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Support to the Implementation of Judicial Reform in Ukraine

POLICY PAPER

Integration of Mediation into Ukrainian Court System

prepared as part of the Council of Europe Project
"Support to the implementation of judicial reform in Ukraine"

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EXECUTIVE SUMMARY

This study is prepared by Dr. Tatiana Kyselova[1] and aims at comprehensive policy guidelines for planning further actions with regards to integration of mediation into the Ukrainian court system in line with the Council of Europe mediation recommendations. This report is based on the findings of the empirical case-study of mediation in Ukraine which was conducted by the author as a Marie Curie postdoctoral fellow in 2016-2017.[2] The report offers analysis of the current situation, main stakeholders of mediation, piloted court mediation schemes, possible scenarios of mediation integration into the court system, and recommendations for further actions. The main findings of the study are as follows.

Given the specific socio-political context in Ukraine and relative cost- and time-efficiency of Ukrainian courts, integration of mediation into the court system will achieve better results if it is soft, gradual but quick - beginning from the voluntary schemes of court mediation and decentralized professional self-regulation with minimum state involvement. Soft integration of mediation within the courts should be reflected in the law on mediation and procedural codes expected to be adopted by the Ukrainian Parliament in 2017. All the models of court mediation piloted in 1997-2016 have potential for further development and mediation regulation should leave doors open to any of these models. The prospective law on mediation should encourage an experimental approach based on pilot court mediation schemes that are continuously monitored and may lead to the possible introduction of mandatory and more centralized elements in the future.

It is suggested that the Ukrainian mediation community should primarily be responsible for coordinating and promoting the integration of mediation within the court system. It should be supported by the international community in such a development including projects to gain the support of the judiciary and the political elite; joint projects with the courts to test court mediation schemes; strategy development and coordination of efforts with lawyers and other stakeholders; drafting of mediation legislation; development of quality control, professional training and ethical standards for mediators.

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1. Introduction

The Council of Europe Action Plan for Ukraine 2015-2017 defines the reform of the judiciary in Ukraine as a priority and underlines that the reform needs to address primarily the issues of judicial independence, implementation of relevant new legislation, problems related to judicial accountability, and establishing a system of alternative dispute resolution.

Mediation is a core method of alternative dispute resolution; it refers to negotiations between the parties of the dispute assisted by a neutral, professional third-party – the mediator. Mediation empowers individuals and allows generating creative, interest-based, and mutually agreeable solutions to problems. The mediator has no right to make decisions as to the merits of the dispute; it is the parties who design their own settlement. The mediator assists them in establishing communication and a comfortable negotiation environment, guides them in the procedural aspects of negotiations, and helps to frame their settlement agreement. Mediation proved to be a highly efficient mechanism for solving disputes in many European countries; it was embraced by governments and integrated into judiciaries. Thus, the main aim of mediation is to assist parties in finding better solutions to their problems through empowering them and improving their relationship. Additionally, if integrated into the justice system, mediation is capable of reducing court congestions and case processing time, thereby increasing savings for individual parties and for the justice system in general, and improving overall access to justice.

This report is aimed at comprehensive policy guidelines for planning further actions with regards to integration of mediation into the Ukrainian court system in line with European standards, in particular the Council of Europe mediation recommendations,[3] and EU Mediation Directives.[4]

This report is based on the findings of an empirical case-study on impediments to mediation development in Ukraine which was conducted by the author as a Marie Curie

[3] European Commission for the Efficiency of Justice (CEPEJ): Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation adopted on 21 January 1998; Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties; Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on Mediation in Civil Matters; Recommendation No. R (99) 19 of the Committee of Ministers to Member States on Mediation in Penal Matters; Guidelines for a better implementation of the above Recommendations. For these documents in English and Ukrainian languages, see http://sc.gov.ua/en/rekomendaciji_komitetu_ministriv_radi_jevropi.html

[4] 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 (Official Journal L 136, 24.5.2008, 3 ff.); Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); 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).

postdoctoral fellow in 2016-2017 in Kyiv, Lviv, Kramatorsk and Odesa. The empirical research consisted of 63 in-depth interviews and five focus-group discussions with mediators, facilitators, lawyers, judges, state officials, international experts, representatives of the ministries, and business. Thus, these policy recommendations incorporate perspectives of all main stakeholders of mediation development in Ukraine. Additionally, this report takes into account the strategy documents of the Ukrainian National Association of Mediators and recommendations of international experts thereby introducing both local and international perspectives.[5]

The report consists of an analysis of the current state of the development of mediation in Ukraine, possible scenarios of integrating mediation into the court system and recommendations for further action.

2. Current State of Development

2.1. Background

The first attempts to plant institutionalized mediation into Ukrainian soil date back to the late Soviet times. The break-up of the Soviet Union caused chaos in all spheres of social life including employment relations. Massive industrial strikes erupted in the Donetsk region, which was a hotbed of the coal-mining industry. Trying to address this problem, a group of psychologists from Donetsk developed contacts with the American Arbitration Association and the US Federal Mediation and Conciliation Service and in the late 1980s conducted a series of joint Soviet-American seminars on conflict resolution in Donetsk and Luhansk regions. This mission resulted in two developments, both rather independent of each other.

First, in 1994 the Donetsk Psychological Center formed a partnership with the US NGO 'Search for Common Ground' to set up the first mediation centre in Ukraine. This initiative eventually resulted in eight mediation centres being set up all over Ukraine supported by a series of grants from USAID, Eurasia Foundation and other donors. One of the most active mediation centers, in Odesa, mediated the first case referred from the courts in as early as 1997.

The second development concerned labour disputes. In order to address industrial strikes in 1998 the Ukrainian government, with the help of a USAID-sponsored project, set up

[5] Reports by William Marsh and Ales Zalar, USAID Fair Justice Program, presented at the Round-table "Legal basis of Pre-trial and Alternative Dispute Resolution" 21 March 2016, Kyiv.

a new governmental agency – the National Mediation and Conciliation Service[6] which was accountable solely to the President of Ukraine and authorized to facilitate settlements of collective labour disputes.

By the end of the 90s most mediation activity moved to Kyiv. In 2001 the Ukrainian Centre for Common Ground (UCCG) was registered in Kyiv and became active in mediation of criminal matters, restorative justice, community building, and school mediation.[7] UCCG created its own network of 15 Ukrainian NGOs and was reorganized into the Institute of Peace and Common Ground in 2012.[8] In 2006 the International Finance Corporation, World Bank Group (IFC) conducted a survey of 1,200 Ukrainian businesses[9] that indicated some desirability for the IFC's mediation intervention in Ukraine. Eventually, IFC offered a seed grant to set up a Ukrainian Mediation Centre at the Kyiv-Mohyla Business School. On top of this, around a dozen regional mediation organizations, active mostly in popularizing mediation and mediation training, were registered in Ukraine over the last twenty years.

The Ukrainian Center for Common Ground, the Ukrainian Mediation Center, the Odesa Regional Mediation Group and a few individual mediators, established an informal Coalition for Promotion of Mediation in Ukraine[10] that focused its efforts primarily at legislative drafting. The Coalition laid down informal foundations for the National Association of Mediators of Ukraine (NAMU)[11] that was established in 2014 and currently seeks to represent Ukrainian mediators at a national level.

