of the dispute (Palumbo, et al., 2013, p. 14). In this regard, mediation holds the promise to reduce the expenses for the court infrastructure through privatization of dispute resolution (Hopt, et al., 2013) (Kulms, 2013). A 2011-study on the costs of mediation in contrast to litigation found that the average cost of litigation in the EU is EUR 10.449 whereas the average cost in mediation is EUR 2.497, and a success rate of mere 24% would ensure cost-related benefits for mediation in the Single Market (De Palo, et al., 2011). Moreover, given the notion that mediation settlements are in fact mutually agreeable outcomes for the parties, this should ensure high compliance with mediated agreements and reduced costs for enforcement and further litigation (European Parliament, 2011).

This potential of mediation has been recognized in the time of the global economic crisis: “Member States have a general duty to limit their citizens’ expenditure of unnecessary time and money in civil litigation. That duty has become an imperative during the current economic downturn” said Arlene McCarthy, the EP rapporteur on the Directive on Mediation at a conference dedicated to the balance between litigation and mediation (McCarthy, 2012). This has led some commentators to identify the mediation reform as primarily motivated to relieve the pressure from public justice budgets by keeping disputants ‘as far away from judicial proceedings as possible, regardless of their needs and what mediation can offer’ (De Hoon, 2014, p. 24). As an example, even though the Directive was not applied in domestic disputes in the UK, the discussion over its implementation opened up the policy window to reconsider the domestic regulation



and to further promote the use of ADR. Commentators of this overall turn towards ADR point out that the initiative was clearly driven by the need for reduction of government spending, in particular the Ministry of Justice's target to cut down 25% of its spending by 2014-15 (target set in 2012), given that legal aid in mediation is more than five times cheaper than legal aid in litigation<sup>10</sup> (Hildebrand, 2012, p. 378).

## 5. Analysis of the case studies

### 5.1. Italy: a bold move towards mediation

*"It is not true that there is no justice in Italy. Instead, it is true that one should not ask the judge for justice, but rather the influential deputy, minister, journalist, lawyer, etc. You can find it: the address is wrong"*

Giuseppe Prezzolini, a journalist and author, 1921.

Whereas many authors in the Europeanization literature (Knill and Lehmkuhl (2002), Duina (1997), Knill & Lenschow (1998)) argue that high institutional incompatibility which requires fundamental changes is unlikely to result in domestic change, the case of Italy, along with those of Slovenia, Portugal and Poland stands in contrast with this hypothesis in the case of the Directive on Mediation. Moreover, the timely and correct transposition, along with the degree of practical change in dispute resolution in Italy, challenged its standing in the 'world of dead letters' (Falkner & Treib, 2008, p. 309). Thus, Italy's experience in implementing the Directive defies the odds, given the high level of misfit, the strong litigation culture and the relatively powerful coalition among lawyers that was very active, foremost in blocking the adoption of the policy and then subsequently sabotaging change. This study argues that the key to this move towards transformation lays in domestic facilitating factors concerning agency who managed to frame the policy in

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<sup>10</sup> The average cost per legal aid client is GBP 535 in mediation proceedings, whereas 2.823 in the case of litigation (Hildebrand, 2012, p. 391)

the light of a domestically salient problem, which had a catalyzing influence on the effectiveness of their efforts.

