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PROMOTING ICT TOOLS TO CROSS-BORDER DISPUTES RESOLUTION

WP4 Dissemination and Exploitation

D4.8 Policy Recommendations

Law and Internet Foundation



Executive summary

This document constitutes deliverable D4.8 Policy recommendations of the e-MEDIATION project, which includes recommendations on mediation and online mediation. These recommendations apply to all EU, and only few of them are narrowly related to the Bulgarian context, given the national scope of the project. Each recommendation is analysed from the perspective of the context that it comes from. All recommendations are based on research undertaken within the project and the feedback gathered during the e-MEDIATION project events.

The document is drafted in English and Bulgarian. As an Annex, there are the printing versions of the recommendations, which were distributed among the participants of the international conference.



Contents

Introduction	6
1. The need of regulation in the online mediation.....	7
Context	7
Recommendation.....	9
2. Categories of disputes for alternative resolution. Stimulating the discussions around the mandatory mediation.....	11
Context	11
Recommendation.....	12
3. Stimulating the discussions around the mandatory mediation	13
Context	13
Recommendation.....	14
4. Promoting mediation among young people and the business – building a mediation culture. The mediation as a compulsory subject within the legal training.	15
Context	15
Recommendations	16
5. Mediation as a compulsory subject within legal training.....	18
Context	18
Recommendation.....	19
Mediation should be incorporated as a compulsory part of the legal training.	19
Free of charge courses on mediation for practicing judges and lawyers should be made available.	19



6. Bulgarian legislation – fine tuning	20
Context	20
Recommendation.....	20
7. National schemes for electronic identification.....	21
The problem with the identification of persons in legal environment: who is behind the computer or the mobile device?	21
Context	21
Recommendation.....	21
8. Mediation Job in the EU. Unified standards for mediation in EU	22
Context	22
Recommendations	23
9. Fostering mediation outside EU.....	25
How can one be sure that a person or entity, based outside the EU, is using credible tools for online identification? How is data protection secured? How is mediation practiced by persons, who are not EU citizens?	25
Context	25
Recommendation.....	26



Introduction

The e-MEDIATION project aims to achieve three main objectives – to contribute to the coherent and effective application of Directive 2008/52/EC; to provide a feasible and secure IT tool for online mediation in cross-border disputes; to promote “mediation culture” throughout the Bulgarian and European society.

As a result of several surveys on the mediation in Bulgaria and in Europe and through the development process of the e-MEDIATION platform, the project team developed a clear picture of the current state of mediation, in particular online mediation in Bulgaria and beyond, as well as of the specific areas in this matter that need improvement, which were also indicated by the practicing mediators, academia representatives and experts in the field.

This document contains policy recommendations on mediation and online mediation. The recommendations are prepared on the basis of the findings from the number of surveys conducted by the project team, and from the research carried out in the course of the e-MEDIATION platform development, as well as taking into account the feedback collected during the dissemination activities.

Each recommendation is also accompanied by concrete context to create a clearer picture and to explain the need for improvement.



1. The need of regulation in the online mediation

What kind of platforms can be used? Which is the applicable law that should regulate the online mediation procedure? Who can run an ODR platform? How can one be sure in the credibility of a platform? What type of requirements for an online platform and respectively for a center that runs it should exist?

Context

The regulation of online mediation is an issue that cannot have a single and quick solution but should be considered as an opportunity to boost the application of mediation as an effective method of alternative dispute resolution.

Alternative online dispute resolution (ODR) has not yet been regulated by the laws of the Member States¹. According to the European Parliament's report on the implementation of the Directive 2008/52/EC, it was the Directive which drawn the national legislator's attention on mediation in general, which also explains the lack of specific regulation in the area of online dispute resolution (ODR). At EU level, the Regulation² of alternative ODR is limited to the field of consumer disputes. This Regulation legitimates an online dispute resolution platform. Studies conclude that the usage of this platform has grown in recent years.³ Given the specific material scope of the platform, the usage and accreditation of dispute resolution platforms in general (areas not limited to the consumer disputes), is an issue which must be resolved at a national level.

