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THE PARTICULAR IMPORTANCE OF MEDIATION IN THE EU DIGITAL MARKET: P2B, DSM & THE DSA PROPOSAL

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MEDIATION = DISPUTE MEDITATION & MEDICATION

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SUMMARY

The future of transactions in the European Union is expected to be largely digital, using, in particular, online platforms in an ever-evolving technological environment. In this digital market for goods and services, alternative out-of-court dispute resolution mechanisms, especially **Mediation**, will become increasingly necessary for a number of important reasons, particularly speed and cost. Moreover, the EU's legislative choices in various areas confirm this. **Mediation** in Greece, either as a specifically regulated institution (formal) or as an out-of-court dispute resolution procedure (informal), is already applied in a wide range of legal matters.

1. Introduction

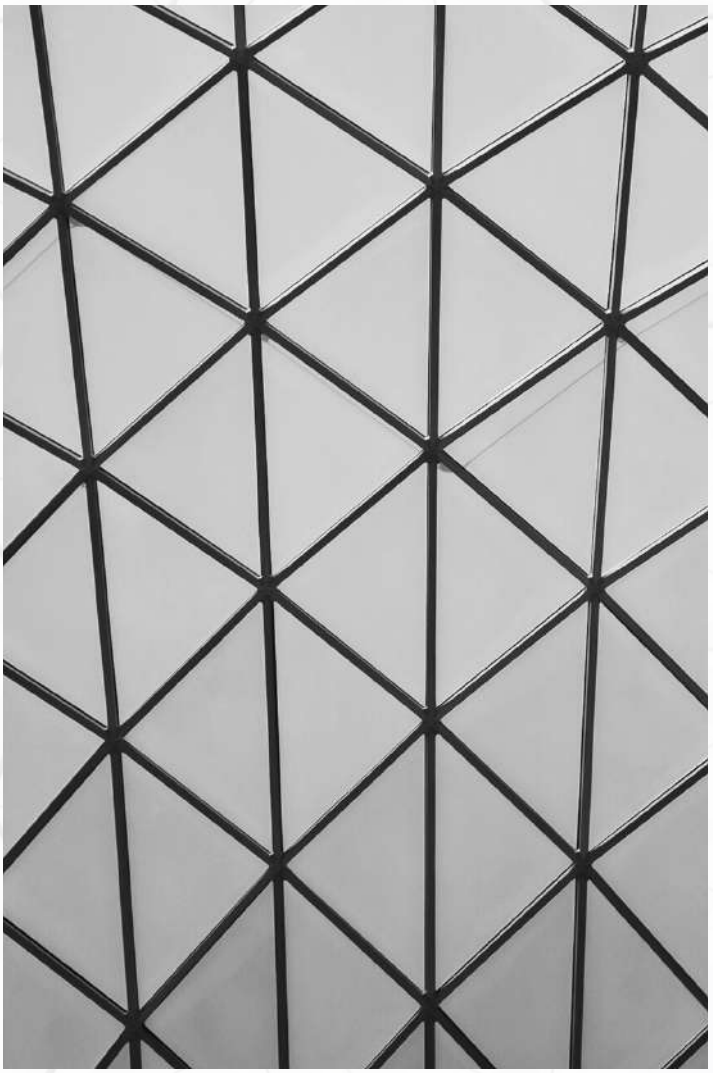
1.1 The digital market for goods and services in the European Union (the EU) is the present of transactional relationships and is expected to represent the vast majority of such relationships in the future, especially in some markets, perhaps even exclusively, in an increasingly technologically advanced and evolving environment. While technology is increasing the choice and alternatives in the categories and modes of contracting, it is also creating complex and diversely interconnected ecosystems. The EU legislator therefore needs to regulate an increasing number of individual sectors and transactions in the digital age.

Inevitably, this legislation also concerns the way of resolution of disputes arising in the context of electronic transactions, i.e. in an environment characterized by automation, standardisation and resulting speed and, at the same time, the need for increased system reliability, trust and transparency but also for minimum cost. All the resulting disputes therefore require **immediate, simple, rapid and reliable resolution.**

1.2 In this context, it is no coincidence that the EU legislator is increasingly choosing mediation (Mediation) as a way of resolving the relevant disputes, either directly and specifically or as one of the alternative forms of out-of-court settlement provided for. In any case, the judicial resolution of such disputes is increasingly becoming the last and forced solution, for the well-known reasons. This recurrent preference of the European legislator for **Mediation** is of particular importance as it sets the tone and indicates its growing acceptance, among other alternative dispute resolution mechanisms, as an appropriate and suitable option.

