

## **DIVORCE MEDIATION IN EUROPE: An Introductory Outline<sup>1</sup>**

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### **Abstract**

‘Divorce mediation’ is a dispute resolution process in which, as an alternative to judicial or administrative decision-making, the spouses are assisted by an impartial and neutral professional (the mediator or mediators) in order to analyse the situation arising from divorce and to try to reach their own agreement with regard to some or all of the matters under dispute. The phrase ‘divorce mediation’ (rather than ‘family mediation’) emphasises the application of this process to the crisis of the couple that takes place with the breakdown of marriage, and explicitly leaves aside mediation for the resolution of other types of conflict that may arise between family members, such as maintenance among relatives, establishing links with biological parents, contact rights of grandparents with regard to their grandchildren, step-parent adoption or any other conflict between relatives. However, the much broader term of family mediation is also used in this sense.

In general, family mediation has taken similar steps in all European countries. Firstly, it was discovered with enthusiasm by professionals who deal with family conflicts. Shortly thereafter, these professionals organised themselves in associations for the promotion and practice of mediation. Next, some national legislatures considered mediation to be a useful mechanism for the resolution of conflicts arising out of separation or divorce, a procedure that is to be preferred to adjudication in adversarial proceedings. Finally, family mediation obtained more detailed legal regulation as such or has been dealt with within the broader framework of rules regarding mediation in civil and commercial matters.

This article offers a brief account and an overall picture of the current situation of this evolution in several European countries.

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## 1. Introduction

It is well known that ‘divorce mediation’ is a dispute resolution process in which, as an alternative to judicial or administrative decision-making, the spouses are assisted by an impartial and neutral professional (the mediator or mediators) in order to analyse the situation arising from the spouses’ wish to be divorced and to try to reach their own agreement with regard to some or all the matters under dispute.

The phrase ‘divorce mediation’ - in contrast to ‘family mediation’ - emphasises the application of this process to the crisis in which a couple finds itself when their marriage breaks down, and explicitly leaves aside mediation aimed at the resolution of other types of conflict that may arise between family members, such as maintenance among relatives, establishing links with biological parents, contact rights of grandparents with regard to their grandchildren, step-parent adoption or any other conflict between relatives.

However, this term is not inclusive enough since problems which are functionally similar to those arising from divorce also take place when married or unmarried couples decide to separate *de facto* or legally. Moreover, talking about ‘divorce mediation’ is focusing on adults who are breaking up their marriage, whereas if we look at families as children-centred systems, regardless of whether parents marry, cohabit, divorce or separate, children always have to be fed, clothed, housed and looked after daily. Therefore, when viewed from the children’s perspective, the social context of mediation will extend more widely than the breakdown of marriage only, to cover all kinds of separation regardless of whether a couple is married or cohabiting.

For this reason, in this article I will not refer to ‘divorce mediation’ but to ‘family mediation’, not in its widest sense, but in the stricter sense of mediation encompassing all possible disputes arising from the breakdown of a couple’s relationship.

Mediation may be seen as a type of ‘Alternative Dispute Resolution’, alongside other processes such as negotiation and arbitration, which share with mediation the common characteristic of resolving disputes between spouses or among family members without a judge’s order after an adversarial trial. However, by contrast with negotiation, where the parties or their representatives seek a resolution to their dispute through direct discussions, in mediation the dispute resolution process is facilitated by a neutral and impartial third party. In contrast to arbitration, where the parties, by mutual agreement, delegate the power to decide to a third party, in mediation this third party does not have the power to decide the dispute and aims at helping the parties to reach their own decision.

Mediators, however, do not universally agree on the theory and practice of their profession. Some stress that the mediator must help the parties in conflict to articulate their

needs and their fears better or, in short, that he or she must help the parties to communicate better. Others emphasise that the mediator must help the parties in dispute to understand the strengths and weakness of their positions and interests better and, if requested, predict for them the possible scenarios if the parties do not reach an agreement. Finally, others insist that one of the aims of mediation is to change the quality of the parties' interaction, i.e. to transform hostility and bitterness between the parties into constructive interaction. If the parties are parents, the breakdown of their personal relationship as a couple will not lead to an end of their relationship as parents. The best interests of their children will require that the best possible relationship between them as parents is preserved for the future.

In all likelihood, these three aspects will be present in the professional activity of the mediator and will be promoted in his or her specific training.

Mediation will be a structured process carried out by specifically trained professionals, which will be performed according to recognised principles and techniques. These principles, which have been the traditional content of the Codes of Practice for mediators, have been set out in Recommendation R (98)1 of the Council of Europe issued in 1998 or in the more recent European Code of Conduct for Mediators and the Proposal of Directive for mediation. In this article, I will concentrate on the broader outlines of the situation of family mediation in several European countries according to domestic law and practice.

## **2. The current state of family mediation in Europe according to national law and practice**

The Commission on European Family Law (CEFL), a group of family and comparative law experts from most European countries established in 2001,<sup>3</sup> published two - in my opinion - very relevant volumes in 2003. These volumes contain the answers given by experts from 22 European countries to a questionnaire of more than 100 questions concerning the grounds for divorce and the problems of maintenance.<sup>4</sup> One of the questions of the questionnaire dealt with in Volume 1 was:

*Are attempts at conciliation, information meetings or mediation attempts required?*<sup>5</sup>

A new book under the auspices of this Commission, which will most probably be published in 2005,<sup>6</sup> deals with parental responsibility, and one of the questions included in the questionnaire (Question 57) is:

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<sup>3</sup>For more details, see <<http://www.law.uu.nl/priv/cefl>> and Walter Pintens, 'Europeanisation of Family Law', in Katharina Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerp/Oxford/New York, Intersentia, 2003, pp. 3-33.

<sup>4</sup>Katharina Boele-Woelki, Bente Braat and Ian Sumner (eds), *European Family Law in Action*, vol. I, *Grounds for Divorce*, Antwerp/Oxford/New York, Intersentia, 2003, and *European Family Law in Action*, vol. II, *Maintenance between Former Spouses*, Antwerp/Oxford/New York, Intersentia, 2003.

<sup>5</sup>Cf. Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, pp. xiv-xvii. Owing to the fact that the questionnaire is organised in alternative sets of answers according to the specific peculiarities of the different legal systems, the same question appears under questions 17, 27, 41 and 50.

<sup>6</sup>Currently the reports are available at <<http://www.law.uu.nl/priv/cefl>>.

*What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?*

Although the questions were not aimed at obtaining reports on family mediation and other alternative dispute resolution mechanisms in the countries and, therefore, the answers do not go into very great detail, these answers offer an excellent starting point from which, with the aid of other sources, an outline of the current situation of family mediation in Europe can be drawn.

In very broad and general terms, family mediation follows similar steps in all European countries: 1) First, it is discovered with enthusiasm by professionals who deal with family conflicts; 2) next these professionals organise themselves into associations for the promotion and the practice of mediation; 3) in a further step, the national legislature refers occasionally to mediation as a useful mechanism for the resolution of conflicts arising out of separation or divorce, a process that is considered preferable to adjudication in adversarial proceedings and 4) finally, family mediation obtains more detailed legal regulation as such or within the broader framework of rules dealing with mediation in civil and commercial matters.

In one of her forthcoming publications, Lisa Parkinson writes:

A picture of mediation in Europe would resemble a constantly changing patchwork quilt or mosaic. The pieces making up this patchwork have recurring patterns and colours, but they are not uniform and they are not woven to a single design. There are many missing pieces and the patchwork has gaps in it. A variegated patchwork that recognises cultural differences is preferable to uniformity.<sup>7</sup>

Let us have a look at this patchwork.