Italy transposed the Directive by enacting the Legislative Decree no. 28 of 4 March 2010 which came into force one year later. At the time of the adoption of this act, the Italian judiciary showed major challenges to deliver dispute resolution services in a timely and affordable manner, as parties were left ‘attempting to extract justice from a legal system with no time to hear their dispute’ (De Palo & Keller, 2012, p. 183). In 2010, it took on average almost 493 days to resolve a litigious civil or commercial dispute at the first instance courts alone, which was the third longest length of proceedings in such cases in the EU in 2010 (CEPEJ, 2012). The data concerning commercial disputes showed an even graver efficiency crisis in the dispute resolution system, as it took businesses on average 1210 days to resolve and enforce a typical business transactions dispute (Doing Business, 2015). The judiciary also faced a staggering backload of 5,532,216 pending civil cases (out of which 3,932,259 litigious, up by 23% since 2006), which was the highest number of litigious civil and commercial pending cases per capita (7 per 100 inhabitants) among EU Member States (and twice as many as the second highest in Portugal (3.5)) (CEPEJ, 2012). As a result of the lengthy proceedings, in 2010 the European Court of Human Rights found Italy in breach of the standard for timely proceedings in 41 instances concerning civil disputes alone (CEPEJ, 2012, p. 172). Finally, in addition to the lengthy proceedings, access to justice was challenged by high costs for litigation, as Italy had the third worst ratio of private cost to value of the claim among OECD countries at 29,5%. (OECD, 2013, p. 3). The extremely high number of first instance courts (1.231), the second highest in the EU, and the highest number of practicing lawyers (211.962), revealed major inefficiencies in the judicial system and a perverted structure of incentives in dispute resolution (CEPEJ, 2012) (Muiznieks, 2012).

The challenges of delivering dispute resolution in Italy received major attention in the light of the financial crisis, and especially the problematic sovereign debt and the continuously decreasing competitiveness of

the Italian economy (see OECD (2013), De Palo & Keller, (2012), Esposito, et al., (2014) Djankov, et al., (2003) Martuscello (2011)). Numerous influential studies pointed out that the performance of the Italian justice system was well beyond the EU and OECD average and that as such, the lagging judiciary was an important factor behind the country's poor growth and had severe negative consequences on the proper functioning of the financial and the labor market, entrepreneurship and innovation and even social cohesion (Esposito, et al., 2014, p. 5). As a result, Italy ranked 147 out of 189 economies in enforcing contracts according to WB's Doing Business 2010 report (2010), whereas the 2011 World Economic Forum pointed out contract enforcement (in particular, the aspect of length of proceedings) as the most serious threat to the financial development of the country (WEF, 2011). Moreover, low public confidence in the judiciary and the overall perception of the problem of lengthy proceedings<sup>11</sup> in the general public paved the way for reforms to tackle these issues.

In order to address the severe problem of judicial inefficiency and in the light of growing public resentment towards the judiciary, the Italian judicial system underwent through major reforms shortly before and after the transposition of the Directive on Mediation. These reforms raised court fees and created appeal barriers in order to reduce the inflow of cases, liberalized the lawyers' fees by abolishing the 'fee-for-service' regime which was providing incentives to lawyers to maximize the number of acts and evidence filed during a litigation and reduced the number of courts in order to create economies of scale and enhance specialization (see OECD (2013), Muiznieks (2012), Esposito, et al. (2014)). Finally, a sweeping and politically sensitive reform pioneered by then-President Silvio Berlusconi transformed the criminal justice

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<sup>11</sup> According to a 2013 Eurobarometer survey, Italian courts received the worst scores among all EU member states in length of proceedings, independence of judges, fairness of judgments, execution of judgments, cost of proceedings and simplicity of proceedings and judgments (Eurobarometer, 2013, pp. 33-37).

system from inquisitorial to accusatorial by enhancing the division between functions of prosecution and adjudication (Povoledo, 2011).

The overall overhaul of the judicial system along with the obligation for implementation of the Directive on Mediation opened up a policy window for pro-mediation domestic actors, ranging from government officials, to business and consumer associations and legal scholars and practitioners, to advocate for a reform to address the inefficiency of the judiciary. In that regard, the proactive approach of the Italian policymakers suggests that they wanted change and ‘the light touch approach’ of the Directive provided an opportunity to review domestic policies, and even ‘shift the blame’ for the reform to the European polity (De Palo & Keller, 2012, p. 182) (Mastenbroek & Kaeding, 2006, p. 337).