The institution of Mediation is therefore significantly strengthened because it is systematically legislated as a **mechanism for** out-of-court dispute resolution in the rapidly developing single EU digital market for goods and services, mainly using **online platforms**. At the same time, and as a result, the **Mediation culture** is becoming increasingly established, since there is a chance for it to be applied in practice, on a case-by-case basis, voluntarily or compulsorily but non-bindingly, and for its flexibility and other advantages to be proven.

1.3 We will briefly review below the legal framework of Mediation and will then consider, by way of illustration and in summary, some recent EU legislation and a proposal for a Regulation, all of particular importance given the timeliness of their subject matter and their expected wide application, which introduce or will introduce **Mediation**, exclusively or among other mechanisms, in the out-of-court resolution of disputes arising in **digital transactional activities.**



2. Mediation in Greece

2.1 Mediation is currently governed by Greek Law 4640/2019 (**Law 4640**), which is the third statutory regulation attempt following a) Law 3898/2010, which transposed Directive 2008/52/EC "on certain aspects of mediation in civil and commercial matters" and b) Law 4512/2018, which remained ineffective due to unconstitutionality (Supreme Court Administrative Plenum Decision 34/2018). We can call for the purposes of this paper the Mediation of Law 4640 "**formal**" mediation.

It is noteworthy that **reference to** Mediation as an alternative way of dispute resolution is made in the Code of Civil Procedure (the **CCP**) (Articles 116A & 214C) and the **Lawyer´s Code** (Article 36(1), Law 4194/2013, as in force) as well as **in various laws,** even with an increasing trend, such as for instance for limited liability companies (Article 3(2), Law 4548/2018), corporate transformations (Article 5(2), Law 4601/2019), trademarks (Article 31, Law 4679/2020) and heavily indebted individuals (Article 4e, Law 3869/2010 - "Katseli Law", as in force after Law 4745/2020).

2.2 In addition, **specific types of** Mediation have been regulated, namely: Bankruptcy Code),

a) financial mediation, for a debtor that is a legal person - small, medium or large entity as defined in Law 4308/2014 (Articles 5-30 and in particular Article 15, Law 4378/2020 - Bankruptcy Code),

b) family mediation (Civil Code Articles 1514 and Articles 8, 15, 21 & 30, Law 4800/2021), with mediators appointed among those registered in a "Special Register of Family Mediators", which is compiled and maintained in electronic form by the Central Mediation Committee (the **CMC**), while the conditions and the procedure for mediator registration were established by Decision No 41917oik./26.8.2021 (OJ B/4017/31.8.2021) of the Minister of Justice and its amendment No. 46181oik./3.9.2021 (OJ B/4145/9.9.2021) and

c) cadastral mediation (Article 6(2)(c), Law 2664/1998, as amended by Article 8, Law 4821/2021), with mediators appointed among those registered in a "Special Register of Cadastral Mediators", which is similarly established and maintained in electronic form by the CMC, while the conditions and procedure mediator registration were established by Decision No. 70058 oik. /23.12.2021 (OJ B/6444/31.12.2021) of the Ministers of Justice and State, with 01.04.2022 having been set as date of commencement for the submission of such disputes to a Mandatory Initial Mediation Session (MIMS).

2.3 At the same time, there is a variety of regulated mechanisms for out-of-court dispute resolution **beyond and outside the "formal" Mediation of Law 4640** under various names, such as "ombudsmen", "intermediators", "committees". These mechanisms, which are certainly not uniformly regulated, are found in a wide range of legal matters, not only in civil and commercial disputes but also in criminal and administrative disputes. These mechanisms include, more or less on a case-by-case basis, elements of '**informal**' Mediation, such as the following:

a) The **procedural** alternative mechanisms for the resolution of private disputes under the CCP, namely the conciliatory intervention of a justice of the peace (Articles 209-214) and the judicial mediation (Article 214B).