## 2.1 Family mediation in Eastern Europe

In the countries that have been under soviet influence for decades, family mediation is still in its infancy. This is also the case in countries such as Hungary and Bulgaria, where their Parliaments have recently passed some legislation on mediation.

In the *Czech Republic*, there are no alternative mechanisms for resolving family disputes. Certified experts who are authorised by the courts to provide an expert opinion on the regulation of contact between the non-resident parent and the child, or expert witnesses reporting on the suitability of each parent for the upbringing of their children may occasionally try to help the parents come to an agreement and in these cases they would fulfil a similar functional role. However, family mediation is not established as a profession and is not regulated by Czech law.<sup>8</sup>

In *Lithuania*, although the Civil Code (Article 3.54 Lithuanian CC) and the Code of Civil Procedure (Article 231, 376 Lithuanian CCP) impose a general duty on the court to take

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<sup>7</sup>Lisa Parkinson, in Chapter 9, 'The Future of Family Mediation' in the revised version of the Spanish edition of her book *Family Mediation* (forthcoming).

<sup>8</sup>See Milana Hrusaková, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, Czech Republic, p. 225, and *Parental Responsibilities*, National Report: Czech Republic, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Czech%20Republic.pdf>>.

all necessary measures in family disputes to reconcile the parties, the law does not provide for mediation either.<sup>9</sup>

In *Poland*, current law and practice refer to reconciliation and to family counselling (Article 70 of the Polish statute of 2003 on social assistance), but family mediation is not provided.<sup>10</sup> The situation is similar in *Russia*.<sup>11</sup>

In *Hungary*, although Parliament passed an Act on mediation in 2002 and family mediation is practised, it is not widely available. It aims at resolving disputes on parental responsibility, residence of the child and contact, and there is special 'child-welfare mediation' that may help parents arrange the matter of contact if they cannot agree on the manner or the time of the contact.<sup>12</sup>

In *Bulgaria*, Parliament passed the first Act on Mediation on the 2 December 2004 in spite of the hostility of some of its conservative members who considered mediation 'dangerous', alleging that it might privatise the judiciary function of the state.<sup>13</sup> The Act does not deal with family mediation only since Article 3(1), as regards the subject matter of mediation, provides that '[t]he subject of mediation may be civil, commercial and administrative disputes related to consumer rights, and other disputes between natural and/or legal persons'. Moreover, Article 3(2) adds that '[m]ediation shall furthermore be conducted in the cases provided for in the Criminal Procedure Code'.<sup>14</sup> However, according to Velina Todorova, the Act as a whole does not create the conditions for the promotion and active use of mediation since it clearly regards mediation as a poorer alternative to judicial proceedings and it is likely that mediation will not be widely used in practice.<sup>15</sup>

In some countries in this group, there is a certain overlap between and confusion about the terms reconciliation, counselling and mediation. In a recent work, Gordana Kovaček Stanić clearly shows this overlap in the *Serbian* Draft Law on Family which introduces mediation.<sup>16</sup> According to this Draft, the mediation procedure is aimed at reconciliation and, if this is unsuccessful, seeks to achieve a settlement (Article 229 Draft). Therefore, the first step of mediation is reconciliation with the purpose of avoiding divorce (Article 234, Draft). As a rule, the so-called 'mediation procedure' is carried out by the court before a single judge. However, a judge who conducts mediation may not participate in

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<sup>9</sup>*Parental Responsibilities*, National Report: Lithuania, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Lithuania.pdf>>.

<sup>10</sup>Cf. Andrzej Mączyński, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, pp. 228-229, and Andrzej Mączyński and Jadwiga Mączyńska in *Parental Responsibilities*, National Report: Poland, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Poland.pdf>>.

<sup>11</sup>Cf. Masha Antokoloskaia, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, p. 229, and in *Parental Responsibilities*, National Report: Russia, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Russia.pdf>>.

<sup>12</sup>See Emilia Weiss, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, Hungary, pp. 226-227, and Emilia Weiss and Orsolya Szeibert, in *Parental Responsibilities*, National Report: Hungary Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Hungary.pdf>>. An English version of the Hungarian Act LV of 2002 on Mediation was provided by Orsolya Szeibert at the Academy of European Law conference 'Divorce Mediation'.

<sup>13</sup>See Velina Todorova, 'Possibilities and Limits of Family Mediation: The Case of Bulgaria', a paper delivered at the Academy of European Law Conference 'Divorce Mediation'.

<sup>14</sup>According to the translation provided by Velina Todorova at the Academy of European Law Conference 'Divorce Mediation'.

<sup>15</sup>See Todorova, 'Possibilities and Limits of Family Mediation', p. 3.

<sup>16</sup>Gordana Kovaček Stanić, 'Self-Determination in Parent-Child Relationships in Serbia and Montenegro', in Miquel Martín-Casals and Jordi Ribot Igualada (eds), *The Role of Self-Determination in the Modernisation of Family Law in Europe*, Girona, Documenta Universitaria (forthcoming 2005).

further judicial proceedings between the parties if mediation has not been successful (Articles 231 and 232 of the Draft). If the spouses agree to psychosocial counselling, the court may entrust mediation to the competent guardianship authority, a marriage or family counselling service, or another institution that specialises in mediating family conflicts at the spouses' proposal or with their consent.

Under the law in force, the reconciliation procedure is the only one regulated. The aim of reconciliation is to reconcile spouses in a way that encourages them to remain married or, if that is not possible, to encourage them to reach an agreement concerning the care of the children after divorce (Articles 352 to 358, Law on Marriage and Family Relations).

It is worth noting that, according to the best doctrine and practice of family mediation, reconciliation and mediation are two completely different tasks. As Lisa Parkinson has pointed out, mediation cannot have the dual function of 'saving marriages' wherever possible and of encouraging an amicable divorce, since this would confuse its image and objectives. If a couple wants to get back together, the mediator should encourage them to seek counselling.<sup>17</sup> On the other hand, the idea of a judge acting as a mediator runs counter to the generally admitted idea that a mediator is a specifically trained professional, an idea which also underpins the current project of a European directive concerning mediation.

## 2.2 Family mediation in Southern Europe

The situation in Southern Europe is very diverse. In *Greece*,<sup>18</sup> there is no structured way of settling divorce or separation issues, including parental responsibility or contact with the child, other than court proceedings, and the situation does not seem to be much better in *Portugal* where, according to De Oliveira, family mediation is still in an early, experimental stage, almost confined to the Lisbon district.<sup>19</sup>

In *Italy*, although there have been some proposals for legislation and local authorities to promote mediation, the development of family mediation is very limited. In some pieces of legislation currently in force, there is even some confusion between family mediation, counselling and other social services aimed at giving support to families.<sup>20</sup> Articles 342 *bis* and 342 *ter* of the Italian Civil Code must be read in this sense, which deal with protection orders and state that when the judge, to put an end to the detrimental conduct of one spouse or cohabitant, orders him or her to leave the family home, he may also call upon the intervention of the 'welfare services operating in the territory or the intervention of a family mediation centre'.<sup>21</sup>

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<sup>17</sup>Lisa Parkinson, *Family Mediation*, London, Sweet and Maxwell, 1997, pp. 9-10.

<sup>18</sup>Cf. Achilles G. Koutsouradis, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 50, p. 443, and in *Parental Responsibilities*, National Report: Greece, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Greece.pdf>>.

<sup>19</sup>See Guilherme de Oliveira, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 50, p. 444, and in *Parental Responsibilities*, National Report: Portugal, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Portugal.pdf>>.