Bearing in mind that the online mediation is not different from the mediation in general, the regulation of the online mediation does not need to be focused on concrete procedure, rather it should allow for unimpeded usage of information and communication technologies in the

¹ Study of European parliament „[‘REBOOTING’ the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU](#)“ indicates the small usage of the online mediation platforms. p. 135. Last accessed on: November, 9th 2018.

² 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)

³ See [The 2018 EU Justice Scoreboard](#), p. 29, Last accessed on: November, 9th 2018.



mediation process. In this regard the Regulation № 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC should be considered in the development of such regulation. However, in order to harness the full potential of the information technologies, additional legal framework should be adopted in order to deal with issues that emerge in relation to the online environment.⁴

Several questions arise:

- How can you ensure that mediators, who have obtained qualification in one Member State could lead online mediation sessions in another Member State? This issue is of particular importance given the specific national requirements of the Member States in the exercise of this profession.⁵
- How is the identity and the representation of the parties involved in the mediation process duly verified and proved?⁶
- How can one be sure in the legitimacy of an online mediation platform?

The resolution of the above-mentioned issues could have an exceptional impact on the use of the mediation in cross-border disputes, especially in building trust and confidence in the legitimacy of the procedure.

As shown in the conclusions set out in the European Parliament's report on the implementation of Directive 2008/52/EC⁷, no information is available on the actual number of disputes resolved by the means of alternative dispute resolution (ADR). Moreover, the report emphasizes on the lack of

⁴ Regulation № 910/2014 allows the mutual recognition of electronic identification – i.e. the recognition of electronically signed documents by electronic signature issued by trust service provider in another Member State.

⁵ For more information, see Recommendation 8.

⁶ This question was raised several times during the events organized under the e-MEDIATION project. For more information, see: Recommendation 7.

⁷ [REPORT 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\(INI\)\)](#) from 27.06.2017



“mediation culture” in the Member States. In fact, the lack of “mediation culture” is due to many factors deriving from different cultural and national differences in the European Union. Moreover, when it comes to online dispute resolution (ODR) additional factors appear, which further stumble the development of mediation culture, as well as the online mediation, such as the lack of confidence in the reliability and security of the online environment; in the adequate data protection, etc. These obstacles, however, should not hamper the efforts in popularizing online dispute resolution as an effective and amicable method of alternative dispute resolution, but, on the contrary – the focus should be on overcoming them and addressing the gaps. This could be justified by the European Commission’s report „The 2018 EU Justice Scoreboard”, which shows that the number of people using the online platform to resolve consumer disputes is increasing. Furthermore, the report of the Directorate-General for Internal policies – “Assessing the Scope of European Dispute Resolution Platform”⁸ provides recommendations for extending the application of the platform to disputes that have not arisen in online environment, which is also a main idea behind the e-MEDIATION project.

In Bulgaria, as part of the general efforts of the State in developing e-Justice and completing the e-Governance, the Ministry of Justice is about to implement a national mediation project, which aims to modernize the Unified register of mediators. This effort is indicative for the interest of the Bulgarian State in the development of mediation in the country.

Recommendation

The legislative framework in the field of online dispute resolution should evolve, as to clarify the legitimacy of online platforms.

Mediation Centers, which run online platforms, should be registered, accredited or certified; the information of such centers should be centralized and EU-accessible.

⁸ See. [Assessing the Scope of European Dispute Resolution Platform](#)



A unified accreditation mechanism for Mediation Centers and for platforms supported by these centers would ensure the platforms' credibility. Once the information of such centers is centralized and EU-accessible the citizens from different Member States could use it. Therefore, the centralization of this information at EU-level could increase the citizens' trust in online platforms.

In this regard, we recommend the establishment of minimum standards at EU-level that Mediation Centers and their platforms must comply with.



2. Categories of disputes for alternative resolution. Stimulating the discussions around the mandatory mediation.

In which cases mediation is appropriate? In which case is it not?

Context

As stated in recital 10 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: „... *it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.*”. In fact, this recital emphasizes on the non-applicability of mediation to disputes related to the exercise of rights and/ or to the fulfilment of obligations for which a specific legal procedure is envisaged. This may vary from country to country across EU. Each Member State therefore should identify the categories of disputes that can be resolved through alternative resolution.