b) The committees for the amicable settlement of consumer disputes (Article 11, Law 2251/1994), the Consumers Ombudsman (Law 3297/2004), the Citizen Ombudsman (Law 2477/1997), the Hellenic Financial Ombudsman - Non-profit Alternative Dispute Resolution Organization (formerly the Banking-Investment Services Mediator), the Mediation of the Mediation and Arbitration Organization (O.ΜΕ.Δ. - Articles 14-15, Law 1876/1990), the Labour Inspectorate (S.ΕΠ.Ε. - Article 3, Law 3996/2011 and more specifically Articles 12, 16-18, Law 4808/2021), the mechanism of the Committee for Online Intellectual Property Breaches (in Greek, ΕΔΡΠΙ; Article 66Ε, Law 2121/1993), the Committee for the Extrajudicial Resolution of Tax Disputes (Article 16, Law 4714/2020 and Ministerial Decision 127519 ΕΞ 2020, as in force, see www.eefdd.gr), the Police and Ports Ombudsman (Articles 2 and 5, Law 4703/2020).

c) Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive) and Regulation (EU) 524/2013 on online dispute resolution for consumer disputes (ODR Regulation), which were incorporated - supplemented by Joint Ministerial Decision 70330oik (OJ B/1421/9.7.2015) and apply subject to Directive 2008/52/EC on Mediation (see above under 2.1), i.e. they do not affect the latter (ADR Directive Article 3(2) and ODR Regulation Article 3).
It should be noted that the mechanism of the aforementioned JMD 70330oik also applies to payment services in the EU internal market, regarding disputes between users and payment service providers (Article 102 of Directive 2015/2366/EU transposed by Article 100, Law 4537/2018).

d) **Criminal mediation** for intra-family violence (Articles 11-14, Law 3500/2006) as well as criminal conciliation and plea bargaining (Articles 301-304 of the Code of Criminal Procedure).

e) Various **administrative appeals** and petitions (Articles 24-27 of the Code of Administrative Proceedings and Article 63 of the Code of Fiscal Proceedings), appeals to the Authority for the Examination of Preliminary Objections (AEPO) against acts of the contracting authorities in the award of public contracts (Articles 360 et seq., Law 4412/2016), the intra-judicial conciliatory settlement of disputes concerning claims arising from the performance of public contracts under the jurisdiction of administrative courts of appeal (Article 126B of the Code of Administrative Procedure), the conciliatory settlement of disputes and the recognition of claims against the State and its entities through the Legal Council of the State (LCS), which issues opinions in this regard (in particular Articles 3, 4, 6, 7, 27 of Law 4831/2021 and MD (Oik) 272/2019, OJ B/2763/3.7.2019), etc.

f) The European Ombudsman who investigates cases of maladministration by the EU institutions (other than the EU Court of Justice), ex officio or following a complaint by an EU citizen, whether a natural or a legal person, provided that no legal proceedings have or had been instituted (TFEU Article 228 and Regulation (EU, Euratom) 2021/1163 of 24.6.2021).

3. Regulation (EU) 2019/1150 (P2B - Platform to Business)

3.1 Regulation (EU) 2019/1150 "on promoting fairness and transparency for business users of online intermediation services" of 20.6.2019, with effect as from **12.7.2020 (Regulation 1150)**, regulates for the **first time** the relationship between:

a) intermediary online commercial platforms and online search engines (the **Providers**),

b) business users and corporate website users, respectively, who are established or resident in the EU (the **Users**) and offer products and services, through online platforms and search engines, to consumers; and

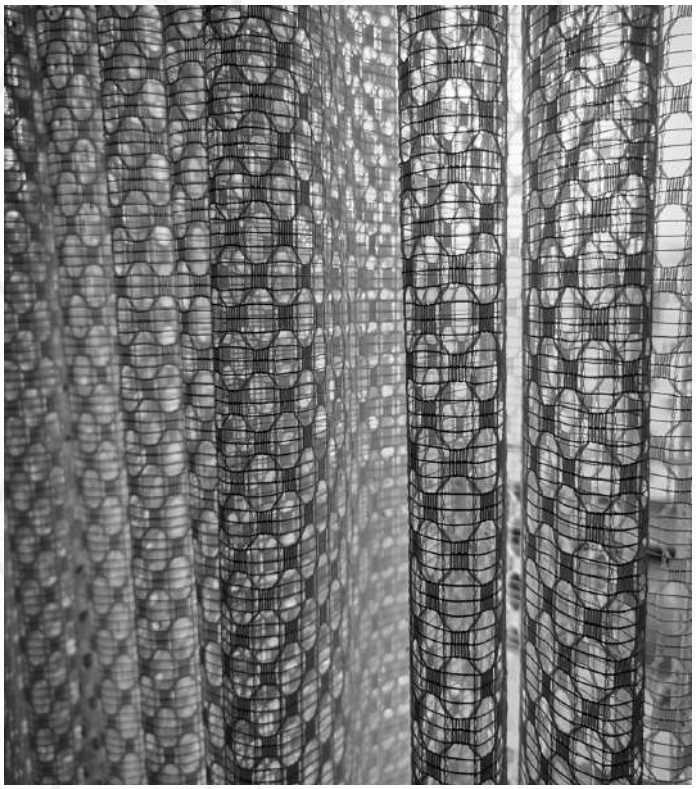
c) consumers who are "located" in the EU and are the final recipients of these goods and services,