A group of scholars and practitioners<sup>12</sup> with extensive experience in mediation brought forth Italy’s ‘mediation paradox’: despite the high success mediation had achieved in certain industries since its first introduction in 1993, it never became really popular and making it mandatory was the only option, if policymakers were to ever relieve the overburdened judiciary (see De Palo (2012), De Palo & Keller (2012, pp. 182-3), Marinari (2012)). In an interview for the purposes of this study, De Palo highlighted that the coercive element of the policy has been a decisive factor for its success and contributed for swift integration of mediation into the wider system of dispute resolution (De Palo, 2015). Their efforts were also supported by the influential bar association in Rome, where its president Giuseppe Grechi criticized the lack of constructiveness on the side of lawyers and spoke in favor of the reform (Marinari, 2012, p. 202). Moreover, Confindustria, one of Italy’s most influential employers’ organizations was supportive of the new policy in the light of its promise for improved access to justice and called for the creation of a ‘serious and deep-

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<sup>12</sup> Giuseppe De Palo, a university professor and founder of ADR Center, the oldest provider of services in Italy was called to testify throughout the legislative process and had the opportunity to regularly voice his and other pro-reform actors’ opinion in national media (see De Palo & Keller (2012) and De Palo (2015)).

rooted culture of ADR' in Italy (MondoADR, 2012). Needless to say, the claims of all these actors were reinforced by the growing severity of the problem of Italy's increasing judicial backlog which gained significance as the country was struggling to recover from the economic crisis and the problematic sovereign debt (Martuscello, 2011) (Donadio, 2011).

The response came through a sweeping reform which introduced coercive elements in mediation in civil and commercial disputes, primarily framed as a corrective to the extreme judicial backlog, but also targeting the reduced competitiveness and rising public debt (Esposito, et al., 2014, p. 10) (De Palo & Keller, 2012). The Legislative Decree 28/2010, enacted by the government, based on the powers delegated from the Parliament, mandated that parties have to attempt to resolve their dispute through mediation *before* they decide to litigate in most disputes in the realm of civil and commercial law: rights *in rem*, division of assets, inheritance, family estates, lease, loans, rental disputes, damages resulting from traffic accidents, civil liability for medical malpractice and defamation and insurance, banking and financial contracts (Legislative Decree 28/2010, Article 5). Furthermore, lawyers were required to inform their clients in writing about the possibility to mediate and the financial incentives linked with the procedure, under the threat of voiding their power of attorney if they failed to do so (*Ibid*, Article 4) and judges were encouraged to invite litigants to mediation in disputes over all alienable rights (*Ibid*). Finally, another coercive provision prescribed that if parties failed to participate in mediation without a valid justification, this could be used against them in the subsequent trial (*Ibid*, Article 8).

As such, the law was highly prescriptive and ambitious in order to ensure full and swift integration of mediation in the wider system of dispute resolution, given the urgency and the severity of the problem of judicial inefficiency. Moreover, given the deeply embedded litigation culture, policy-makers opted for strong 'triggering' mechanisms and aimed to swiftly restructure the demand and supply in dispute resolution in civil and commercial matters (Alexander, 2012, p. 153) (Marinari, 2012, p. 189). According to

a draft report on the adoption of the Legislative Decree 28/2010, the reform would have impacted one million pending cases before the Italian courts (see De Palo & Keller (2012, p. 184)).

Following the RCI logic of Europeanization as changing domestic opportunity structures and differential empowerment, the transposition of the Directive empowered domestic actors whose preferences were in line with the European policy on the account of actors whose preferences favored the status quo. In the case of Italy, the latter interests were represented by the Italian lawyers' union Organismo Unitario dell'Avvocatura (OUA) which saw the reform as a threat to the revenues of its members (Metteucci, 2013). The interests of lawyers were also represented by the opposition in the Parliament, and following a contentious parliamentary debate over the provision regulating mandatory attempt for mediation found in the proposed law from 2009, pro-mediation policymakers circumvented this veto point by omitting the contested provision and delegated wide legislating powers to the executive (Matteucci, 2015) (De Palo, 2015).