Since 2010 Ukrainian mediators have gained some support from the members of Parliament (*Verkhovna Rada*) and registered ten drafts of a Mediation Law. However, due to the unstable political situation, frequent changes of governments and parliamentary re-elections, the law still awaits to be finally adopted by the Parliament. On the 3rd of November 2016, the *Verkhovna Rada* voted for the draft law "On mediation" in its first reading.[12] It is expected that the law will be adopted by the end of 2017.

In parallel to this process, the movement to introduce mediation into the court system of Ukraine was supported by international donors. Based on information provided by NAMU

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[6] Law of Ukraine On the Resolution of Collective Labor Disputes of 3 Mach 1998, No 137/98-BP http://zakon3.rada.gov.ua/laws/show/137/98-%D0%B2%D1%80

[7] Ukrainian Center for Common Ground http://www.uccg.org.ua/; Nancy Erbe, *Global Popularity and Promise of Facilitative ADR, The*, 18 TEMP. INT'L & COMP. LJ (2004).

[8] Institute of Peace and Common Ground http://ipcg.org.ua/en/about/

[9] Ukraine Commercial Dispute Resolution Study: Researching Commercial Disputes among Ukrainian Companies. (2007). Available at http://documents.worldbank.org/curated/en/917271468309373283/Ukraine-commercial-dispute-resolution-study-researching-commercial-disputes-among-Ukrainian-companies

[10] Initial Coalition included the Ukrainian Center for Common Ground, Ukrainian Mediation Center, Odesa Mediation group and Tatiana Khudyakova as an individual mediator.

[11] National Association of Mediators of Ukraine http://namu.com.ua/

[12] The Draft Law on Mediation No 3665, 17 December 2015, available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57463

and information obtained through the interviews in this study, since 1997 at least five mediation projects were piloted in fifteen courts of general and administrative jurisdictions of first and appellate instances. Three court mediation models have been developed within these projects.[13]

Although initially, in the 90s, mediation in Ukraine was supported by US donors and mediation organizations, by the mid-2010s European influence became more visible. Although it is highly questionable that mediation is a European value, in the aftermath of the 2014 Euro-Maidan protests, Ukrainian mediators have adopted the discourse of Europeanization and started representing mediation as an integral part of the European culture and an important European value reflected in the EU-Ukraine Association Agreement and numerous cooperation documents.[14]

Since 2014 a number of Ukrainian mediation NGOs and individual mediators with experience in group facilitation and community building became involved in dialogues in Eastern and Southern regions of Ukraine which are the most affected by the armed conflict. Some of these dialogues were conducted solely as private initiatives[15] but most were supported by international organizations and foreign donor agencies such as, for example, the OSCE[16], the UK Embassy,[17] MATRA Netherlands[18], and the German Federal Ministry of Foreign Affairs.[19] By 2015 chaotic and uncoordinated initiatives were partly systematized through several reports and databases.[20] In 2015 an international organization called MediatEUr, in partnership with the United Nations Development Programme in Ukraine, launched an online and offline Dialogue Support Platform to coordinate future efforts of all actors involved in various dialogue initiatives all over Ukraine.[21]

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[13] See Sections 2.2. and 2.3. of this Report.
[14] Vitaliy Krupelnitsky, *Mediation as a Phenomenon of European Legal Relations*, LAW TODAY 2011; Editorial, *Mediation as a Means of Europeanization of Ukraine*, INVESTYTSIYNA GAZETA 13 April 2013; Ruslan Kirilyuk, *EU-UKraine Association Agreement: Mediation is a European Value*, Kyiv Mediation Center http://medyacia.com/page102575.html
[15] Report: Mapping of Dialogue Initiatives to Resolve Conflict in Ukraine by International Center for Policy Studies, Ukraine, http://icps.com.ua/assets/uploads/files/mapping_of_dialogue_initiatives_eng_.pdf
[16] OSCE National Dialogue Project http://www.osce.org/ukraine/117808
[17] Conflict Prevention Pool in Ukraine, peacebuilding projects https://www.gov.uk/government/publications/conflict-prevention-pool-work-in-ukraine
[18] International Center for Policy Studies, Ukraine http://icps.com.ua/en/studies-icps/government-policy/national-dialogue-in-ukraine-what-are-the-chances-of-success/
[19] Federal Foreign Office, Germany http://www.auswaertiges-amt.de/EN/Startseite_node.html
[20] Agder Research Project, Norway http://dialogue-ukraine.org/; Report: Mapping of Dialogue Initiatives to Resolve Conflict in Ukraine by International Center for Policy Studies, Ukraine http://icps.com.ua/assets/uploads/files/mapping_of_dialogue_initiatives_eng_.pdf
[21] Ukraine Dialogue Support Platform http://dialoguesupport.org/

2.2. Pilot Court Mediation Projects

Mediation in courts can be integrated into a dozen different designs – from the right of parties to ask for a stay of court proceedings (to allow for mediation), to mandatory pre-trial mediation when all the cases of a certain type are statutorily required to be mediated before the court can hear the case. Voluntary court mediation schemes include any schemes where mediation requires the consent of the both parties. In contrast, mandatory schemes require parties to attempt mediation in good faith but do not require that they settle.

Given the favourable legal framework in all procedural codes of Ukraine that allowed settlement at any stage of proceedings, it became possible to practice voluntary schemes of court mediation from as early as 1997 when the Donetsk Mediation Group secured a grant from the Eurasia Foundation to set up pilot mediation programs at courts in Donetsk and Odesa. In 1997 mediators from Odesa Regional Mediation Group mediated admittedly the first court-referred case in the former USSR region. The model developed within this project allowed judges to refer cases to mediation with the consent of the parties to a dispute. This scheme resulted in 9 court cases being mediated by external mediators.[22]

In 2009 the Ukrainian Mediation Center (UMC) piloted its referral system within the Dniprovskiy Kyiv Court of general instance. UMC's mediators were present at the court premises during the hearings and attempted to persuade parties to agree to mediate their case. Although mediators conducted more than 100 information sessions with litigants (always only one party) it was possible to conduct only a few mediations. These first experiences strongly suggested that until judges get interested in referring cases to mediation and actively direct litigants to mediation, mediators on their own will not be able to convince parties to take part in mediation.

Therefore, the subsequent court projects focused on judges. A large scale effort to introduce mediation into the Ukrainian court system was been launched by way of two grants from the European Commission and the Council of Europe - 'Judicial Selection and Appointment Procedure, Training, Disciplinary Liability, Case Management and Alternative Dispute Resolution' 2006-2007 and 'Transparency and Efficiency of the Judicial system of Ukraine' 2008-2011. The mediation component of these projects was aimed at promoting a model of judicial mediation suggested by Dutch and German experts.[23] The project trained judges from four Ukrainian courts – from Bila Tserkva, Vinnytsya, Donetsk and Ivano-

[22] Narrative report of the project, on file with the author.
[23] FRIEDRICH-JOACHIM MEHMEL & FRANS VAN AREM, COURT-BOUNDED AND COMMERCIAL MEDIATION – A PILOT PROJECT IN UKRAINE: A STORY OF SUCCESS (Council of Europe. 2011).