<sup>20</sup>See Angela D'Angelo, 'Un contributo per un approccio giuridico allo studio della mediazione familiare', *Familia* (2004), pp. 543-549.

<sup>21</sup>Cf. Salvatore Patti, Liliana Rossi Carleo and Elena Bellisario, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Questions 3 and 17, pp. 62 and 228, and Salvatore Patti in *Parental Responsibilities*, National Report: Italy, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Italy.pdf>>. See also Paola Ronfani, 'Children, Law and Social Policy in Italy', *International Journal of Law, Policy and the Family*, 15 (2001), pp. 276-289.

In this section on Southern European countries, *Spain* is the exception. Family mediation has been practised since the mid-1980s by psychosocial teams attached to family courts. By the end of the 1980s, family mediation services had been created in the Basque country, Barcelona, Madrid and other cities. During the 1990s, family mediation was promoted by various associations, and the Catalan legislature began to prepare a Draft Bill concerning family mediation in 1997, which was introduced into the Catalan Parliament in 1999.<sup>22</sup> After a delay caused by regional elections and many disputes between professional groups as to which professionals should be allowed to practise mediation and under what conditions, the Draft Bill finally became an Act in 2001.<sup>23</sup> In the meantime, the Draft Bill was taken as a model by other Autonomous Communities for their own legislation and two other Autonomous Communities, Galicia<sup>24</sup> and Valencia<sup>25</sup>, also passed their family mediation Acts in 2001; the Canary Islands followed suit in 2003<sup>26</sup>. All these Acts are exhaustive and, in general terms, comply with Recommendation R 98(1) of the Council of Europe. They establish a public centre which is in charge of organising mediation, the participation of professional corporations, the principles and procedures of family mediation and the sanctions which mediators infringing the law will incur.<sup>27</sup>

### 2.3 Family mediation in Northern Europe

In *Norway*, according to the Marriage Act 1991, which came into force on 1 January 1993, mediation is compulsory for spouses who have children from their marriage who are under 16 years of age (cf. Section 26 Marriage Act), except in specific cases, such as in cases of domestic violence (cf. Section 23 Marriage Act). Obviously, this does not mean that they are compelled to reach an agreement, but that they must initiate mediation before the case is brought before the County Governor or a court (cf. Section 26 Marriage Act).

The purpose of mediation is *not* to bring the spouses back together. The Act explicitly states: 'The purpose of the mediation is to reach an agreement concerning parental responsibility, right of access or where the child or children shall permanently reside, with due emphasis on what will be the best arrangement for the child/children.'<sup>28</sup> The spouses are under an obligation to attend this mediation in person unless compelling reasons prevent

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<sup>22</sup>See Miquel Martín-Casals, Jordi Ribot and Josep Solé in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, pp. 229-230, and Cristina González Beilfuss in *Parental Responsibilities*, National Report: Spain, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Spain.pdf>>. See also Miquel Martín Casals, 'La mediación familiar: concepto y principios generales en las iniciativas legislativas españolas', *Familia* (2001), pp. 1125-1153.

<sup>23</sup>Ley 1/2001, de 15 de marzo, *de mediación familiar de Cataluña* DOGC núm. 335526, de 26.3.2001, p. 4380, BOE núm. 91, de 16.4.2001, p. 13797, rect. DOGC núm. 3548, de 8.1.2002, p. 276.

<sup>24</sup>Ley gallega 4/2001, de 31 de mayo, *reguladora de la mediación familiar* DOG núm. 117, de 18.6.2001, p. 8113, BOE 2 julio 2001, núm. 157, p. 23425.

<sup>25</sup>Ley valenciana 7/2001, de 26 de noviembre, *reguladora de la mediación familiar en el ámbito de la Comunidad Valenciana* DO. Generalitat Valenciana núm. 4138, de 29.11.2001, p. 25105, BOE núm. 303, de 19.12.2001, p. 48192.

<sup>26</sup>Ley canaria 15/2003, de 8 de abril, *de mediación familiar de Canarias* BO. Canarias núm. 85, de 6.5. 2003, p. 7136; BOE núm. 134, de 5.6.2003, p. 21879.

<sup>27</sup>See Martín Casals, 'La mediación familiar', pp. 1125 et seq.

<sup>28</sup>S. 26 Marriage Act; <<http://www2.law.uu.nl/priv/cefl/Reports/pdf/NorwayApp02.pdf>>.

them from doing so, and when an attempt at mediation has been made, a certification is to be issued to that effect.<sup>29</sup>

In Sweden,<sup>30</sup> mediation is called ‘cooperation talks’. These ‘cooperation talks’ are defined as talks where the parents under expert guidance try to arrive at a common point of view on the questions of custody and access. The goal of the talks is to make the parents reach an agreement, but even if no agreement is reached, through these talks parents may learn how to understand each other’s opinions better and how to manage their conflicts in a way that negatively affects the children as little as possible. The goal is partly for them to agree on questions involving their children and partly to improve their ability to cooperate as parents.

Today, ninety per cent of the parents who separate in Sweden solve the questions regarding custody, residency and access either entirely on their own or with assistance through cooperation talks or family counselling. Only ten per cent of the parents receive help from the court to solve the questions mentioned.<sup>31</sup>

The parents often turn to the municipalities themselves to receive assistance in reaching an agreement. However, after a case regarding custody, residency or access has been brought before a district court, the court may refer the matter to the social welfare committee. The court’s option to institute cooperation talks does not as such depend on the parents’ consent, and cooperation talks are ordered as soon as the court assumes that they may serve a purpose. Whether the cooperation talks may be considered unproductive if they are carried out without the voluntary participation of the parents is another matter. Also, there are no sanctions that can be imposed in order to make the parents attend the cooperation talks. However, it cannot be ignored that a parent who refuses to participate in cooperation talks without cause may show thereby evidence of a lack of willingness to attend to what is the best interest of the child. In certain situations, such as when one parent has been abused by the other, it may be totally inappropriate to institute cooperation talks.<sup>32</sup>

In Finland, the Finnish Marriage Act contains an entire Chapter to family mediation (Chapter V). The basic guideline that it establishes is that ‘[d]isputes and legal matters arising in a family should primarily be settled in negotiations between the family members and decided by agreement’.<sup>33</sup> The general planning, monitoring and control of mediation is entrusted to the State Provincial Offices, under the supervision of the Ministry of Social Affairs and Health. The Municipal Board of Social Welfare is in charge of arranging family mediation in a municipality and mediation may be rendered also by societies, associations and foundations as well as by individuals, authorised thereto by the State Provincial Office (cf. Section 22) The authorisation to practise mediation is granted by the State Provincial

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<sup>29</sup>See Tone Sverdrup, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 50, Norway, p. 443, and Peter Lødrup and Tone Sverdrup in *Parental Responsibilities*, National Report: Norway, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Norway.pdf>>.

<sup>30</sup>See Maarit Jänterä-Jareborg, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, Sweden, p. 231, and Maarit Jänterä-Jareborg, Anna Singer and Caroline Sörgjerd in *Parental Responsibilities*, National Report: Sweden, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Sweden.pdf>>. See, in more detail, Eva Ryrstedt, ‘The Child’s Right to Speak in Matters concerning Custody, Residency or Access’, in Miquel Martín-Casals and Jordi Ribot Igualada (eds), *The Role of Self-Determination in the Modernisation of Family Law in Europe*, Girona, Documenta Universitaria (forthcoming 2005).

<sup>31</sup>See Ryrstedt, ‘Child’s Right to Speak’.

<sup>32</sup>Ibid.