The OUA however, posed itself as an influential informal veto player and challenged the policy in the political arena by organizing three general strikes and by legally challenging the policy in two cases before the domestic courts. In these challenges, the OUA contested that the Government had exceeded its delegation powers and that mandatory mediation limited the right to effective judicial protection, thereby implying that the Directive had been improperly transposed. In one of the instances, the CJEU, after receiving the case for preliminary ruling, found no conflict between Italy's policy and the right to effective judicial protection (*Alassini* [2010] ECR I-02213, ¶¶66, 68) and recognized that the policy pursued a legitimate objective in the general interest, which was to provide a quicker and less expensive settlement and alleviate the burden of the judiciary (*ibid*, ¶¶64). Another judicial challenge led to a suspension of the policy from October, 2012 until September, 2013, after the Italian Constitutional court found that the

government had exceeded its delegated legislating powers, one year after the law entered into force in March, 2011.

However, following the early success of the implementation, as more than 215,000 mediation processes took place in 2011 and 2012 combined (out of 418.596 cases in which mandatory attempt for mediation was applicable) (Italian Ministry of Justice, 2015, p. 3), but also due to CJEU's backing of mandatory mediation, the policy was reinstituted through an even more ambitious programme called "Destination Italy"/"To Do' (*Ita. 'fare'*) Law 59/2013, which entered in force starting 20 September, 2013 and reaffirmed the government's commitment to address the severe problems in the judicial system.

In its second coming, mandatory mediation underwent through few major changes which aimed to soothe the opposition by providing mandatory lawyers' assistance to the parties (unless parties opted out) and simplifying the enforcement of mediation settlements, which could be made enforceable with the signature of the lawyers representing the parties in addition to the court's approval. Moreover, the new policy loosened the coercive mechanism introduced by the 2010 policy, as the attempt for mediation became no longer a precondition for admissibility before the court (in other words, no longer mandatory), and instead parties were required to have an informative meeting with a mediator free of charge.

Despite the partially successful challenges to the policy presented by the OUA, the mediation reform was preserved as a result of the salience of the problem it aimed to address. Even though outnumbered, the proponents of mediation managed to present the policy as a panacea to Italy's severe problems in the judiciary, thereby inducing change which went beyond the policy (judging by the rising number of voluntary mediation and the diminishing opposition). Ever since the policy was reinstituted, it gave rise to a new wave of mediations: a total of 41,604 in 2013 and 179,587 in 2014, 10% out of which were mediated on voluntary basis (Italian Ministry of Justice, 2015). Moreover, the Statistical office of the Italian Judiciary contributes a

decrease of around 3% in litigation rate to the introduction of mediation (Ministry of Justice, 2015). Finally, one of the respondents of the surveys indicated that an increasing number of lawyers see a new business opportunity and become mediators (Appiano, 2015), and another one suggested that opposition has almost diminished (De Palo, 2015).

This outcome challenges the notion that change is contingent upon the goodness of fit of the European policy as argued by Duina (1997) and Heritier (1994) or even the lack of veto points and the presence of facilitating formal institutions as argued by Haverland (2000), Börzel (1999) and Börzel & Risse (2000). Instead, change was promoted by change agents, represented in the governing majority, mediation experts and the business representation and the effectiveness of their efforts was amplified and reinforced by the high salience of the problem of major inefficiencies in the judiciary in the light of the country's attempts for recovery of the economic crisis. This confirms the notion of policy-making as 'a function of crisis' (Kingdon, 1995, p. 95) and the influence that the high salience of certain problems can have in empowering change agents and catalysing change (see Versluis (2004)).

An important 'externality' of the introduction of mandatory mediation and a contributing factor for reinstituting the policy after the intervention of the Constitutional Court and the high number of mediations despite the loosening of the mandatory elements of the policy, was the process of collective learning, which lead to the internalization of new norms and change of the collective understanding of dispute resolution in civil and commercial matters. Before the introduction of coercive elements, unofficial estimates showed that no more than 2,000 mediations were initiated (De Palo, et al., 2014, p. 8), and these numbers increased considerably after the policy was instituted, as the numbers of mediations outside the scope of mandatory mediation were approximately 11,000 in 2011, 17,000 in 2012, 16,000 in 2013 and 18,000 in 2014 (Italian Ministry of Justice, 2015).