Frankivsk[24] who mediated cases in 2010-2011. These efforts resulted in a total of 50 mediations in administrative, family, labour and land disputes with a 72% settlement rate.[25] Apart from judges, the project trained lawyers, advocates, state officials and trainers in mediation; produced an educational film and conducted a number of awareness-raising public events including mediation weeks in pilot courts.[26]

In 2013-2016 another project 'Educating Judges for Economic Growth' was supported by the National Judicial Institute of Canada in cooperation with the High Qualification Commission of Judges of Ukraine. It opted for a different model – judicial settlement conferences – in two pilot administrative courts and one court of general jurisdiction in Odesa and Ivano-Frankivsk.[27] The project organized a few study visits of Ukrainian judges to Canada and trained a group of trainers who trained judges in other Ukrainian courts to settle disputes. The project did not collect case data, and the only information available from the interviews of this study suggests that in the six months of the project the number of settlement agreements in the Malinovsky court of Odesa increased from 50 to 150.

In 2001-2012 the Ukrainian Center for Common Ground implemented a number of projects on mediation in criminal matters that *inter alia* included referrals from courts. The projects connected the prosecutor office, police, courts, mediators, victims and offenders through a multilevel mechanism of interaction. This mechanism has been implemented in 8 regions of Ukraine and resulted in 541 mediated cases and 152 restorative circle conferences (2001-2012).[28]

The most recent (2014-2015) USAID "Fair Justice" project to support mediation in eight courts of the Volyn oblast relied on a model of mediation by external mediators and reported 47 information sessions and 38 mediated cases with a 37% settlement rate.[29]

All the court mediation projects offered mediation services to litigants on a *pro bono* basis. Similarly, all the pilot projects took an advantage of existing procedural legislation that permits settlements at any stage of the proceedings including the stage of the enforcement of judgements. Given the absence of a provision in law that directly allows mediation within

[24] Bila Tserkva Miskrayonnyi Court, Vinnytsya Administrative Court, Donetsk Administrative Appeal Court, Ivano-Frankivsk City Court
[25] Iryna Zaretska, "The Way to Understanding or Negotiations without Giving in", available at http://jurliga.ligazakon.ua/yurtv_detail/211
[26] Educational video "The Way to Understanding or or Negotiations without Giving In", available at https://youtu.be/QZYBPgxN4m8
[27] Odesa Administrative Court; Malinovsky Court of general jurisdiction, Odesa; Ivano-Frankivsk Administrative Court, Ivano-Frankivsk. See, Judges of Administrative Courts Take Part in Ukrainian-Canadian Project "Education of Judges for Economic Development", 16 March 2015, available at http://www.vasu.gov.ua/123378/
[28] Natallya Pylypiv, *Vidnovne pravosuddia v Ukraini: Rezultaty ta perspektyvy*, 17 VIDNOVNE PRAVOSUDDIA V UKRAINI (2011)
[29] VOLYN REGIONAL CIVIC ORGANIZATION "CENTER FOR LEGAL AID", MEDIATION IN COURTS: MYTH OR RELAITY (USAID, 2016). Available at http://legalaid.in.ua/upload/files/3a44250831253ade03a28cb816844196.pdf

the court system, all the projects relied heavily on the personal support of the presidents of the respective courts. UCCG's and Ukraine-Canada projects managed to attract some official support from the Council of Judges and the High Qualifying Commission of Judges. For example, the High Qualifying Commission of Judges rendered a decision to grant exceptions for pilot courts in cases where judge-mediators would violate the statutory periods for the consideration of cases (which never happened in reality). Therefore, many judges stated that they would feel more comfortable if mediation were directly encouraged by the law. Thus, court mediation in Ukraine still requires legislative support - a law on mediation and mediation-related provisions in procedural codes, as well as the support of judicial leadership.

2.3. Models of Court Mediation Developed within Pilot Projects

The pilot court mediation projects outlined above have developed three models of voluntary court mediation.

Model 1. Voluntary mediation by external mediators

This model was used in the court projects in Donetsk and Odesa (1997-1999), in Kyiv courts (2009), and in the recent project in Volyn courts (2015). Mediators in this model are trained outside the court and cooperate with the court administration. In appropriate cases, judges inform litigants about the mediation procedure and suggest referring their case to an outside mediator. If both parties agree to mediate, they choose a mediator from a list of external mediators available in the court. After the mediation process is over, the parties bring their settlement agreement to the same judge. Based on the current procedural codes, there are several procedural options to finalize a settlement within court procedures: (1) the judge may take into account the settlement when drafting a judgement; (2) the claimant may drop his/her claims; (3) the claimant may ask the court not to consider the case; (4) the respondent may accept the claims fully or in part; (5) parties may sign a settlement agreement (*myrova ugoda*) and submit it to judge for confirmation. If the parties do not reach agreement in mediation, the judge who is appointed in this case decides it.

Advantages of the model: high level of training and independence of external mediators that prevents any suspicions of corruption or the court's vested interest in specific outcomes of mediations.

Challenges of the model: The model requires a high level of judicial awareness about mediation, judges' trust of external mediators as well as their ability to convincingly explain the benefits of mediation and address any concerns parties may have about the process.

During the project implementation phase in pilot courts, parties did not pay for mediation services and mediators were supported by the project. However, it is unclear how mediator fees would be paid when the financial donor support is not available.

Model 2. Voluntary mediation by a judge-mediator

This model was developed by the Council of Europe and EU projects on court reform in 2006-2011. Judges in this model receive extensive mediation training in interest-based facilitative mediation, are able to serve as mediators and to clearly distinguish the roles of a judge and a mediator. When the judge decides that the case is suitable for mediation he/she refers it to another judge within the same court who serves as a mediator and conducts mediation in a special mediation room. Consent of the parties is essential. After the parties take part in mediation, whether with or without a settlement agreement, they come back to the initial judge. Thus, the case is mediated and judged by two different judges. Based on the current procedural codes, there are several procedural options to finalize a settlement within court procedures: (1) the judge may take into account the settlement when drafting a judgement; (2) the claimant may drop his/her claims; (3) the claimant may ask the court not to consider the case; (4) the respondent may accept the claims fully or in part; (5) parties may sign a settlement agreement (*myrova ugoda*) and submit it to judge for confirmation. If the parties do not reach agreement in mediation, the judge who is appointed in this case decides it.

Advantages of the model: The high status of a judge-mediator (as compared to external mediators) motivates parties to use mediation to settle their dispute. The parties do not pay for mediation and the cost of mediation is included into court fees. The parties do not have problems with periods of limitation because the settlement procedure takes place after the claim has been submitted.

Challenges of the model: The model requires additional financial and human resources for training of judges, equipment of designated mediation rooms within court premises, administration of case referrals within the courts. The model, as piloted in Ukrainian courts, did not allow the judges to be paid for the time spent in mediation sessions (as these were “not their” cases) thereby decreasing the motivation of judges to mediate.

Model 3. Dispute settlement conferences by Judges (protsedura vregulyuvannya sporu za uchastyu suddi)

This model cannot be regarded as mediation as such but rather as a special kind of judicial settlement procedure akin to arbitration.[30] It was piloted by the Ukraine-Canada court reform project and was referred to as "negotiations on pre-trial dispute settlement by judge". In its initial format, the model allowed the judge appointed to decide the case to initiate and facilitate the settlement procedure and to make a final decision.