Besides the above-mentioned categories of disputes, which are excluded from the scope of mediation, several experts define other categories where mediation is not appropriate method for resolution of disputes.⁹

In the Bulgarian Mediation act as well as in number of other legislations the main scope of application of the mediation procedure is well defined.¹⁰

As stipulated in the recitals of the Directive 2008/52/EC the mediation might have limited scope of application in family law and labor matters. At the same time the most common application of the mediation is in these spheres.

⁹ Example, see Phil Neiman- [When is mediation inappropriate?](#)

¹⁰ See, REPORT 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’); Croatia’s mediation act - <https://www.hgk.hr/documents/mediation-act586b9f6251f81.pdf>



According to the general opinion of the mediators in Bulgaria the most effective application of mediation is in family law matters. However, at EU level, the family law matters are not subject to specific regulation - Directive or Regulation. Therefore, further studies should be focused on defining the categories of disputes especially in the family law matter to which the idea of mandatory mediation could be successfully applied.

The development of Mediation Centers at the Bulgarian Courts would increase the number of disputes resolved by mediation, thus the workload of the judiciary will be reduced.

Recommendation

National surveys for identification the specific categories of disputes to which mediation is applicable should be conducted;

The results of such surveys will stimulate the identification of those dispute to which mandatory mediation may be introduced, resp. different form of mandatory mediation.

Therefore, this will lead to:

- enhanced „mediation culture”;
- reduced workload of courts;



3. Stimulating the discussions around the mandatory mediation

When is the mandatory mediation a feasible solution? A blanket mandatory mediation is not a panacea. When is it appropriate to have mandatory mediation and/or mandatory information sessions, mandatory navigation to mediation and/or judge orders for conducting mediation?

Context

The introduction of mandatory mediation is an issue that has no unique answer. Prior to defining the scope of mediation mandatory application, several studies must be carried out. Many convincing arguments for and against the mandatory mediation could be applied. Compulsory mediation in fact opposes the voluntary principle which is the backbone of the mediation, therefore the introduction of such obligation poses a number of challenges.¹¹ At the same time the Italian experience in this matter shows some positive effects of the mediation for reducing courts' workload. Therefore, it's worth it to have a debate on the voluntary and mandatory mediation.¹²

Furthermore, compulsory mediation may take different forms ranging from mandatory first meeting with mediator; judicial order that imposes mandatory mediation; obligation of both judges and attorneys to provide information to the parties about the possibility of mediating the dispute, to mandatory mediation procedure to be carried out prior to the trial, etc.

Prior to taking the political decision to introduce compulsory mediation, a profound study should be undertaken focusing mainly on the categories of disputes to be subject to mediation.

Meanwhile, the mandatory mediation will raise some issues related to:

¹¹ See [Menini and another v Banco Popolare Società Cooperativa \(Case C-75/16\) \(14 June 2017\)](#).

¹² See Study of European parliament „[‘REBOOTING’ the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU](#)“ indicates the increase of mediation procedures due to the mandatory element. p.8.



- the lack of “mediation culture” and of well-trained experts; therefore, judges should have appropriate knowledge in the field of mediation, and they should identify the disputes that might be resolved by mediation;
- the negative attitude of legal professionals (i.e. lawyers, legal practitioners, legal advisors, etc.) towards the mandatory mediation;

These issues are also closely related to the main factors hindering the application of mediation procedure.

Recommendation

Stimulating the discussions around the mandatory mediation.

Mandatory mediation should neither be excluded a priori as a legislative option nor considered as a panacea for addressing the issue of courts’ workload. Therefore, the debate around the mandatory mediation should continue and greater efforts must also be made on:

- conducting additional studies in order to clarify the categories of disputes for mandatory mediation in matter of family law, commercial, insurance, liquidation of property, as well as their sub-categories (See Recommendation 3);
- identifying various forms of mandatory mediation and their applicability to the respective categories of disputes;
- setting minimum professional standards for practicing mediation;
- enhancing the “mediation culture” among legal practitioners (lawyers, legal advisors, attorneys etc.), as well as among the citizens;

The expectations and attitude of lawyers, legal practitioners, legal advisors could be examined by carrying out various studies (questionnaires, consultations, polls, etc.). Furthermore, a general strategy for tackling the challenges to promote mediation, resp. online mediation, need to be drawn up.