Change agents among the Italian epistemic community were instrumental in facilitating change beyond the policy, in a process which can be explained through the logic of collective learning and internalization of new norms. Thus, mediation professionals and organizations, in the likes of Professor Giuseppe De Palo and the ADR Center and Giuseppe Grecchi and the Milan Bar Association have been at the center of the Italian mediation debate before the Parliament, the media and at many academic and practitioners' conferences, and have been instrumental in highlighting the benefits of the project. In addition, certain actors in the judiciary have acted as change agents within their profession, with the most notable example being Judge Massimo Moriconi, who used his powers to suggest mediation to parties before the court in the absence of mandatory mediation in the 2012-2013 period and achieved reduction of at least 10% of the disputes appearing before the court (Matteucci, 2015, p. 225).

The influence of the Italian change agents has spread onto the EU level as well, where a team of practitioners from the ADR Center authored influential studies on the efficiency-related gains of mediation and the challenges of the implementation of the Directive across the EU (see De Palo, et al. (2011), De Palo, et al. (2014)) and have facilitated a rising consensus among practitioners across the EU over the benefits of mandatory elements in mediation (De Palo, et al., 2014, p. 8). Moreover, the European Parliament has recognized the Italian policy experiment as a positive example (see European Parliament, (2011), European Parliament, (2011b) and European Parliament (2012)) and this has given a positive impulse to the change already happening in Italy.

Finally, the outcome of Italy's response to the Directive on Mediation can be identified as one moving towards transformation, as note of caution is due since the policy has been implemented recently and the process of full transformation would necessitate a much longer period.

## 5.2. Sweden: *Change not necessary*

The Directive on Mediation was transposed into Swedish legislation through the adoption of Act (2011:860) on Mediation in Certain Private Law Disputes (Mediation Act), which entered into force on 1<sup>st</sup> of August, 2011. Court-connected mediation ('special mediation') has been featured as a possibility in the Swedish Code of Judicial Procedure since 1948. However, neither of these policies have managed to increase the popularity of mediation, as its usage remains limited to not more than 500 mediations annually (see table 1).

The implementation of the Directive on Mediation put pressure on the institution of dispute resolution in civil and commercial matters and its notion in Swedish legal culture. In particular, the Directive necessitated creating out-of-court mediation schemes, whereas it has been a common practice for Swedish judges to encourage amicable solution among the parties and even act as mediators themselves (Chapter 42, Section 17 of the Code of Judicial Procedure (CJP) (SFS 1942:740), a method which is excluded from the scope of the Directive (Directive, Para. 12 of the preamble) (Nylund , 2014) (Marian, 2011). The alternative of this method has been 'special mediation', which was much alike the form prescribed in the Directive, and is administered by third person appointed by the court (Ch. 42, Sec. 17 of the CJP). However, this form has been used very rarely, as in inquiry from the 2004-5 period suggests that only 157 were referred to special mediation (Ficks, 2012, p. 344). Moreover, as a fundamental principle, the administration of justice is public and serves the wider social purpose of general prevention as a way of supporting public stability and order, in contrast with the need for confidentiality as one of the fundamental principles in mediation (Petersen, 2014).

Nevertheless, the process of implementation of the Directive on mediation provided pro-mediation Swedish policymakers with the opportunity to revise relevant national policies and act as policy entrepreneurs. Hence, the result was a policy which went beyond the minimum requirements set by the

Directive by enabling its application in domestic disputes (Act on Mediation, Section 2), providing for enhanced confidentiality and professional secrecy (*Ibid*, Section 5), suspension of prescription periods up to a month beyond the mediation procedure (*Ibid*, Section 6) simplified enforcement of mediation settlements (*Ibid*, Sections 7-11) and the obligation of judges to direct the parties to special mediation, whenever suitable according to the nature of the case (CJP, Chapter 42, Section 17).