The model is included in the Draft Law on amendments to the codes of civil, commercial and administrative procedure in a slightly changed format.[31] The draft law avoids using the term mediation in labelling this procedure, but uses the term "procedure of dispute settlement with the participation of a judge". It refers to settlement at the preparatory stage of court proceedings with the consent of both parties by the same judge who is appointed to hear the case. The judge has a right to meet each party separately without having to record these meetings. The draft law permits the judge to give advice as to the possible judgement in the case and to suggest solutions for the dispute during the settlement procedure. If the parties come to an agreement during the settlement conference, the judge confirms and stamps the settlement agreement. If they do not reach a settlement, another judge is appointed to make a final judgment in the case. According to the draft law the judges are not required to have any special training in settlement skills.

Advantage of the model: Judges in this model have the highest level of interest to practice mediation because this decreases their time spent in court hearings. The parties do not pay for mediation and the cost of mediation is included into court fees. The parties do not have problems with periods of limitation because the settlement procedure takes place after the claim has been submitted.

Challenges of the model: Some judges may not be interested or have the abilities to facilitate settlement of disputes. There are risks of manipulation during unrecorded confidential meetings between the judge and the parties, as well as risks of manipulation by the parties who wish to change the judge for their case without having legitimate grounds for challenge.

[30] See Annex 1. Tatiana Kyselova and Luiza Romanadze, Differences between mediation and dispute settlement by judge according to drafts, 2017

[31] Draft Law of Ukraine On Amendments to Commercial Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Administrative Procedural Code of Ukraine and other legislative acts, No 6232 of 23 March 2017, available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415

To conclude, court mediation by external mediators as well as settlement procedures by judges have their advantages. Therefore, this report suggests that legislation remains open to these models and gives the parties a right to choose among them. In order to encourage experimental approach, the courts may be granted the right to decide about piloting mediation schemes through the Assembly of Judges of this court (and not by the central authorities as it is currently the case).

3. Main Stakeholders of Mediation Development in Ukraine

3.1. Professional Community of Mediators[32]

The professional community of mediators in Ukraine includes about twenty organizations in Kyiv, Odesa, Lviv, Kharkiv, Vinnytsya and other places in Ukraine[33] that have been operating since 1995 and have made an important contribution towards the popularization of mediation in Ukraine through publications in mass media and social media, research, educational videos, Internet sites, presentations, round tables, school and University courses in mediation. Ukrainian mediators took the most active part in drafting of mediation law (ten drafts were submitted to the parliament). In 2016, they have developed a consolidated text of the draft that was submitted to the parliamentary Committee as suggestions for the second reading. The organizations of Ukrainian mediators have acquired substantive experience in the development and teaching of training courses in basic mediation skills, negotiation, family mediation, mediation skills for managers, dialogue facilitation, conflict management, restorative justice, peace-building, culture of peace and tolerance. Training programs last from a few hours (awareness raising trainings) to 220 hours of practical and theoretical teaching that include evaluation through exams and certification.[34]

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[32] More detailed information on organizations of mediators in Ukraine, see Tatiana Kyselova, Mediation Organizations in Ukraine: Short Guide 2017, available at http://ssrn.com/abstract=3012496

[33] For example, Kyiv Mediation Center http://www.kyivcm.com/; Lviv Mediation Center http://www.mediation.lviv.ua/; Odesa Regional Mediation Group https://www.facebook.com/OdessaGroupMediation/; Podil Mediation Center, Vinnytsya https://www.facebook.com/PodolskyMediationCenter/; Ukrainian Academy of Mediation, Odesa http://mediation.ua/en/; Ukrainian Institute for Peace and Common Ground, Kyiv http://ipcg.org.ua/en/; Ukrainian Center for Concordance, Kyiv http://concordance.org.ua; Ukrainian Mediation Center, Kyiv http://ukrmediation.com.ua/en/; Center for Law and Mediation, Kharkiv https://www.facebook.com/centerlawmediation; Center of Financial Mediation, Kyiv http://www.fin-mediation.com/ua/; Center of Mediation and Moderation under Kyiv-Mohyla Academy https://www.facebook.com/Centre-for-Mediation-and-Moderation-1445578315737851/ , Kyiv; School of Mediation at the Academy of Advocacy of Ukraine, Kyiv http://aau.edu.ua/ua/mediation-school/

[34] See for example, Business-Mediator certification program by the Ukrainian Mediation Center, http://business-mediation.com.ua/

Minimum number of training hours for mediators has increased from 40 to 90 hours that was reflected in the draft law on mediation. Based on information from this study, more than 3.000 Ukrainians have been trained in mediation under various programs since the late 90s. Ukrainian trainers in mediation are often invited to conduct trainings and to consult mediators in other countries of the former Soviet Union. Since 2014 Ukrainian mediators have united themselves into a National Association of Mediators that coordinates the development of mediation in Ukraine including legislative drafting, cooperation with lawyers and judges, development of ethical standards and standards of training.[35] Organizations of mediators initiated several court mediation projects under the first model – court mediation by external mediators.

3.2. Members of Parliament

In 2010 the first draft law on mediation was registered in the Ukrainian Parliament by O. Tyschenko. Since that time ten other drafts have been registered in Parliament. In December 2015 two drafts were submitted to the Parliament - by MP Serhiy Kivalov, and a group of MPs from various political fractions with Olena Shkrum as the leader. The latter draft No 3665 by Olena Shkrum was voted by the Parliament on the first reading on November 3rd 2016. The Committee on Legal Policy and the Judiciary is the parliamentary committee responsible for the draft law on mediation. Ukrainian mediators, in particular the National Association of Mediators of Ukraine, are the most active contributors to the legislative drafting process working in tandem with MPs. It is planned that the Working group develops final suggestions to amend the 3665 draft in 2017 and that the Parliament will finally adopt the law on mediation by the end of 2017.

3.3. Courts

Courts in Ukraine, as in many other places, have been slow to embrace mediation. Since 1997 at least five mediation projects were piloted in fifteen courts of general and administrative jurisdictions of the first and appellate instances. Three court mediation models have been developed within these projects,[36] yet overwhelming support from courts has not been achieved yet. Although Ukrainian mediation organizations and international donors did

[35] National Association of Mediators of Ukraine http://namu.com.ua/
[36] For more information see Section 2.3. of this Report

reach some top-rank officials and judges through court mediation projects, political instability did not allow for the generation of strong and stable support. The judicial elite, who have been trained within the framework of the pilot projects, have been reshuffled in the post-2014 reforms and those who remain in place are under severe pressure of anticorruption campaigns which complicate any mediation initiatives within courts.