irrespective of the place of establishment or residence of the Providers and of the law otherwise applicable (Article 1(2)).

Such Providers are, as we know, search engines (e.g. Google, Bing, Yahoo, Mozilla) and various kinds of platforms such as e-commerce (e.g. Amazon, Ebay, Alibaba, Skroutz), collaborative economy (e.g. Airbnb, Uber), price & terms comparison (e.g. Trivago.com, Booking.com), social/professional networking (e.g. Facebook, Linkedin), app stores (e.g. Apple App Store, Amazon App Store, Google Play Store), service reviews (e.g. Tripadvisor), and other platforms.

3.2 Within the above general framework of digital services in the EU, the need for regulation arose basically from:
- the rapidly increasing use of online platforms and search engines,
- their overall importance in the trade/Community market and the need to build confidence in the way they operate; and
- the increasing dependence of Users - sellers and therefore the need to protect both them and, indirectly, the consumers - final buyers, from any unfair/unilateral practices of the Providers imposing unfair terms.

Regulation 1150 provides for exceptions to its application (e.g. for payment services) and subsidiarity with regard to the national laws of the Member States (in particular civil and especially contract law), while not affecting EU law in other respects (Article 1(3)-(5)).



3.3 Regulation 1150 specifically and explicitly recognises the importance of **Mediation** as a means of satisfactory dispute resolution rather than "judicial proceedings which can be lengthy and costly" (recitals 40-43) and provides for its **mandatory use** by Providers - online platforms (i.e. not by online search engines).

An exception under Regulation 1150 is made for Providers - online platforms that are "small enterprises" (thus also excluding "micro enterprises") within the meaning of the Annex to the Recommendation 2003/361/EC of 6.5.2003 of the European Commission (the **Commission**) "concerning the definition of micro, small and medium-sized enterprises" (the **Recommendation**). This exemption from the mandatory requirement does not, of course, mean that these enterprises cannot voluntarily use Mediation.

In particular, Providers - online platforms are required to create a **permanent mechanism of** voluntary Mediation for the out-of-court resolution of disputes between them and Users in relation to their services to Users. This mechanism shall include at least two (2) EU or non-EU mediators, who must meet specific requirements and conditions (impartiality, independence, etc.), and the Providers shall bear a reasonable proportion of the total costs of the Mediation in each individual case.

The principle of good faith in the parties' participation in the Mediation and the preservation of the parties' legal rights, in particular the right to initiate legal proceedings at any time is stressed (Article 12).

3.4 It is further envisaged that the Commission, in cooperation with Member States, should encourage the setting up by Providers - online platforms and their associations of **Mediation organisations** to facilitate the implementation of their obligations under the Regulation, in particular in view of the cross-border nature of their services. Obviously, online platforms may alternatively contract with existing Mediation organizations - service providers, particularly online, that have the relevant know-how (Article 13).

3.5 Supplementary measures for the implementation of Regulation 1150 were introduced by **Law 4753/2020**, namely a) the regulation of the introduction of a **special collective action** by associations and organizations of Users, b) the creation of a register of such associations and organizations and c) the designation of a supervisory authority for Providers, which is the Interdepartmental Market Surveillance Unit (in Greek DI.M.E.A.), specifying the scope of its authority and the sanctions it may impose for violations.

4. Directive (EU) 2019/790 (DSM - Digital Single Market)

4.1 Directive (EU) 2019/790 "on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC" of 17.4.2019, with a transposition date by **7.6.2021 (Directive 790)**, lays down rules to further harmonise EU law on copyright and related rights, taking into account digital and cross-border uses of protected content, but - with the exception of the amendment of the above-mentioned Directives - without otherwise affecting existing EU legislation (Article 1).
Directive 790 brings about a significant reform of the intellectual property law (Law 2121/1993, as in force).