4. Promoting mediation among young people and the business – building a mediation culture. The mediation as a compulsory subject within the legal training.

What additional efforts should be undertaken to promote mediation? How should mediation philosophy be introduced in the early education of students?

Context

The events organised under the e-MEDIATION project have once again proved the lack of knowledge among the general public about the mediation and the positive aspects of alternative dispute resolution. Lawyers for example tend to mix up mediation process with some concepts applicable to the trial, which however, are irrelevant to mediation. There is a lack of general understanding of the idea behind mediation –mediation does not provide an answer to the question who is right and who is wrong, rather it supports the parties to reach on their own a mutually acceptable solution to their dispute.

As pointed out above, the European Parliament has identified the lack of „mediation culture” as an issue that should be addressed. Meanwhile, according to the report of the European Commission – “The 2018 EU Justice Scoreboard”¹³, the efforts and ways for promoting mediation have increased across the Member States.

In this regard the concept of the mediation as an alternative dispute resolution should be promoted not only among legal professionals, but also among the general public. What is more, the application of mediation should not be limited only to legal dispute resolution. It shall be considered as an effective instrument for resolution also of social disputes. This way mediation could reach wide application in people’s daily life. Moreover, mediation requires the usage of soft skills (communication skills, critical thinking, creativity and collaboration). These skills have crucial role in every aspect of life – working environment, business, education, personal and family

¹³ See, [The 2018 EU Justice Scoreboard](#), Last accessed on: November, 9th 2018.



life, and therefore the early development of the soft skills should be supported, e.g. from an early stage of education.

Furthermore, according to experts in the field, mediation has added value in schools. It is considered as an effective instrument for creating a culture of peace in the whole society.¹⁴ So far, no comprehensive strategy in terms of promoting mediation in schools has been developed. The application of this alternative dispute/ problem resolution method in schools, would raise students' awareness of mediation at their very early age. In school, the most popular way to introduce mediation is by applying it as effective instrument for resolving disputes among the children. However, children first should study and develop “mediation-related skills”, such as communication skills and creative thinking.

Besides, mediation techniques are getting more popular in the university curriculums of different disciplines such as business management, business communications, pedagogy, etc., but still mediation has not found its worthy place.¹⁵

On the other hand, from businesses point of view, mediation could be used as a key instrument for helping companies keep and develop partnerships. Therefore, the business society should be aware of the mediation's benefits so that private sector applies mediation in practice. Encouraging the entrepreneurs to include mediation clauses in the terms of their contracts, as well as using this option before proceeding to arbitration or to a trial, should be a key objective of professional organizations such as the Bulgarian Chamber of Commerce and Industry and others.

Recommendations

The usage of mediation in schools should be encouraged.

¹⁴ See. Ketina Klyavkova. [Mediation in school](#). Last accessed on: November, 9th 2018.

¹⁵ See. Study of European Parliament „[‘REBOOTING’ the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU](#)“, p. 157, Last accessed on: November, 9th 2018.



Mediation should be included as a standalone subject in the educational curriculum of universities;

Mediators' training should be controlled – mediation training institutions should be part of higher educational institutes, as to control the quality of the training;

Business organisations should foster mediation.



5. Mediation as a compulsory subject within legal training.

How to overcome legal practitioners' scepticism towards mediation? What's the added value of the mediation techniques for practicing lawyers?

Context

Alternative dispute resolution is usually a non-compulsory subject within legal training¹⁶. Nevertheless, the academic community in some countries has already started to find it necessary for the legal education to incorporate more studies on soft skills.¹⁷

In this regard, mediation should be examined not only as a specific method for alternative dispute resolution, but also as a skill which can benefit legal practitioners in their communication with clients, to develop critical and creative thinking that stays out of commonly accepted standards and conventional ideas – at the end, this could result in finding new business opportunities for the clients and unconventional problem solving. There is a saying in the legal community that successful lawyers are not those who win the most cases, but the ones who don't let their clients go to court.