Furthermore, contrary to popular perception, Ukrainian courts are relatively efficient, especially in the international comparative context. For example, the study by Tatiana Kyselova on dualism of the Ukrainian courts revealed their astonishing efficiency in terms of time and cost savings.[37] The relative efficiency of Ukrainian courts is corroborated by the results of the 2013 Council of Europe study that found that Ukrainian courts are more efficient than or as efficient as their European counterparts in processing civil and administrative law cases.[38] Although efficiency of Ukrainian courts had notable decreased after 2015 due to lustration of many judges, this has not yet affected the overall international ratings of Ukrainian courts.[39]

Thus, the relative efficiency of Ukrainian courts suggests that they might be interested in mediation as a better dispute resolution technology rather than as an efficiency raising mechanism. Indeed, Ukrainian judges who took part in the pilot mediation projects demonstrated their understanding of mediation as enlightened dispute resolution; they saw themselves as carriers of a new settlement-based dispute resolution culture. This attitude should be maintained and encouraged. Courts do remain a major gate-keeper for dispute resolution and their support is vital for the mediation movement to develop. The professional mediation community should invest more efforts to gain the support of the judiciary for the development of mediation both within and outside the court system.

3.4. Legal Community

The attitude of Ukrainian lawyers to mediation remains ambiguous. On the one hand, their leaders, in particularly the Ukrainian Bar Association and the Ukrainian National Bar

[37] Tatiana Kyselova, *Dualism of Ukrainian Commercial Courts: Exploratory Study*, 6 HAGUE JOURNAL ON THE RULE OF LAW (2014), http://ssrn.com/author=448274

[38] Ukraine civil and administrative cases clearance rates are respectively 103,0% and 95,7% (compared to 98,2% median EU rate); Ukraine civil and administrative cases disposition times are respectively 47 and 55 days (compared to 95,7 and 98,9 days median EU time). Council of Europe, "Enhancing Judicial Reform in the Eastern Partnership Countries", 2013.

[39] Ukrainian courts still retain a good position with regards to the time of contract enforcement – 378 days (to compare - the average time in Europe and Central Asia is 486 days). See 2017 World Bank Doing Business rating, http://www.doingbusiness.org/reports/global-reports/~/media/WBG/DoingBusiness/documents/profiles/country/UKR.pdf

Association have publicly expressed their support for mediators and have organized a number of joint events to popularize mediation among lawyers. In 2016, a Mediation Committee and a Family Mediation Section were officially established by the Ukrainian National Bar Association and the Ukrainian Bar Association respectively.[40] On the other hand, this research has found that lawyers do feel a threat to their profession from mediators and try to compete with mediators by actively acquiring mediation skills and integrating mediation into their legal practice. Recently, a number of law firms began advertising mediation as part of their service package. However, this research has not identified that these companies actually render mediation services in any meaningful quantities. Mediation in this sector seems to function primarily as a marketing mechanism to attract clients to legal services.

3.5. State Agencies

The Administration of the President of Ukraine has demonstrated its interest in alternative dispute resolution (ADR) through the adoption of the Decree on the Strategy of the Reform of the Court System, Judicial Procedures and Related Legal Institutions 2015-2020.[41] The Decree states that mechanisms of alternative dispute resolution should be expanded, in particular through practical implementation of mediation and conciliation. Thereby, the President stresses that mediation now requires more concrete and practical steps to be implemented and to achieve tangible results. ADR efforts of the Administration of the President are currently devoted to the adoption of new codes of civil, commercial and administrative procedure that include judicial settlement procedures.[42]

The Ministry of Justice - at the level of deputy ministers and heads of departments - has been involved in drafting the mediation law since 2010. Its support became strongly evident in 2015 when Ukraine undertook steps to improve its rating in the World Bank Doing Business Index including the Alternative Dispute Resolution (ADR) rating.[43] In December 2015 the Cabinet of Ministers issued a Decree to entrust this task to the Ministry of Justice.[44]

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[40] Mediation Committee, Ukrainian National Bar Association, http://unba.org.ua/komitety
Family Mediation Section of the Committee on Family Law and Property Disputes, Ukrainian Bar Association http://www.uaa.org.ua/about/komitety/family-law-komitet.php

[41] Decree of the President of Ukraine «Strategy of Reform of Court System, Court Procedures and Related Legal Institutions 2015-2020» 2015 № 276/2015, 20.05.2015 http://zakon4.rada.gov.ua/laws/show/276/2015

[42] Draft Law of Ukraine On Amendments to Commercial Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Administrative Procedural Code of Ukraine and other legislative acts, No 6232 of 23 March 2017, available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415

[43] In 2016 World Bank Doing Business Index for the first time included ADR index that *inter alia* gave points for 1) availability of mediation and other ADR mechanisms to business; (2) legal regulation of ADR through consolidated laws or as a part of other legislative acts; and (3) financial mechanisms that motivate parties to attempt mediation. See http://www.doingbusiness.org/methodology/enforcing-contracts

[44] Decree of the Cabinet of Ministers of Ukraine «Action Plan on Implementation of the Best Practices of High Quality and Efficient Regulation by the World Bank Group rating "Doing Business 2016"», 16.12.15, № 1406-p, http://zakon1.rada.gov.ua/laws/show/1406-2015-%D1%80

Therefore, representatives of the Ministry of Justice, along with the NGO "Easy Business in Ukraine",[45] took an active part in the development and discussions of the draft law on mediation chaired by the National Association of Mediators during 2016.

Another area of possible cooperation between mediators and the Ministry of Justice refers to cross-border family disputes.

The Ministry of Finances and the State Fiscal Service are currently under pressure to meet international requirements, in particular by the International Monetary Fund, and to implement mediation in tax disputes. Discussions about the possibility of tax mediation within state fiscal agencies were started in 2013. In 2014 the Draft Amendments to the Tax Code introducing mediation were registered in the Parliament but apparently got stuck there.[46] The Draft suggested detailed regulation of mediation procedures that is built into the system of internal, administrative, pre-trial dispute resolution within the hierarchy of tax authorities. However, the major drawback of the draft is the absence of a clear vision of the status of mediators within this system (whether mediators will be state servants or external, independent professionals) and other issues.

In May 2016, the Ministry of Justice, the Ministry of Finance and the State Fiscal Service were officially entrusted with the task of developing a draft law on improving the appeal procedure for tax-payers including implementation of mediation within this procedure.[47] The National Association of Mediators have actively joined this process, established a Working group and coordinated several round-tables on mediation in fiscal matters in 2016-2017.[48]

The Ministry of Social Policy has included mediation in its list of social services[49] and developed Standards of Mediation as a Social Service[50] that apparently derived from the Council of Europe project to assist the integration of gypsy communities. Although the Ministry had its own rather specific understanding of mediation, NAMU's mediators have negotiated a definition that generally falls within the broader understanding of mediation and submitted proposals to amend the Standards of the Ministry.

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[45] Easy Business in Ukraine http://www.easybusiness.in.ua/
[46] Draft Law on Amendments to the Tax Code (mediation procedure), available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53239
[47] Plan of Actions of the Government of Ukraine for 2016, approved by the Order of the Cabinet of Ministers of Ukraine № 418-p, 27.05.2016 http://zakon5.rada.gov.ua/laws/show/418-2016-%D1%80/paran6#n9
[48] Round-table "Mediation as one of the efficient means of resolution of fiscal disputes and building of partner relations between authorities and business" http://www.ucci.org.ua/visti/rus/news/2016/11/17/50_.shtml
[49] Decree of the Ministry of Social Policy of Ukraine "On the List of Social Services offered to the persons in hard life circumstances which they cannot face on their own", 19.09.12, № 1614/21926, http://zakon4.rada.gov.ua/laws/show/z1614-12
[50] Order of the Ministry of Social Policy of Ukraine "On the State Standard of Mediation as Social Service", 17.08.2016, No 892, http://zakon2.rada.gov.ua/laws/show/z1243-16

Services in the Matters of Children, Obolon rayon, Kyiv City Administration for several years practically mediate cases concerning divorce, parenting and other matters of family law. At the moment, the Service has signed a cooperation agreement with the Ukrainian Mediation Center, organized a working group of family mediators who conduct mediations and supervise their work in family matters, including various methodological trainings and meetings.