As regards the **reasons for** the adoption of Directive 790, special reference should be made to recital 79, according to which, because "authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal" (for the well-known reasons of cost and time), Member States should provide for an **"alternative dispute resolution procedure"** either by establishing a new body or mechanism or by relying on an existing, sectoral or public body or mechanism. The right to judicial dispute resolution is not affected in any case.

Therefore, Directive 790 recognises, albeit without naming them, the well-known problems associated with the judicial pursuit and enforcement of rights, in particular the very long duration and the overall costs of the procedure, and establishes alternative dispute resolution solutions to precede judicial resolution, as a last and compulsory resort.

In particular, Directive 790 provides for out-of-court dispute resolution mechanisms, including mediation, for **three (3) general categories of disputes.** In particular:

4.2 ***Video-on-demand delivery platforms***

On the one hand, Directive 790 provides for a "negotiation mechanism" and in particular the assistance of **"an impartial body or mediators"** to parties who face difficulties related to the licensing of rights when seeking to conclude agreements for the distribution of audiovisual works on **video-on-demand platforms.** Mediators are thus assessed and named as an alternative equivalent of an appropriate and impartial body.

The assistance of this body, established or designated by existing ones, and of the mediators, where appropriate, will be provided in the negotiations of the parties for the conclusion of agreements, including **by submitting proposals** to them (Article 13). The possibility for mediators to give an opinion to the parties, in any case a non-binding opinion, is therefore specifically provided for and confirmed, in addition to their normal role of facilitating a parties' agreement (facilitative vs. evaluative mediation).

This possibility for the mediator to **express an opinion** is provided for by Law 4640, exceptionally and without prejudice to his/her other obligations, in particular the obligation of neutrality (Article 13(2), Law 4640).
Member States had to notify the Commission of the body or mediators chosen by the deadline for transposing Directive 790, i.e. by **7 June 2021** (see below under **4.5**).

4.3 *Providers of online content-sharing services*

On the other hand, Directive 790 provides that Member States should ensure that **"out-of-court dispute resolution" mechanisms are** available between providers of online content-sharing services and users regarding the disabling of access to, or the removal of works or other subject matter uploaded by the latter (Article 17(9)).
"Providers of online content exchange services" are defined as those providing an information society service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of 9.9.2015 "laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification)", of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected or other protected subject matter uploaded by their users, which the service optimises and promotes for profit-making purposes, however providing for exceptions (Article 2(5) & 2 (6).

Such out-of-court resolution should be carried out in an impartial manner without depriving users of their legal rights, including their right to have recourse to efficient judicial remedies. It should be noted that, at a previous level, each provider must make available to users an "effective and expeditious" mechanism for the latter to lodge complaints and seek redress. The non-positive outcome of this complaint - redress procedure may also be followed up by an attempt for an out-of-court resolution as above.
The Commission adopted on 4.6.2021 [COM(2021) 288 final] **guidance** with reference, inter alia, to out-of-court settlement (Article 17(10)).

4.4 *Exploitation contracts of authors and performers*

Thirdly, Directive 790 obliges Member States to provide for and make available **"voluntary, alternative dispute resolution procedures"** between (a) authors and performers and (b) the parties to whom the former have **licensed or transferred their rights**, as well as the legal successors of such parties, in relation to disputes concerning the transparency obligation and the mechanism for updating contracts applied in the context of ensuring that the former receive "appropriate and proportionate remuneration". Indeed, such rights of authors and performers are regulated mandatorily (Articles 18-21 and 23).

4.5 Finally, the **deadline** for the transposition of Directive 790 by **7.6.2021** (Articles 26 and 29 and Article 27 - transitional provision on the transparency obligation as from 7.6.2022) has expired without action. For its transposition, a Working Group was set up by the Ministry of Culture and Sports, whose extended term of office expired on 30.7.2021 (Ministry of Culture and Sports A.P. 329929 /13.7.2021. Currently, the relevant bill is under preparation (update 4.2.2022).

5. The proposal for a Regulation on a Single Market for Digital Services (DSA - Digital Services Act)

5.1 On **15.12.2020** the Commission published a proposal for a Regulation "on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC". The explanatory memorandum of the proposal highlights the emergence of new and innovative digital information society services since the adoption of Directive 2000/31/EC on e-commerce, which change the way citizens communicate and at the same time are a source of new risks and challenges and therefore require regulation. It should also be noted that the coronavirus pandemic crisis has demonstrated the importance of digital technologies and the dependence of society on digital services.