Therefore, mediation techniques and skills could be a useful tool in the everyday work of legal practitioners and even to lead indirectly to decreasing the number of disputes through planned early negotiation and settlement agreement.

¹⁶ In accordance with one of the recommendations made within the Study of European Parliament - *Courses on mediation, especially mediation advocacy, are very rare in EU law schools, and almost unheard of in business schools..... In some cases, these courses are a mandatory part of the degree requirements. Fostering university-level mediation education nurtures future mediation users.*“ - [REBOOTING' the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU](#)“ стр. 216

¹⁷ Вж. ADR in Legal Education: The Promise of 21st Century Skills: <https://www.maastrichtuniversity.nl/events/adr-legal-education-promise-21st-century-skills>



Training judges and lawyers on mediation is believed to be a successful approach to increase the number of disputes resolved through mediation.¹⁸ Judges' knowledge in the field of mediation is crucial in order to encourage the parties to use this tool.

Recommendation

Mediation should be incorporated as a compulsory part of the legal training.

Free of charge courses on mediation for practicing judges and lawyers should be made available.

¹⁸ See. [REBOOTING' the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU](#)“, Page 216



6. Bulgarian legislation – fine tuning

How can the gaps in legislation of the mediation process be overcome?

Context

Specific requirement related to the Bulgarian mediation act.

The elaboration of this recommendation is based on discussions with mediators and legal analysis of the current Bulgarian legislation.

The Directive itself, does not exclude the possibility of Member States to define a duration period of mediation. The expiry period established in Bulgaria is six months, and its expiration automatically terminate the mediation procedure, irrespective of parties' willingness to continue with it. The termination, on the other hand, entails legal consequences – limitation periods begin to run again; if both parties are willing to continue the procedure, they must start all over again – i.e. the moment, considered as a starting point of the mediation procedure, should be defined again, etc. It's causing certain inconvenience in cross border dispute resolution services, which are enabled by online platforms, like the one that was developed within the e-MEDIATION Project.

Recommendation

The legal consequences of the expiry period in order to create legal certainty should be cleared up.



7. National schemes for electronic identification

The problem with the identification of persons in legal environment: who is behind the computer or the mobile device?

Context

Although this recommendation doesn't seem to be directly related to mediation at first sight, it is extremely important for the success of electronic mediation. One of the most frequently asked questions during the events held within the project's framework, was regarding the users' identification and how the parties could be sure that they are negotiating with the exact person that has been empowered to represent the legal entity. This issue is even more significant for cross-border disputes. Building trust in information technologies is one of the major challenges nowadays. The implementation and integration of such platforms with national schemes for electronic identification, would allow the broader usage of online ADR in national and cross-border relations, especially when the platform's objective is resolving disputes arising from non-electronic environment.

In general, the matter of parties' identity on platforms for electronic mediation is neglected. In most cases the parties register without enough guarantees for personal identification. If the parties are able to verify their identity on the platform, the legitimacy of mediation process will be increased, as well as parties' trust in it.

The usage of qualified electronic signature addresses this issue to a certain extent, although electronic signature's main purpose isn't personal identification, but verification of document's integrity and content.

Recommendation

The usage of electronic means for identification on online platforms should be fostered and integrated with the national schemes for electronic identification.



8. Mediation Job in the EU. Unified standards for mediation in EU

Can one trust in the quality of mediation performed in different countries? How freely can you practice mediation in other Member States? Is there a guaranteed minimum payment to mediators in a particular country?

Context

The Report on the Implementation of Directive 2008/52/EC stresses on the Member States' good practice to adopt obligatory accreditation procedures for mediators and/or to maintain registries of mediators¹⁹. The lack of harmonisation among Member States regarding the accreditation of mediators also should be put into consideration. The same report stipulates that some Member States have introduced in their national laws the requirement for completing special training before acquiring accreditation, while others have not. Obtaining qualification to practice mediation in one Member State, however, doesn't automatically allows mediators to practice in another Member State²⁰. In addition, it should be noted that there're no unified standards for practicing mediation. This regulation gap creates certain obstacles to the usage and internationalization of electronic platforms for mediation since it limits mediators from different countries to use platforms maintained in another Member State, and/or in case they're using such platforms, the legitimacy of their work/practice could be undermined.