<sup>33</sup>S. 20(1) Marriage Act; <<http://www2.law.uu.nl/priv/cefl/Reports/pdf/FinlandApp02.pdf>>.

Office for a fixed period, not exceeding five years at a time, and may be revoked if there is a reason for this (cf. Section 23(2)).

In 1996 an amendment was made to the Finnish Marriage Act in order to ensure that family mediators' services are also available to solve problems arising from the implementation of an approved agreement or a court decision on child custody or right of access (Section 20(3) Finnish Marriage Act). It is at this stage of the *enforcement* of custody or right of access agreements or decisions, that mediation has had a greater impact. To handle these cases, the first thing that the relevant court does is to appoint a mediator for the case. Accordingly, mediation is mandatory, except when the decision or approved agreement is recent (less than three months), in urgent cases and when the enforcement of mediation has already failed (Chapter 2, Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access).<sup>34</sup>

In *Denmark*, from 2001 onwards mediation has been offered as an alternative to counselling in the County Governor's Offices, which usually deal with consensual divorces and spousal maintenance, child support, contact arrangements and adoption. The courts resolve the major issue of who should have custodial responsibility, but cannot make contact orders. The Danish government promotes a standard package of contact arrangements which can be altered by agreement. If there is a dispute about contact, the matter is initially dealt with by a lawyer in the County Governor's Office, who contacts the parents and arranges a meeting with them, where they are advised to attend counselling or mediation. If the problems cannot be resolved by means of counselling or mediation, then the lawyer in the County Governor's Office issues an order which is enforceable in the courts. It is reported that in sixty-four per cent of mediations a complete solution has been found and in eighteen per cent of cases the conflict has been partly solved. Alongside the counselling and mediation offered by the administrative authorities, experimental mediation programmes have started in some courts.<sup>35</sup>

In the situation of the Nordic countries, the existence of mandatory mediation in some countries and under certain circumstances is noteworthy since this is contrary to the understanding of family mediation in most European countries. It is well known that Recommendation R (98)1 of the Council of Europe provides that '[m]ediation should not, in principle, be compulsory' (II a).<sup>36</sup> However, the Proposal for a Directive on certain aspects of mediation in civil and commercial matters is not in line; it provides: 'This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede on the right of access to the judicial system . . .'<sup>37</sup> In the United States, where mediation is mandatory in 13 states - except in cases of domestic violence - and in 22 states judges are given the discretion to order couples to enter mediation, empirical data provide supportive evidence that mandatory mediation is much more effective

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<sup>34</sup>See Matti Savolainen, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 17, Finland, p. 226, and Kirsti Kurki-Suonio, in *Parental Responsibilities*, National Report: Finland, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Finland.pdf>>.

<sup>35</sup>Ingrid Lund-Andersen and Christina Gyldenløve Jeppesen de Boer, in *Parental Responsibilities*, National Report: Denmark, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Denmark.pdf>>.

<sup>36</sup>Recommendation No. R (98)1 of the Committee of Ministers to Member States on Family Mediation (adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies), available at <[http://www.era.int/web/en/resources/5\\_2341\\_1509\\_file\\_en.1929.pdf](http://www.era.int/web/en/resources/5_2341_1509_file_en.1929.pdf)>.

<sup>37</sup>COM(2004) 718 final.

than a purely voluntary process.<sup>38</sup> It has to be borne in mind, moreover, that mandatory mediation does not mean that the parties have to agree to anything, but only that they have to attend a mediation session; they are not obliged to continue if they do not want to.

## 2.4 Family mediation in Western Europe

I use the term 'Western Europe' here not in the sense that was used in the Cold War era, but to refer to European countries geographically located in Western and Central Europe.

### 2.4.1 Germany

In *Germany*, family mediation appeared in the mid-1980s in the south of Germany and it did not become well known in the north of Germany until the beginning of the 1990s. Divorce mediation and separation mediation are offered mainly by practitioners in private practices. However, youth offices and other social services also offer family mediation within the framework of counselling services for separation and divorce.<sup>39</sup>

At the beginning of the 1990s, all mediators organised themselves around two mediation associations, the *Bundesverband für Mediation* (BM) and the *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM). The BM has its roots in the peace movement and, therefore, is much more concerned with mediation in the broadest sense of social conflict. For this reason, the focus of the association is not only family mediation, but also different areas of conflict such as school relations, industrial relations involving young people, neighbourhood problems, environmental conflicts, etc. By contrast, the BAFM, founded in 1992 by a group of family mediators who had learnt the theoretical basis of mediation from the United States, was specifically aimed at family mediation. The expansion of their interests to other areas of conflict has taken place over the last few years.

An essential difference between the two associations is their position regarding who can be trained as a mediator and what previous training is required. Owing to its origins and philosophical background, the BM does not require mediators to have any previous academic training and grants qualification as a mediator on the grounds of a person's practical experience. By contrast, the training offered by the BAFM is aimed at lawyers and professionals in psychology or fields related to psychology. From the outset, this association has emphasised that family mediation is a specific field for specialists from different professional backgrounds who offer family mediation as a second professional activity. The *Bundesrechts-anwaltskammer* (Federal Chamber of Lawyers), however, does not seem to share this opinion, and considers mediation a clear legal counselling activity and, therefore, a field of activity which should be exclusively reserved for lawyers.

Over the years, the BAFM has developed a very high standard of training for its members as well as a code of practice which closely follows the European Recommendation

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<sup>38</sup>See Andrew I. Schepard, *Children, Courts and Custody: Interdisciplinary Models for Divorcing Families*, Cambridge, Cambridge University Press, 2004, pp. 58-60.

<sup>39</sup>See Nina Dethloff and Dieter Martiny in *Parental Responsibilities*, National Report: Germany, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Germany.pdf>>. See, in more detail, Marie Hilgenfeld, 'Familienmediation in Deutschland. Projekt Matilde' at <<http://www.skf-hamel.de/matilde/fami.htm>> and Hans-Georg Mähler and Gisela Mähler, 'Familienmediation', in Fritjof Haft and Katharina Gräfin von Schlieffen (eds), *Handbuch der Mediation*, München, Beck, 2002, pp. 891-928.

of 1998.<sup>40</sup> In the meantime, both the code of practice and the professional training standards have also been accepted by the BM. Nevertheless, these standards are not binding, which has led to differentiated training orientations. Many mediators also engage in other specific training opportunities, since in most cases they cannot make a living solely as self-employed family mediators.<sup>41</sup>

#### 2.4.2 France<sup>42</sup>

In all likelihood, the most comprehensive account of the evolution of family mediation in France and its current situation up to 2004 written in any of the seven languages known to me (including French) is Deborah Macfarlane's paper *Family Mediation in France*.<sup>43</sup> The reader specifically interested in France will be well advised to stop reading this paper here and move to Ms Macfarlane's if he or she wants to have a detailed introduction of family mediation in this country, and learn about how different associations of family mediators were created and evolved and what the reactions of the legal actors and the public have been as regards an institution that has expanded over the last twenty years, but which has only recently received legal recognition within the family law provisions of the French Civil Code. Therefore, I will not summarise Macfarlane's paper here but I will quote it when appropriate only and I will devote more attention to the legal aspects of its regulation.