3.6. Business

The business community as a potential client of mediation has not yet overwhelmingly supported mediation in Ukraine. Only some attempts to popularize mediation were carried out by the European Business Association and a few other associations. The Chambers of Commerce and Industry became interested in promoting mediation as providers rather than users of mediation services. In 2015-2017, a German-Ukrainian Business Partnership Project established several mediation centers under the auspices of regional and national Chambers but they have not yet reported statistics on the cases mediated.[51]

3.7. International Donors and International Organizations

Mediation in Ukraine has not enjoyed the same wealth of financial support by international donor organizations compared to Russia. Neither has mediation become a focus of international aid as much as in rule of law and court reforms programs. In the 90s these were organizations mostly from the United States and Canada which brought the idea of modern mediation to Ukraine and other former Soviet Union countries. These organizations became the main partners of Ukrainian mediation NGOs in terms of financial support, expertise transfer, and mediation ideologies.

After 2008, the European Union emerged as a leading promoter of mediation and other ADR mechanisms among its member-states influencing neighboring countries such as Ukraine. Additionally, the geographical proximity of the EU, links to European mediation communities and appealing success stories of mediation in some EU member-states inspired Ukrainian mediators. Therefore, by the first decade of the new millennium most of the donors which sponsored mediation projects were European, including the European Commission,

[51] German-Ukrainian Business Partnership project http://business-mediation.com.ua/wp-content/uploads/2015/01/Werbung-Project-2.jpg in partnership with the Delegation of German Economy in Ukraine http://ukraine.ahk.de/ and the Lviv Chamber of Commerce and Industry http://eng.lcci.com.ua/

Council of Europe, the UK Embassy, the Swiss Agency for Development and Cooperation, Polish Aid and others.

For example, apart from the current project on Support to the Implementation of the Judicial Reform in Ukraine, the Council of Europe has supported two large projects that included a court mediation component - 'Judicial Selection and Appointment Procedure, Training, Disciplinary Liability, Case Management and Alternative Dispute Resolution' 2006-2007 and 'Transparency and Efficiency of the Judicial System of Ukraine' 2008-2011. The Swiss Agency for Development and Cooperation has been fruitfully supporting the Ukrainian Center for Common Ground through a series of grants for mediation in penal matters and restorative justice for almost a decade.

In summary, the stakeholders of mediation development in Ukraine are numerous with a varied degree of self-interest in mediation and varied resources. The Ukrainian court system, due to its specific configuration, relative efficiency and continuous institutional uncertainty, currently lacks systemic self-interest to raise court efficiency through mediation. The Ukrainian Government recently became more interested in mediation by way of the motivational mechanisms of the international community, yet this is an external influence and mediation is not the priority in the war-time crisis for the Government. The Ukrainian mediation community, which is highly professional, vibrant, open-minded and reform oriented, remains the only highly-motivated self-interested stakeholder which is capable of leading the process of mediation development in Ukraine. At the same time, it is obvious that mediation development is impossible without political support and primarily support from the judiciary. Yet, it is the mediation community that should work with the courts, the Government, the wider legal and business community to gain strong support and should be empowered to do so.

4. Possible Scenarios of Integration of Mediation into the Court System

4.1. Less Desirable Scenario - Integration through Mandatory Court Mediation Schemes

The seemingly easiest way to introduce mediation into the court system is to mandate its use in certain types of cases before the court can start to consider the claim. This scenario

has been introduced, for example, in Italy in 2013 and since that time Italy has become a leader in terms of the quantity of mediations with more than 200,000 mediations reported annually.[52]

In the Ukrainian legal tradition such a mandatory mediation mechanism would fall within the broader category of mandatory pre-trial dispute resolution (*obov'yazkove dosudove vregulyuvannya sporiv*). This mechanism was in force in Soviet times in inter-enterprise disputes and was known as *pretenziya* dispute resolution.[53] The Constitutional Court decision of 2002 prohibited any legislative provisions that require mandatory pre-trial dispute resolution. In another circle of reforms, in June 2016 the Ukrainian Parliament adopted amendments to the Constitution that changed Article 124 to directly state that "the law can establish a mandatory pre-trial dispute resolution mechanism".[54] Thereby, the Constitution has given a green light to mandatory mediation in Ukraine but this does not mean that it actually established such a scheme. It remains up to legislators whether to introduce mandatory mediation schemes by way of legislation or not.

Mandatory mediation has the advantage of a quick result in terms of mediation statistics. Mandatory court mediation allows for a rapid decrease in the number of cases tried in courts, which might positively influence the overall disposition time and costs of the court system. Within mandatory mediation schemes, it is more feasible to exercise control over the quality of mediators' training, the quality of mediation processes and legal aid to disadvantaged groups of citizens. Finally, mandatory mediation guarantees a certain stable flow of mediation cases, and therefore income, for mediators.

However, there are the risks and disadvantages of mandatory mediation, especially in the context of a post-Soviet Ukrainian transition, which should be carefully considered. This research has identified the following risks:

1) A mandatory pre-trial mediation requirement can only compel parties to attempt to settle but not compel them to settle. Given that any formal mandatory requirement is often treated by the parties and their lawyers as a bureaucratic formality and as an additional step on the way to court, many litigants simply do not show up even at the first information session about mediation. This means quite low settlement rates in mandatory mediations (around

[52] See mediation statistics at the website of the Ministry of Justice of Italy https://webstat.giustizia.it
[53] Tatiana Kyselova, *Pretenziia Dispute Resolution in Ukraine: Formal and Informal Transformation*, 40 REVIEW OF CENTRAL AND EAST EUROPEAN LAW (2015). http://ssrn.com/author=448274
[54] The Law on Amendments to Constitution of Ukraine, 2 June 2016, No №1401-VIII, http://zakon5.rada.gov.ua/laws/show/1401-19

23% in Italy). Therefore, more than 70% of cases that were referred to mediation bounce back to courts. [55]

2) Time and costs increase for the cases that attempted mediation but did not settle (in Italy the party has the right to apply to court within 30 days after the commencement of mediation if the other party does not show up to a mediation session or does not wish to settle).

3) Mandatory mediation entails a tension between the need to guarantee cheap mediation procedures to the parties and the need to properly support mediators. Given that the parties cannot be forced to pay high fees for mandatory court mediation in accordance with the *Alassini v Telecom Italia Case* of the European Court of Human Rights,[56] the most feasible option is that the state subsidizes mandatory mediation procedures. This requires additional expenditures from the state budget.