No veto points were present in the case of implementation in Sweden, as all opposition to the act did not go beyond the parliamentary debate and there was almost no discussion in the public. The policy was not very high on everyone's agenda, to the extent that most lawyers were not even aware of the changes, unlike the implementation in Italy, where the OUA posed a factual veto point (Nylund, 2014, p. 38). Instead, the general perception was that the Mediation Act was adopted 'primarily to avoid accusations that Sweden was breaching its treaty obligations' (Ficks, 2012, p. 342). Moreover, Ficks (2012) reports that an investigation he conducted on the awareness over the Mediation Act among 48 district courts across Sweden revealed that none of the courts even applied the act and only few were aware of it (p. 354).

Following the logics of RCI whereby the absence of veto points and the presence of facilitating formal institutions induces domestic change (Börzel & Risse, 2000), the expected likelihood of change in Sweden was high. In addition to the lack of veto points, there were already existing formal institutions, in the likes of the judge's authorization to appoint a 'special mediator', as well as the existence of multiple well-established ADR schemes<sup>13</sup>, such as the Swedish National Board for Consumer Complaints, Rent and Tenancy Tribunals and the Stockholm Chamber of Commerce. However, as stated earlier, the adoption of the policy resulted in hardly any changes on the ground. In a survey for the purposes of this study, a

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<sup>13</sup> ADR schemes in Sweden handled 1.11 cases/1000 inhabitants in 2007, which is higher than the EU average of 0.99 cases/1000 inhabitants (Alleweldt & al., 2009, p. 45).

representative from the Arbitration Institute of the SCC noted that the Institute handled only 5 cases through mediation in 2014 and that number has been constant through the years (Berggren, 2015).

The lack of change following Sweden's implementation efforts can be explained by the low political significance assigned to the policy, or the inability of change agents and policy entrepreneurs to frame the policy in the light of a salient problem. In such circumstances, the low salience of the policy, given that it received very little public attention, inhibited the capacity of change agents to advocate for change.

Furthermore, whereas the initial success of the policy and the influential epistemic community had a positive influence in initiating a collective learning process in Italy, this was not the case in Sweden. Swedish epistemic community delegitimated the policy in the light of the existing system of dispute resolution which already offered swift, flexible and affordable dispute resolution, indicating that the policy was not needed nor desirable in the Swedish system of civil justice. Nylund (2014) argues that this has been the case with most European policies regarding civil procedure in general, as there is a widespread perception among practitioners that such policies do not concern Sweden, because there are efficient systems for dispute resolution already in place. Moreover, a survey among judges in Swedish district courts revealed similar opinions about the reform, as they pointed out various practical reasons for the low popularity of mediation – the existing mechanism for judicial settlement was successfully meeting the needs of the parties, whereas mediation was more expensive, not as accessible and unknown (Dahlqvist, 2014, p. 138). Finally, as suggested by the Roschier Disputes Index 2010, arbitration has already been established as the most preferred dispute resolution method among Swedish and Finnish businesses, as 71% prefer arbitration more than any other mechanism (Roschier, 2010).

It took on average 195 days to resolve litigious civil and commercial disputes in Sweden in 2010 (CEPEJ, 2012), whereas 314 days to for a typical commercial dispute from the moment the plaintiff files the lawsuit in court until payment, which is among the shortest in the EU (Doing Business, 2015). Furthermore,

whereas the costs for mediation are borne by the parties (amounting up to EUR 3,000 per day for a dispute valued at EUR 100,000) and no financial incentives are provided, judicial settlements are free of charge (Adamsson, 2012). Swedish courts receive only 0.5% of their budget through fees, unlike the European average of 23.4%, which highlights the perception of justice as a public good in Sweden in contrast to the notion of parties as consumers of dispute resolution as a public service in most EU member states (CEPEJ, 2012). Due to these performances, the Swedish civil justice system is trusted among the majority of its users (76%), which is among the highest in the EU (Eurobarometer, 2013).

Around one third of all litigious civil cases in Sweden are resolved through a settlement, usually during the preparatory phase of the process (Swedish National Courts Administration, 2014), where judges have an obligation established by law to facilitate an amicable settlement (*förlikningsförhandling*) between the parties (Ch.42, Sec.17, CJP). These proceedings maintain a high degree of procedural flexibility and informality and therefore this procedure practically absorbs most qualities that mediation is advertised to have against litigation elsewhere (Nylund , 2014) (Ficks, 2012).