##### 2.4.2.1 Origins and development

Family mediation was introduced into France from Quebec in the late 1980s and, according to MACFARLANE, at a time when "the courts dealing with family law matters were experiencing considerable backlogs and the costs associated with litigation, both social and financial, were rising steeply" and when "to professionals in the family area the courts did not always seem very effective in dealing with divorce and related matters in ways that were helpful to the parties or their children".<sup>44</sup>

In April 1988, a group of professionals from different European countries and backgrounds who were interested in promoting family mediation created the *Association Pour la Médiation Familiale* (APMF).<sup>45</sup> According to the website of the Association "at its beginnings very few family mediation practitioners were affiliated to the Association and its

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<sup>40</sup>These are the 'Richtlinien der BAFM für Mediation in Familienkonflikten', available through <<http://www.bafm-mediation.de>>.

<sup>41</sup>In this sense, Hilgenfeld, 'Familienmediation in Deutschland'.

<sup>42</sup>In the interests of research integrity, the original section was replaced in consultation with the author on 3 March 2008. The modified text reflects the law as it was when the paper was first published in the EJCL (July 2005).

<sup>43</sup>Deborah Macfarlane, 'Family Mediation in France', *Journal of Family Studies* (April 2004), reproduced on the website of the UNAF at <[http://www.unaf.fr/article.php3?id\\_article=793](http://www.unaf.fr/article.php3?id_article=793)>.

<sup>44</sup>See Macfarlane, 'Family Mediation in France' at <[http://www.unaf.fr/article.php3?id\\_article=793](http://www.unaf.fr/article.php3?id_article=793)>. Since I have not had access to the paper version, my quotations refer to the web version. For a brief but extremely well-structured outline up to 1997 see also "Annexes.-Le développement de la formation à la médiation familiale en France et en Europe et sa reconnaissance", in Annie Babu, Isabella Biletta, Peirre Bonnure-Aufiere et alii, *Médiation familiale. Regards croisés et perspectives*, Paris, Érès, 1997, p. 265.

<sup>45</sup>See APMF website at <[www.mediationfamiliale.asso.fr](http://www.mediationfamiliale.asso.fr)> or <<http://perso.wanadoo.fr/mediationfamiliale/index.html>>. See Babu, Biletta, Bonnure-Aufiere et alii, *Médiation familiale. Regards croisés et perspectives*, p. 265. <[http://www.fmcp.org/Mediation\\_familliale/livremf1.htm](http://www.fmcp.org/Mediation_familliale/livremf1.htm)>.

main aim was to promote mediation”<sup>46</sup>. Currently, although promotion is an important aim, since mediation is still unknown to many legal professions and to the public at large, their members are increasingly family mediators who are looking for contact between practitioners. According to the website of the APMF, the association “brings persons from different horizons together, including professionals from the social, psychology and judiciary areas, and also persons responsible for parents’ organisations and institutions offering family mediation services”<sup>47</sup>. The aims of the APMF are “to promote mediation in family matters in the face of the public, institutions, public authorities, media...”, to “guarantee the ethics, the training and the professional conditions that are necessary to practice family mediation according to its code of conduct” and to “carry out all actions and research referring to family mediation and its professionalisation”.<sup>48</sup> Its Code of Conduct, established in 1990 and reformed in 1998, refers both to the relationship of family mediators with other professionals and with the mediating parties.

A second landmark for family mediation in France is the first European conference on family mediation, which took place in 1990 and gathered over 500 participants of 8 different nationalities. In October 1988 the «Association des Amis de Jean Bosco » opened a family mediation service in Caen and at the same time the organisation of this Conference in cooperation with the APMF began. In 1991, in the wake of this Conference, another association was created: the *Comité Nationale des Associations et Services de Médiation Familiale* (CNASMF - National Committee of Associations and Services of Family Mediation), now called *Fédération Nationale de la Médiation Familiale* (FENAMEF - National Federation of Family Mediation)<sup>49</sup> This association brought together associations administering family mediation services with the aims of promoting the quality of family mediation, fostering compliance with its code of conduct and bringing family mediation to the knowledge of and to be recognised by public authorities and by the public at large.

According to Macfarlane, FENAMEF and APMF still are the main national associations of family mediation in France, the APMF representing around 25 family mediation services and the FENAMEF 196. She also reports that there is also a smaller group called the *Centre Nationale de Médiation* (CNM - National Centre for Mediation).<sup>50</sup>

In 1992, on the initiative of the APMF, experienced family mediators and mediation trainers from a number of European countries set up the *European Forum Training and Research in Family Mediation*<sup>51</sup> and drafted the so-called *European Charter for the Training of Family Mediators*<sup>52</sup>, an instrument of self-regulation establishing the standards and the theoretical and practical training required for family mediators. The Charter, divided into two sections, tries to give a response to the following questions: a) what is the field of application of family mediation?; b) which are the skills required to become a family mediator?; c) does family mediation practice require professionalisation? and d) how should the required skills to become family mediator be certified? Whereas the first question receives a quite restrictive answer which confines family mediation dealt with in the Charter to “mediation in the

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<sup>46</sup> See APMF website at <[www.mediationfamiliale.asso.fr/](http://www.mediationfamiliale.asso.fr/)> (my translation).

<sup>47</sup> Ibidem (my translation).

<sup>48</sup> Ibidem (my translation).

<sup>49</sup> See CNASMF (now called FENAMEF) at <<http://www.fenamef.asso.fr/>>. These historical data are taken from the official historical webpage of FENAMET at <<http://www.fenamef.asso.fr/media/Historique.asp>>.

<sup>50</sup> See Macfarlane, ‘Family Mediation in France’ at <[http://www.unaf.fr/article.php3?id\\_article=793](http://www.unaf.fr/article.php3?id_article=793)>.

<sup>51</sup> See its official website at <<http://www.europeanforum-familymediation.com/Standards.htm#sss>>.

<sup>52</sup> The Charter can be found under the heading “Les Textes Fondamentaux de la APMF” under the link “Charte de Formation” at the website of the APMF at <<http://www.mediationfamiliale.asso.fr/>>.

situations of divorce and separation”<sup>53</sup>, the second is answered with the description of personal aptitudes, required knowledge and specific skills. As regards the third question, an implied clear the “yes” underpins the whole exercise, and finally, after drawing a distinction between the knowledge and skills required for consciousness-awareness campaigns and for family mediation practice, it lays down a very comprehensive training programme. According to the Charter, trainers for family mediation in the envisaged area, i.e., divorce and separation, should be family mediators and other professionals of the specific relevant fields (law, psychology, sociology, etc.) (2.4). The Charter establishes a basic syllabus regarding content of training (2.5) and provides for the duration of “a minimum of 30 days of effective training”<sup>54</sup> (2.3). Training includes an initiation in the practice of mediation, in small groups under the supervision of an experienced trained mediator (2.6) and finally the Charter refers to procedures for assessment of trainees (2.7). The standards laid down in the Charter were designed to be flexible enough as to adapt to the particularities of every country. Training programmes in other European countries have adopted them in order to receive the accreditation from the *European Forum*. In France, however, this accreditation was superseded by the establishment, on 11 December 2003,<sup>55</sup> of a state diploma in family mediation, which has been regulated in detail by a circular of 30 July 2004.<sup>56</sup>

#### 2.4.2.2 French legislation

Mediation can take place out of court (usually called *médiation indépendante conventionnelle*) or in connection with judicial proceedings (so called *médiation judiciaire*).

In the first case, the parts may enter mediation in order to prevent judicial proceedings from arising or to overcome problems that have sprung from the execution of a separation or divorce order. Some authors consider that, as long as mediation remains unrelated to the process and outside the control of the judge, this sort of mediation can also take place even when proceedings have been instituted as a sort of “private affair” of the parties.<sup>57</sup> In France there are no general regulations governing this first type of mediation.