4) Mandatory mediation makes it absolutely essential for the state to guarantee free legal aid and free access to mediation services to those categories of citizens who are entitled to free legal aid within court proceedings. Free legal aid within mediation procedures is possible at the moment through the system of Legal Aid Centers in accordance to the Law on "Free Legal Aid" (Article 2 and 7).[57] However, this still requires additional expenditures from the state budget.

5) Quick introduction of mandatory mediation, even in the narrow category of disputes such as divorce disputes, requires a stable and professional pool of trained and certified mediators. Furthermore, if mandatory mediation is introduced, the principles of access to justice require that mediators are available in all, even most distant, courts. At the moment it is not feasible to provide such services equally in all courts of Ukraine.

6) Mandatory mediation in the post-Soviet context may entail some risks of corrupt activity (for example, judges may manipulate mediation to the advantage of certain mediators which in turn may lead to the phenomenon of the so-called "pocket mediators" when mediators form an agreement with a certain judge who refers cases to them for an informal fee). These risks are not fatal for mediation but they have to be foressen when drafting legislation.

Having weighted the above advantages and disadvantages of mandatory mediation in the context of current Ukrainian court reforms, this report suggests postponing the idea of

[55] In Italy more than 50% of cases of mandatory mediation end up with only one party present at the first session. See Italian mediation statistics https://webstat.giustizia.it
[56] Alassini v ItalTelecom [2010] EUECJC-317/08, C-317/08, [2010] ECRI-221, [2010] 3 CMLR 17
[57] Law of Ukraine On Free Legal Aid, No 3460-VI of 2 June 2011, available at http://zakon2.rada.gov.ua/laws/show/3460-17

introducing mandatory court mediation schemes. Instead, the report suggests to start gradually but quickly with voluntary schemes of court mediation. Through trial and error and pilot programs such a path can eventually bring Ukraine to mandatory court mediation or mandatory information sessions about mediation, but this should not happen overnight.

4.2. Desirable Scenario - Soft Integration through Voluntary Court Mediation Schemes

Based on the analysis of pros and cons of the possible mandatory mediation schemes and the existing piloted models of court mediation in Ukraine, having consulted with the professional community of mediators and other stakeholders, this study suggests that the most fruitful and the least risky option to integrate mediation into the Ukrainian court system is to move in small but quick steps. Below are the **principles** that such a gradual integration should follow.

The aim of integration of mediation within court system should be to offer multiple dispute resolution methods for disputants to choose the best suitable one. This will empower people and promote individual responsibility for their lives. When mediation becomes to be treated solely as a tool to dispose of the court cases and to clear up the court dockets, its nature gets distorted

Any meaningful integration of mediation into a court system requires additional efforts of the state and the mediation community to generate popular demand in mediation services. Without such efforts mediation legislation will not have much impact on the way people solve their conflicts. Therefore, incorporation of mediation into the court system should become an integral part of the broader strategy of mediation development in Ukraine. Apart from the relationship between mediation and the courts, such a strategy should *inter alia* address the measures to popularize mediation within the wider population; to introduce mediation and related courses (non-violent communication, restorative justice approaches, etc.) into school and University curricula; to educate judges and lawyers about mediation; to actively involve business and other potential clients of mediation in mediation development, etc.

Integration of mediation into the court system should be based on the gradual development of legislation starting from the framework law on mediation and proceeding to specialized regulations within civil, commercial, family, administrative, tax, criminal, and other areas. Legislation on mediation should be based on international standards, in particular

Recommendations of the Council of Europe on mediation, EU Mediation Directive and UNCITRAL Model Law on International Conciliation Procedure. The law should encourage an experimental approach to court mediation through setting up pilot schemes by decision of the Assembly of Judges of the individual courts. These schemes should be carefully assessed by external evaluators with consequent policy recommendations. Therefore, it is suggested that the law on mediation should be reviewed after several years and necessary amendments should be incorporated based on the results and consultations with all the stakeholders.

Mediation should be applicable to the disputes of all types including civil, commercial, family, criminal, administrative and all others with restrictions imposed by the current legislation. Given that mediations have been conducted in various Ukrainian pilot courts since 1997 and decisions of these courts mentioning mediation are contained in the Single Registry of Court Judgements of Ukraine,[58] the widest possible application of mediation is not only theoretically desirable but practically possible.

The law on mediation should be of a framework nature and should provide basic definitions and principles of mediation; regulate only basic aspects of mediation procedure (confidentiality of information connected to mediation, recognition and enforcement of mediation clauses and mediated settlement agreements, rights and duties of the parties and mediator) and set up only basic professional standards for mediators (requirements for working as a mediator, registries of mediators, mediators' liability).

The law on mediation and procedural codes should incorporate voluntary models of court mediation including: (1) the right of the parties to request a stay of court proceedings for a limited time-period in order to mediate their dispute and the duty of the court to grant such a stay; (2) the right of the judge in appropriate cases to recommend mediation to the litigants and, possibly, the duty of the judge (in preparatory meeting) to ask the parties whether they would like to mediate their case.

In light of the pilot court mediation projects implemented in Ukraine by the Council of Europe and other organizations, the law on mediation and procedural codes should permit judges to take part in settlement procedures. A settlement procedure by a judge should co-exist with the opportunity for mediators to get referrals of cases from courts with the consent of the parties. However, the procedure of settlement by judges as proposed by the Draft law

[58] Malynovsky rayonny court, Odesa http://www.reyestr.court.gov.ua/Review/35225626; Апеляційний суд м. Києва http://www.reyestr.court.gov.ua/Review/28654344; Frankivsky rayonny court, Lviv http://www.reyestr.court.gov.ua/Review/33781390; Pyriatynky rayonny court, Poltava oblast http://www.reyestr.court.gov.ua/Review/16662939, http://www.reyestr.court.gov.ua/Review/24426270; Vinnytsky okruzhny administrative court http://www.reyestr.court.gov.ua/Review/48836081

on amendments to procedural codes (Draft No 6232) requires changes. In particular, it is suggested that the settlement procedure should not be conducted by the same judge as was assigned to hear the case, but rather by another judge, who was trained to facilitate settlement. In case parties do not reach agreement during a settlement procedure with such a judge, they come back to the initial judge for a hearing.

The law on mediation and procedural codes have to include provision that guarantees that mediators cannot be called as witnesses to what happened during mediation.

The law on mediation should combine voluntary models of court mediation with financial incentives that will motivate the parties to use mediation to solve their disputes. Currently, the draft procedural codes include possibility of 50% return of the court filing fees in case the parties sign settlement agreement, the respondent accepts the claims or the claimant drops the claims. [59] In order to increase public awareness about mediation and to stimulate its use, it is suggested to mention that the parties are also entitled to 50% return when they reached agreement through mediation, although the exact wording of the provision requires discussions with judges and mediators.[60] Judges should have more incentives to promote mediation and other means of alternative dispute resolution, in particular it is suggested that statistical reports on the work of individual judges should include the number of cases which settled through mediation.

The law on mediation should regulate mediators based on the principle of minimal state involvement and decentralized market regulation. Professional regulation of mediation should be entrusted to organizations of mediators based on the principle of self-regulation and self-governance. Later, when the law is reconsidered in several years, more centralized options of professional regulation may be introduced, such as co-regulation by the Ministry of Justice (maintaining a registry of mediators) or by a specially designated, mixed private-public body. However, as a starting point, professional regulation of mediation activity should be fully entrusted to mediation organizations.