The Regulation proposal lays down harmonised rules on the **provision of intermediary** information society **services** (as defined in Directive (EU) 2015/1535 - see above under **4.3**) in the internal market to recipients, whether natural or legal persons, established or resident in the EU irrespective of the place of establishment of the providers, without prejudice to the e-commerce Directive and other relevant EU law instruments. Three (3) services are defined as intermediary, namely ‘mere conduit’, 'caching' and 'hosting' services, as defined in the Regulation proposal (Articles 1 and 2).

5.2 Among the various obligations on providers introduced by the Regulation proposal are specific obligations for **'online platforms'** (other than the 'micro and small enterprises' in the Annex to the Recommendation - see **3.3** above). Online platforms are defined as providers of a hosting service which store and disseminate information to the public at the request of a recipient of the service, unless that activity is a minor and purely ancillary feature of another service they provide (Article 2.h). These specific obligations are preceded by an internal complaints system and a **mechanism for out-of-court dispute resolution** between platforms and recipients of their services, without prejudice to the recipient's right to judicial protection (Articles 16-18).

In particular, recipients of services have the right to choose a **certified body for** the out-of-court settlement of their disputes with the platforms, in which the latter must participate in good faith and be bound by its decision. The availability and certification of this body is an obligation of the Member State in which the body is established, and certification is based on **conditions** specifically mentioned in the Regulation proposal, which also apply to any mediator, such as impartiality, independence, expertise in the subject matter of the dispute, swiftness, efficiency, technological ease of communication and, of course, language and cost-effectiveness. With regard to the latter, it is specifically stated that the fees charged by the out-of-court settlement body, in addition to being reasonable, should not exceed the costs.

Out-of-court dispute resolution bodies may either be established by Member States specifically to implement the obligations of the Regulation proposal or they may already exist, provided they meet the requirements and are certified. The Member States will notify to the Commission the bodies they have certified and their specifications, and the Commission will publish them on a **dedicated website** which it will keep up to date.

5.3 The above special out-of-court dispute resolution mechanism **is without prejudice to** Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive) and the procedures and bodies for alternative dispute resolution provided for therein (Article 18(6) - see above under 2.3.c).

5.4 It is also interesting that provision is made for the possibility of the **collective representation** of the recipients of services by authorising bodies, organisations or associations to exercise their above rights (of complaint and out-of-court dispute resolution), provided that they meet the conditions set out above, namely that they operate on a non-for-profit basis, are legally constituted under the law of the Member State concerned and specifically include this activity in their statutory objectives.
According to the Regulation proposal, the above regulation is "Without prejudice to Directive 2020/XX/EU of the European Parliament and of the Council" and probably refers to the (very significant) Directive (EU) 2020/1828 of 25.11.2020 "on **representative actions for the protection** of the collective interests of consumers and repealing Directive 2009/22/EC" with a transposition deadline of 25.12.2022 and effect from 25.6.2023 (Article 68).

5.5 The Member State where the provider's main establishment is located has **jurisdiction over the** out-of-court dispute resolution mechanism. If the provider does not have an establishment in the EU but provides services in the EU, the Member State where the provider's legal representative resides or is established has jurisdiction, and if no such representative has been designed, all Member States in order of priority in time, with an obligation of the State which first decides to exercise jurisdiction to notify all others (Article 40).

5.6 The estimated **time of enactment** of the Regulation proposal is around the end of 2022, and the Regulation will enter into force and apply immediately three months after its entry into force (Article 74).

6. The future

Let us be allowed to predict that alternative out-of-court dispute resolution mechanisms, and in particular Mediation among such mechanisms, are already and will become increasingly necessary in the EU both in general and in particular in the digital single market. Practical experience confirms the dead-ends of judicial pursuit and enforcement of rights and at the same time the advantages of swift and low-cost dispute resolution offered in particular by Mediation, off- & online. In addition, technological developments are increasingly requiring shorter, simpler, more reliable and cheaper **procedures for immediate dispute resolution rather than the mere pursuit of rights** in an uncertain environment.

The recent and forthcoming EU legislation referred to above by way of illustration only, shows the **acceptance within the EU of the importance of out-of-court dispute resolution mechanisms, and in particular Mediation**, for the future of transactions that will be digital, using mainly online platforms. As technological developments continue, the EU legislator will be called upon to regulate the new forms of transactional life and the resolution of disputes arising from them.

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