In the second case, mediation is connected to ongoing or at least started judicial proceedings and is governed by the *Loi no. 95/125*, relating to the organisation of legal jurisdictions and civil, penal and administrative procedures<sup>58</sup> and the *Décret no. 96-652*, which develops the provisions of the Act and incorporates them into the New Code of Civil Procedure (NCPC).<sup>59</sup> These provisions do not apply to family mediation only and are applicable to disputes over other civil matters, but they refer exclusively to court related

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<sup>53</sup> Ibidem at at <<http://www.mediationfamiliale.asso.fr/>> (my translation).

<sup>54</sup> Ibidem (my translation).

<sup>55</sup> *Décret* n° 2003-1166 du 2 décembre 2003 portant création du diplôme d’Etat de médiateur familial, JO n° 284 du 9 décembre 2003, p. 20964.

<sup>56</sup> See the circular establishing this diploma and all related documentation in <[http://www.mediation-familiale.info/download/circulaire\\_formation\\_mediation\\_2004.pdf](http://www.mediation-familiale.info/download/circulaire_formation_mediation_2004.pdf)>.

<sup>57</sup> See in this sense, for instance, Pierrette Bonnoure-Aufiere, *Médiation familiale et loi: regards d’une avocate, médiatrice familiale*, in Babu, Biletta, Bonnoure-Aufiere et alii, *Mediation familiale. Regards croisés et perspectives*, Paris, Érès, 1997, pp. 159-212, p. 163.

<sup>58</sup> *Loi* n° 95-125 du 8 février 1995, relative à l’organisation des juridictions et à la procédure civile, pénale et administrative, JO n° 34 du 9 février 1995, p. 2175.

<sup>59</sup> *Décret* n° 96-652, du 22 juillet 1996, relatif à la conciliation et à la médiation judiciaires (JO n° 170 du 23 juillet 1996) quoted hereafter according to the provisions of the Nouveau Code de Procédure Civile as NCPC.

mediation. They confer a power on the judge that allows him or her to retain control over the subject matter throughout the judicial proceedings.<sup>60</sup>

According to the provisions on *médiation judiciaire*, mediation is voluntary and will only take place if the parties give their consent to it. However the judge may, at any stage of the proceedings, stay proceedings and appoint a third person who will hear the parties and confront their points of view in order to enable them to find a solution to their conflict.<sup>61</sup>

Mediation can be entrusted to natural persons or to associations, i.e. to legal persons. If the appointed mediator is an association, its legal representative submits on behalf of the association the name of the person or person who will carry out mediation to the approval of the judge<sup>62</sup>. Persons carrying out mediation must be of good standing, according to certain parameters established by the Act, have the qualifications that are necessary according to the subject-matter of the dispute, have practical experience or be properly trained in mediation and offer the guarantees of independence that are necessary for the practice of mediation<sup>63</sup>

The mediation order issued by the judge mentions the agreement of the parties, appoints the mediator, sets the initial duration of mediator's task and indicates the date on which the matter will be called back to the court. Additionally it establishes the amount of the interim payment to the mediator to a level as close as possible to the foreseeable final remuneration that he or she will obtain, and indicates where the parties will deposit this interim payment and the period for doing so. If the deposit of the interim payment is not made or not made in time, the mediation order expires and judicial proceedings are reassumed<sup>64</sup>.

Once the mediator is appointed, the clerk of the court's office notifies the parties and to the mediator of the mediation order. The mediator then communicates his or her acceptance to the judge and, once he receives notice of the fact that the deposit of the interim payment has been made, he summons the parties to a meeting.<sup>65</sup>

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<sup>60</sup> See in this sense, Marie-Thérèse Meulders-Klein, *La personne, la famille, le droit. Trois décennies de mutations en Occident*, Paris, Bruxelles, LGDJ, Bruylant, 1999, p. 548.

<sup>61</sup> Art. 21 *Loi* n° 95-125: 'Le juge peut, après avoir obtenu l'accord des parties, désigner une tierce personne remplissant les conditions fixées par décret en Conseil d'État pour procéder:...// 2° Soit à une médiation, en tout état de la procédure et y comprise en référé, pour tenter de parvenir à un accord entre les parties.' Also Art. 131-1 NCPC as amended by *Décret* n° 96-652: 'Le juge saisi d'un litige peut, après avoir recueilli l'accord des parties, désigner une tierce personne afin d'entendre les parties et de confronter leurs points de vue pour leur permettre de trouver une solution au conflit qui les oppose // Ce pouvoir appartient également au juge des référés, en cours d'instance.'

<sup>62</sup> Art. 131-4 NCPC: 'La médiation peut être confiée à une personne physique ou à une association. // Si le médiateur désigné est une association, son représentant légal soumet à l'agrément du juge le nom de la ou des personnes physiques qui assureront, au sein de celle-ci et en son nom, l'exécution de la mesure.'

<sup>63</sup> Art. 131-5 NCPC: 'La personne physique qui assure l'exécution de la mesure de médiation doit satisfaire aux conditions suivantes: // 1° Ne pas avoir fait l'objet d'une condamnation, d'une incapacité ou d'une déchéance mentionnées sur le bulletin n° 2 du casier judiciaire; // 2° N'avoir pas été l'auteur de faits contraires à l'honneur, à la probité et aux bonnes mœurs ayant donné lieu à une sanction disciplinaire ou administrative de destitution, radiation, révocation, de retrait d'agrément ou d'autorisation; // 3° Posséder, par l'exercice présent ou passé d'une activité, la qualification requise eu égard à la nature du litige; // 4° Justifier, selon le cas, d'une formation ou d'une expérience adaptée à la pratique de la médiation; // 5° Présenter les garanties d'indépendance nécessaires à l'exercice de la médiation.'

<sup>64</sup> See Arts. 21 *Loi* n° 95-125 and art. 131-6' *Décret* n° 96-652.

<sup>65</sup> Art. 131-7 NCPC: 'Dès le prononcé de la décision désignant le médiateur, le greffe de la juridiction en notifie copie par lettre simple aux parties et au médiateur. » //« Le médiateur fait connaître sans délai au juge son acceptation. // Dès qu'il est informé par le greffe de la consignation, il doit convoquer les parties.'

The subject matter of mediation may encompass the whole matter of the conflict or only part of it. The fact that the parties have started mediation, however, does not remove the matter from the control of the judge who may, nevertheless, adopt all measures that he or she deems fit<sup>66</sup>.

Although the mediator is not empowered to set up an inquiry, if the mediation so requires it and the parties agree, he may hear third parties who give their consent to it.<sup>67</sup> The mediator must keep the judge informed of the difficulties he or she may find during mediation.<sup>68</sup>

The duration of the mediation process cannot exceed three months. However, upon request of the mediator, the judge may extend it once for another three months.<sup>69</sup> The judge may also terminate mediation at any time, either on his own motion, when he considers that the continuation of mediation is no longer productive any longer, or upon request of the mediator or any of the parties.<sup>70</sup>

When the mediator finishes, his task he informs the judge in writing about whether the parties have been able to reach a solution to the conflict that divides them or not.<sup>71</sup> Upon the parties' request, the judge ratifies the agreement submitted by the parties. This ratification (called *homologation*) renders the agreement enforceable and is a discretionary power of the judge.<sup>72</sup>

Any communication between the mediator and the parties during mediation and all information that has come up during it is confidential and privileged. In this sense, the corresponding legal provisions establish that mediators cannot reveal the information obtained during mediation to third parties and that the observations of the mediator and the

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<sup>66</sup> Art. 131-2 *Décret* n° 96-652: 'La médiation porte sur tout ou partie du litige // En aucun cas elle ne dessaisit le juge, qui peut prendre à tout moment les autres mesures qui lui paraissent nécessaires.'