[59] Article 131, Draft Law of Ukraine On Amendments to Commercial Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Administrative Procedural Code of Ukraine and other legislative acts, No 6232 of 23 March 2017, available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415

[60] Earlier, mediators proposed two other motivational mechanisms: (1) a discount of the court filing fees in case the parties attempted mediation and had not reached a settlement; (2) refusal of the court to award the costs in case a party refused to take part in a mediation session. Both proposals are still very raw and require further discussion and careful consideration with judges and other stakeholders.

5. Recommendations

Based on the Council of Europe mediation recommendations and analysis of the present study, this report recommends the following:

1. When integrating mediation into the Ukrainian court system, refrain from treating mediation solely as a tool to dispose of court cases and to clear up the court dockets. Instead, the aim of mediation within the court system should focus on enhancing the citizens' choice of dispute resolution mechanisms available to them and offering an option that empowers and promotes individual responsibility for settling disputes. Ukrainian judges, who took part in the pilot mediation projects, demonstrated their true understanding of mediation as an enlightened dispute resolution process and saw themselves as promoters of a new settlement-based dispute resolution culture. This attitude should be maintained and encouraged.

2. Rely on a strategy of soft, gradual integration of mediation into the court system of Ukraine beginning with voluntary schemes of court mediation and decentralized professional self-regulation with minimum state regulation. Encourage pilot mediation projects and their continuous monitoring in cooperation with the courts, mediators and other stakeholders.[61]

3. Adopt the law on mediation which has been voted in by the Parliament in the first reading in November 2016 (draft No 3665) by including suggestions from the National Association of Mediators of Ukraine and other stakeholders (consolidated draft). Ensure that the law on mediation, the codes of civil, commercial and administrative procedure (draft law No 6232), as well as other relevant legislative texts incorporate voluntary models of court mediation and the principles of soft integration of mediation into the court system suggested by this report (section 4.2.). A settlement procedure by a judge should co-exist with the opportunity for mediators to get referrals of cases from courts with the consent of the parties.

4. To encourage the National Association of Mediators of Ukraine to develop strategic vision and policies in the areas of mediation awareness raising, self-regulation of mediation profession, mediation education, etc. in a transparent and open process of public

[61] Council of Europe Guidelines require that "schemes and on-going pilot projects are continually monitored and evaluated" para 28, Guidelines for a Better Implementation of the Existing Recommendation On Alternatives to Litigation between Administrative Authorities and Private Parties; para 15, Guidelines for a Better Implementation of the Existing Recommendations Concerning Family Mediation and Mediation in Civil Matters; para 15, Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters.

consultations with all the stakeholders.[62] Ensure that the policies *inter alia* elaborate on the motivation mechanisms for mediation to be included in the legislative texts in line with the Council of Europe standards.[63]

5. Given increasing competition between lawyers and mediators, as well as the crucial importance of support for mediation from the Parliament, the Government, the local authorities, the judiciary and the business community,[64] support joint projects between mediators and these stakeholders that promote understanding, cooperation and joint action including joint strategy development.

6. Encourage and support the Ukrainian mediation community to develop and further strengthen professional training standards of mediators and standards of accreditation of training programs; monitor quality of mediation services; develop and effectively enforce professional standards of conduct for mediators based on the European Code of Conduct.[65]

7. In light of the consequences of the armed conflict in Eastern Ukraine, ensure that the Strategy of Mediation Development *inter alia* addresses the role of mediation and dialogue in peacebuilding and transitional justice. Research involving academics, mediation practitioners and representatives of the state can be launched to facilitate this process.[66]

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[62] Council of Europe Recommendations and Guidelines require that the Member State develop policies to develop mediation. See, for example Guidelines for a Better Implementation of the Existing Recommendation On Alternatives to Litigation between Administrative Authorities and Private Parties, para 10 “Alternatives to litigation between administrative authorities and private parties will only become established in member States if a policy that addresses the use of these means of dispute resolution is adopted”.

[63] Council of Europe Guidelines suggest that “In order to make mediation more attractive to users, member states may wish to consider diminishing, abolishing or reimbursing court fees in specific cases if mediation is used to try to settle the dispute either before going to court or during court proceedings”, para 47, Guidelines for a Better Implementation of the Existing Recommendations Concerning Family Mediation and Mediation in Civil Matters; para 50, Guidelines for a Better Implementation of the Existing Recommendation On Alternatives to Litigation between Administrative Authorities and Private Parties.

[64] Council of Europe mediation Recommendations and Guidelines expressly state that the following stakeholders should be involved into the process of mediation development: Governments, judges, lawyers, mediation providers, prosecutors, other criminal justice authorities, state authorities, non-governmental organizations, universities, academic institutions, social workers.

[65] Council of Europe Recommendations require that Member States “ should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators”, See Recommendation Rec (2002)10 on mediation in civil matters, para 15.

[66] Council of Europe Guidelines require that “Member states, universities, other academic institutions and mediation stakeholders should support and promote scientific research in the field of mediation and alternative dispute resolution”, para 44 Guidelines for a Better Implementation of the Existing Recommendations Concerning Family Mediation and Mediation in Civil Matters; para 41, Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters; para 52, Guidelines for a Better Implementation of the Existing Recommendation On Alternatives to Litigation between Administrative Authorities and Private Parties.

Annex 1. Differences between mediation and settlement procedure by judge according to current drafts[67]

	Mediation (Draft Law № 3665 of 17.12.2015)	**Settlement procedure by judge** (Draft law № 6232 of 23.03.2017)
Essence of the procedure	Structured negotiations between the parties to the conflict with the support of an intermediary-mediator with the aim of finding a solution	Communication of the parties with the judge for the purpose of obtaining explanations and additional information in order to assess the parties' prospects of winning the case in litigation
Orientation of the procedure	Towards interests and needs of the parties	Towards positions of the parties
Intermediary	Neutral and independent mediator chosen by the parties	The judge who is assigned to hear the case
Participants of the procedure	Parties to the conflict and the mediator	Parties to the litigation and the judge
Role of intermediary	A mediator ensures adherence to procedural rules, helps to establish communication between the parties and supports the parties in finding mutually acceptable solutions	The judge explores the grounds and the subject-matter of the claim, the grounds for the objections, gives explanations about the scope of proof to the parties, In closed sessions, the judge has the right to draw the parties' attention to court practice in similar disputes. The judge may offer the parties a proposal for an amicable settlement of the dispute
Place in the court procedure	At any stage, with the consent of the parties	Before the hearing of the case on its merits, with the consent of the parties
Structure of the procedure	The procedure consists of successive stages through which the mediator guides the parties	Procedure is not structured
Desired result of the procedure	Consensus - the result satisfies interests of the parties	Compromise - both parties give up their positions in part
Duration of the procedure	By agreement of the parties	Within a reasonable time, but not more than thirty days from the date of the judge's decision to initiate a settlement procedure
Repeat the procedure at the request of the parties	Possible	Not possible

[67] Prepared by Tatiana Kyselova and Luiza Romanadze, 2017