It should be noted that it isn't necessary for the mediators to have certain education (economical, legal, etc.) but to be trained to use mediation techniques. This issue can undermine parties' confidence that they will choose a qualified mediator. The establishment of unified regime for professional mediator practice and a single registry of mediators across EU, is certainly hard to

¹⁹ See recommendation 5 from the Report on the implementation of Directive 2008/52/EC <http://www.europarl.europa.eu/cmsdata/122603/juri-committee-mediation-directive.pdf>

²⁰ According to Bulgarian legislation a mediator could be only individual meeting the requirements set out in Art.8 among which is "successfully finished training" In 4 however, indicates that Minister of Justice approves the training mediation organizations by order. A question arises: "How the Minister of Justice list a mediator who has been trained outside Bulgaria?"



achieve, therefore steps should be taken towards setting up at least unified standards which will help foreign mediators to practice in other Member States.

On the other hand, in an ideal situation, an electronic platform shall not be bound to a certain location or jurisdiction of a country, a priori. In this regard, what do legal terms like “mediator practicing in the country” mean in case the mediator is using an online platform? The lack of regulation hinders the solution of this problem and demonstrates the need for specific rules to be applicable not only at national level, but on international too.

Member States’ practice of maintaining registries of mediators isn’t unified as well. Providing one point of access to all Member States’ registries (e.g. Europa.eu) would be useful to potential users of mediation services and especially for cross-border mediation.

Recommendations

A more favourable regime for practicing mediation throughout Europe should be established, including the possibility of creating a single register of mediators in Europe. It would facilitate foreign mediators to practice and register in online platforms like the one developed within e-MEDIATION Project.

Unified fees for the work of mediators in Bulgaria should be set at national level in order for business representatives and all interested parties wishing to use electronic mediation, to be able to predict their costs similarly to judicial and arbitration procedure. Lower costs would promote more mediation initiatives.

The possibility of specialization of trained mediators in a specific field – family disputes, labor disputes etc. - should be enabled, following the example of France. This would provide an opportunity for better understanding of the mediation by the society and legal practitioners as well as would guarantee greater quality in executing mediation. Surveys among mediators in Bulgaria show that the method used for differentiation of legal practitioners (junior, senior) could be applied to mediators as well, based on their completed training, specialization, background, number of



mediations concluded, and other criteria. Introducing an additional training for mediators working particularly in online environment is also under discussion between mediators in Bulgaria.



9. Fostering mediation outside EU.

How can one be sure that a person or entity, based outside the EU, is using credible tools for online identification? How is data protection secured? How is mediation practiced by persons, who are not EU citizens?

Context

Global business requires global view on the electronic mediation as a feasible method for resolving cross-border disputes outside EU. At the same time, all issues mentioned so far, stand out even more significantly.

Challenges related:

- applicable law implementation outside EU – what’s the level of personal data protection and all other directly involved legal acts;
- how can individuals outside EU be sure that they are provided with secure means of identification;
- how parties/persons could be assured in the protection of personal data;
- practicing mediation by persons, qualified outside EU
- recognition and enforcement of mediation agreements;

These problems’ solution goes definitely beyond mediation since it concerns Internet governance and all challenges related to it²¹. International Private Law is the existing mean for resolving this type of disputes, but it can’t respond to the threats connected to remote electronic identification of the parties.

Discourse on this matter shouldn’t be underestimated but encouraged. In this regard, the promotion of platforms for mediation would make a positive impact and would boost the evolution of the

²¹ See Report by Steering Committee on Media and Information Society to the Council of Europe - [Internet Governance Strategy 2016-2017 Progress in implementation of actions and activities](#), Page 20.



legislation for online cross-border dispute resolution. Discourse on this matter should be incorporated and following on from the discussions around Internet governance.

Recommendation

The discussions around cross-border mediation with parties, established outside EU should be fostered.