<sup>67</sup> Art. 131-8. *Décret* n° 96-652: 'Le médiateur ne dispose pas de pouvoirs d'instruction. Toutefois, il peut, avec l'accord des parties et pour les besoins de la médiation, entendre les tiers qui y consentent. // Le médiateur ne peut être commis, au cours de la même instance, pour effectuer une mesure d'instruction.'

<sup>68</sup> Art. 131-9 *Décret* n° 96-652: 'La personne physique qui assure la médiation tient le juge informé des difficultés qu'elle rencontre dans l'accomplissement de sa mission.'

<sup>69</sup> So Art. 23 *Loi* n° 95-125: 'La durée de la mission de conciliation ou de médiation est initialement fixée par le juge sans qu'elle puisse excéder un délai fixé par décret en Conseil d'État. // Le juge peut toutefois renouveler la mission de conciliation ou de médiation. Il peut également y mettre fin avant l'expiration du délai qu'il a fixé, d'office ou à la demande du conciliateur, du médiateur ou d'une partie' and Art. 131-3 NCPC: 'La durée initiale de la médiation ne peut excéder trois mois. Cette mission peut être renouvelée une fois, pour une même durée, à la demande du médiateur.'

<sup>70</sup> So Art. 23 *Loi* n° 95-125 in the previous footnote and Art. 131-10 NCPC: 'Le juge peut mettre fin, à tout moment, à la médiation sur demande d'une partie ou à l'initiative du médiateur // Le juge peut également y mettre fin d'office lorsque le bon déroulement de la médiation apparaît compromis. // Dans tous les cas, l'affaire doit être préalablement rappelée à une audience à laquelle les parties sont convoquées à la diligence du greffe par lettre recommandée avec demande d'avis de réception // A cette audience, le juge, s'il met fin à la mission du médiateur, peut poursuivre l'instance. Le médiateur est informé de la décision.'

<sup>71</sup> Art. 13 1-11 NCPC: 'A l'expiration de sa mission, le médiateur informe par écrit le juge de ce que les parties sont ou non parvenues à trouver une solution au conflit qui les oppose. // Le jour fixé, l'affaire revient devant le juge.'

<sup>72</sup> Art. 25 *Loi* n° 95-125: 'En cas d'accord, les parties peuvent soumettre celui-ci à l'homologation du juge qui lui donne force exécutoire.' Also Art. 131-12 *Décret* n° 96-652: 'Le juge homologue à la demande des parties l'accord qu'elles lui soumettent. // L'homologation relève de la matière gracieuse.'

declarations he records cannot be reproduced or invoked without in agreement of the parties in any further judicial proceeding<sup>73</sup>.

Since this legislation was passed, the changes in concerning family law and family mediation have been rapid and a series of reports and studies underpinned by the concern of the rather timid growth in the number of conflicts submitted to family mediation in France have been issued.<sup>74</sup> Probably the most important of these reports and studies has been the 2001 study on family mediation entitled *Arguments et propositions pour un statut de la Médiation Familiale en France* (Arguments and proposals for a statute on family mediation in France), presented to the Minister for the Family, Children and Handicapped Persons and written by Monique Sassier, the Assistant Director-General of the *Union Nationale des Associations Familiales* (UNAF - National Union of Family Associations).<sup>75</sup> Although one of the main aims of the report – to pass a Bill relating specifically to family mediation – has not been reached, some other measures that it proposed have already been implemented in the intervening four years. This is the case, for instance of the incorporation of family mediation into the Civil Code and the empowerment of the judge to order attendance at a mandatory informative session on family mediation before starting judicial proceedings. Or that of the creation of a consultative council on family mediation and a State diploma in family mediation.

Accordingly, Art. 255 of the French Civil Code (hereafter C.civ.) as amended by the *Loi 2002-3005, du 4 mars 2002, relative à l'autorité parentale*<sup>76</sup> now provides that the judge may propose to parents that they enter mediation and that, if they agree to mediate, he may appoint a mediator in order to facilitate the exercise of parental authority by agreement of the parents (Art. 255, 1 C. civ.). Also, pursuant to Art. 255, 2 C. civ., the judge may now enjoin them to attend an information session on family mediation.<sup>77</sup> Similar rules can be found in Art. 373-2-10 C. civ.<sup>78</sup> with regard to the *mesures provisoires* in the case of divorce<sup>79</sup> Finally, the *Décret n° 2004-1158 du 29 octobre 2004*<sup>80</sup> referring to the new family law procedure, has extended mediation as a general measure in family proceedings. The judge will be able to

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<sup>73</sup> Art. 24 *Loi n° 95-125*: 'Le conciliateur et le médiateur sont tenues à l'obligation du secret à l'égard des tiers. // Les constatations du conciliateur ou du médiateur et les déclarations qu'ils recueillent ne peuvent être évoquées devant le juge saisi du litige qu'avec l'accord des parties. Elles ne peuvent être utilisées dans une autre instance. // Toutefois, le conciliateur ou le médiateur informe le juge de ce que les parties sont ou non parvenues à un accord.' Art. 131-14 *NCPC* provides that: 'Les constatations du médiateur et les déclarations qu'il recueille ne peuvent être ni produites ni invoquées dans la suite de la procédure sans l'accord des parties, ni en tout état de cause dans le cadre d'une autre instance.'

<sup>74</sup> See for a comprehensive account of all initiatives, Macfarlane, 'Family Mediation in France' at <[http://www.unaf.fr/article.php3?id\\_article=793](http://www.unaf.fr/article.php3?id_article=793)>.

<sup>75</sup> Monique Sassier, *Arguments et propositions pour un statut de la médiation familiale en France*, available at <<http://lesrapports.ladocumentationfrancaise.fr/BRP/014000484/0000.pdf>>.

<sup>76</sup> JO n° 54 du 5 du mars 2002 p. 4161.

<sup>77</sup> With regard to the *mesures provisoires* in the case of divorce, Art. 255 of the French Civil Code provides: 'Le juge peut notamment: 1° Proposer aux époux une mesure de médiation et, après avoir recueilli leur accord, désigner un médiateur familial pour y procéder; 2° Enjoindre aux époux de rencontrer un médiateur familial qui les informera sur l'objet et le déroulement de la médiation; 3° Statuer sur les modalités de la résidence séparée des époux...'

<sup>78</sup> Art. 373-2-10: 'En cas de désaccord, le juge s'efforce de concilier les parties // A l'effet de faciliter la recherche par les parents d'un exercice consensuel de l'autorité parentale, le juge peut leur proposer une mesure de médiation et, après avoir recueilli leur accord, désigner un médiateur familial pour y procéder. // Il peut leur enjoindre de rencontrer un médiateur familial qui les informera sur l'objet et le déroulement de cette mesure.'

<sup>79</sup> Amended by the *Loi 2004-439 du 26 mai, relative au divorce* JO n. 122 du 27 mai 2004 p. 9319.