Bearing all these practical aspects in mind, the majority of Swedish scholars and practitioners have not been very accepting of mediation as prescribed in the Directive and have expressed their skepticism for its development in Sweden in the future (see (Ficks, 2012), (Dahlqvist, 2014), (Engström & Marian, 2011), (Marian, 2011) and (Nylund , 2014)). As a result, mediation is likely to stay in the shadow of the pretrial procedure for judicial settlement and will be counted as a supplementary mechanism of dispute resolution in civil and commercial disputes, rather than an integral part of it. As shown here, this has largely due to the low political significance attracted to the policy, as it could not address a salient problem in the Swedish judiciary and was subsequently delegitimated by the Swedish epistemic community.

Finally, the outcome of Europeanization in Sweden can be categorized as absorption, as the implementation of the directive did not produce any changes in the practice of mediation and was absorbed into existing policies and practices.

## 6. Conclusions and wider implications of the study

This study highlighted the role of pro-mediation change agents at the domestic level in promoting change by both advocating for a particular policy at the stage of transposition and by legitimating the policy and initiating a process of collective learning once it was instituted. However, their capacity in both regards was highly influenced by the presence of a politically salient issue which could be addressed by adopting the policy, whereby high salience of the problem had a positive reinforcing influence on their capacity to promote change.

In the case of Italy, the process of transposition came amidst an overall reform in the judiciary and a severe crisis of inefficiency in the judiciary, and presented the pro-mediation change agents in the executive with the opportunity to adopt a sweeping policy which aimed to swiftly restructure supply and demand in the system of dispute resolution in civil and commercial matters. The policy aimed to influence parties in certain disputes to consider mediation as a viable alternative before they decide to litigate and employed coercive measures in the light of the general legal culture in which litigation was deeply embedded. Despite the challenges posed by the lawyers' associations, which posed a factual veto point in the implementation of the policy, the preferences of pro-mediation actors prevailed due to the salience and the extent of the problem of judicial inefficiency. These concerns, along with the efforts of influential members of Italian epistemic community had a positive influence on legitimating the policy and initiating an overall change in the legal culture.

Despite the lack of veto points and the existing pro-ADR legal culture as a facilitating institution in the case of Sweden, pro-mediation change agents were not able to promote significant change, as they were not

able to present the reform in the light of a salient problem. Moreover, their influence was inhibited by the domestic epistemic community which found that reform was unnecessary, as most potential benefits of mediation were present in the existing system of dispute resolution.

The findings of this study place EU reforms in civil justice in the area of domestic politics and highlight the influence of the preferences and beliefs held by domestic actors. The process of integrating mediation into the wider legal culture was reliant on the preferences of both domestic policy-makers and the epistemic community, as they were active in shaping the public debate in the light of the benefits of the reform and its potential to address an important problem. Therefore, in order to produce change towards the balanced relationship between mediation and litigation, EU policies should look to empower change agents at the domestic level and provide a stimulus for change beyond formal compliance. An alternative strategy should inevitably include a more prescriptive approach and set goals which would be clearer and more easily determined than the present target of 'balanced relationship', because as suggested in the case study of Sweden and many other Member States where the Directive fell short to induce significant practical impact, reforms in mediation pioneered by the EU are not particularly high on everyone's agenda.

**Appendix:** *List of questions used for the written questionnaires and interviews conducted for the purpose of this study:*

1. Do you believe mediation is used to its full capacity as means of dispute resolution in (*your country*)? Please explain.
2. (*Your country*) transposed the Directive on mediation in civil and commercial disputes in (*year*). Do you think there have been any changes in the habits of practitioners of dispute resolution (lawyers, judges) ever since? What are the differences, if any?
3. Has the Directive brought for a change in the habits of parties in need of dispute resolution? What are the differences, if any?
4. How would you rate the political importance of developing mediation in *your country*?
5. Will the popularity of mediation rise or decrease in the future? Please explain.



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