<sup>80</sup> JO n° 255 du 31 octobre 2004, p. 18492.

propose mediation and appoint a mediator if parties agree to mediate in other conflicts over family matters at their disposal. He will not be able, however, to enjoin the parties to attend an information session, since the legislation confines this possibility to the two types of dispute mentioned in the Civil code (cf. Art. 1071 of the NCPC).<sup>81</sup>

As regards the creation of a consultative council, a Decree of 8 October 2001, has established the *Conseil national consultatif de la médiation familiale* (National Consultative Council on Family Mediation)<sup>82</sup>. The main aims of this Council are to define the scope of the application of family mediation and the code of practice of the profession, as well as to lay down the content of the training programmes, to certify training centres and the compliance of associations and services with the required standards for them to receive public funds, to define new funding schemes and to evaluate the results.<sup>83</sup>

Finally, in Article 1 of Decree No 284 of 2 December 2003, the State Council (Social Section) provided for the creation of a State diploma in family mediation. The diploma, which is now offered, is open to all professionals of the humane, social, legal or medical sciences and comprises a total of 560 hours work, 70 of which are to be devoted to practical training spread over a maximum of three years.<sup>84</sup>

Although family mediation has established itself institutionally and professionally, the success of family mediation has not been as great as its advocates expected and number of family conflicts submitted to family mediation is still quite low. This has been sometimes attributed to a certain contradiction between the expectations of the public authorities and judges, on the one hand, and family mediators, on the other, or to a certain distrust of the roles of the former and the latter during the mediation process; or even to a certain distance between the “références mentales” between North American and North European countries and France.<sup>85</sup> Additionally, not all conflicts are ripe for mediation and, even if they are, mediation does not afford a clear advantage in all of them. In this sense, according to Sassier’s report, family mediation associations considered that only ten per cent of the couples who were divorcing or separating in 2001 could have gained an advantage by embarking on mediation.<sup>86</sup> Although an increase in information may improve the results, it still remains to be seen whether mandatory assistance to information sessions will contribute to the use of family mediation becoming widespread.

### 2.4.3 England and Wales

In England and Wales, family mediation developed under the name of ‘conciliation’ in the early 1970s. In 1974, the Finer Report recommended that a unified family court be

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<sup>81</sup> Art. 1071: ‘Le juge aux affaires familiales a pour mission de tenter de concilier les parties. // Saisi d’un litige, il peut proposer une mesure de médiation et, après avoir recueilli l’accord des parties, désigner un médiateur familial pour y procéder. // La décision enjoignant aux parties de rencontrer un médiateur familial en application des articles 255 et 373-2-10 du code civil n’est pas susceptible de recours.’

<sup>82</sup> Arrêté du 8 octobre 2001 portant création du Conseil national consultatif de la médiation familiale, JO n° 234 du 9 octobre 2001, p. 15858.

<sup>83</sup> See the information on the *Conseil national consultatif de la médiation familiale* at <<http://www.fenamef.asso.fr/media/pageLibre00010121.asp#100001867>>.

<sup>84</sup> See Arrêté du 12 février 2004 relatif au diplôme d’État de médiateur familial, JO n° 49 du 27 février 2004, p. 3961.

<sup>85</sup> See, in this sense, Jacqueline Rubellin-Devichi, *Droit de la Famille*, Paris, Dalloz, 2001, pp. 120 and 121.

<sup>86</sup> See Sassier, *Arguments et propositions pour un statut de la médiation familiale en France*, p. 67, where it is stated that ‘les associations indiquent que 10 %, à l’heure actuelle, des couples en cours de séparation ou de divorce tireraient profit de la médiation’.

established and that ‘conciliation’ be the primary means of helping couples to settle all issues arising in separation and divorce. In 1977, Registrars at the Bristol County Court introduced a conciliation procedure in defended divorce proceedings and in 1978 the Bristol Courts Family Conciliation Service (BCFCS) opened as an out-of-court voluntary pilot scheme which aimed at helping separated or divorcing parents and their children to deal with questions of custody and access and other problems arising from marital breakdown.<sup>87</sup> Over the next years, both ‘in court’ and ‘out of court’ family conciliation services were created. National associations, such as the National Family Conciliation Council (NFCC - 1981), the Solicitors Family Law Association (SFLA - 1982)<sup>88</sup> and the Family Mediators Association (FMA) (1988)<sup>89</sup> were established. In 1993, the National Family Conciliation Council was renamed ‘National Family Mediation’ (NFM)<sup>90</sup> and this association, together with the Family Mediators’ Association (FMA) and Family Mediation Scotland (FMS)<sup>91</sup> in January 1996<sup>92</sup> founded the UK College of Family Mediators, to provide national standards for the selection, training and accreditation of family mediators and to compile a national register of family mediators.<sup>93</sup>

For many years, there has been little official support and funding for family mediation, but the 1990 Law Commission Report *Family Law: The Ground for Divorce*<sup>94</sup> marked a turning point. The Government considered that mediation should play a much greater part in the process of resolving the consequences of marital breakdown. In a later white paper, it emphasised once again the benefits of reaching an agreement with the help of a mediator compared with traditional court adjudication with the intervention of partisan lawyers.<sup>95</sup>

Family mediation was allotted a central role in the reform of divorce introduced by the Family Act 1996, which aimed at removing fault and, among other aspects, at contributing to a situation where divorce could be carried out

- (i) with minimum distress to the parties and to the children affected;
- (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
- (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end.<sup>96</sup>

Part II of the Act, which was not introduced, would have required all those seeking a divorce to go through a series of steps prior to the issuing of a divorce order. In one of these steps, the

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<sup>87</sup>See Nigel Lowe, in *Parental Responsibilities*, National Report: England and Wales, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/England.pdf>> and Parkinson, *Family Mediation*, pp. 475 et seq. See also Dame Brenda Hale, David Pearl, Elizabeth J. Cooke and Philip D. Batyes, *The Family, Law and Society: Cases and Materials*, 5th edn, London, Butterworths/LexisNexis, 2002, pp. 295 et seq.

<sup>88</sup>Solicitors Family Law Association at <<http://www.sfla.org.uk/>> (now called ‘Resolution first for family law’).

<sup>89</sup>Family Mediators’ Association at <<http://www.fmassoc.co.uk/>>.

<sup>90</sup>National Family Mediation at <<http://www.nfm.u-net.com/>>.

<sup>91</sup>Family Mediation Scotland at <<http://www.familymediationscotland.org.uk/>>.

<sup>92</sup>UK College of Family Mediators at <<http://www.ukcfm.co.uk/>>.

<sup>93</sup>See Parkinson, *Family Mediation*, pp. 475-485, and Hale et al., *Family, Law and Society*, pp. 295 et seq.

<sup>94</sup>*Family Law: The Ground for Divorce* (Law Com. No. 192, 1990).

<sup>95</sup>*Looking to the future: Mediation and the Ground for Divorce* (Cm. 2799 (1995)), paras 5.21-5.25.

<sup>96</sup>Family Law Act 1996, Pt I, s. 1©. The Act can be found at <<http://www.hmso.gov.uk/acts/acts1996/1996027.htm>>.

spouses would have had to attend an information meeting at least three months before a statement of marital breakdown was made.<sup>97</sup> At this meeting, among other kinds of information, information about mediation would be given.

Part III of the Act - which, unlike Part II, entered into force - introduced a more effective way of encouraging mediation at an early stage and of reducing litigation. Under a requirement introduced by Part III of the Family Law Act 1996, those seeking public funding for court proceedings must first be referred by their lawyer to a State-registered family mediator, to receive information about mediation and to regard it as an alternative to contested court proceedings. At this preliminary meeting, which the applicant may attend separately or with the other party, as preferred, the mediator explains the help that can be offered through mediation and makes an assessment with the client of the suitability of the dispute for mediation (Section 29). Although mediation was seen as a better and cheaper alternative to adversarial proceedings, the Family Law Act 1996 did not make mediation compulsory: the principle that participation in mediation should be voluntary was maintained. Although there was criticism on the requirement that one party attend an information meeting cannot encourage mediation unless the other party is also willing,<sup>98</sup> experience has shown that the opportunity to receive information from a mediator at an early stage results in mediation being accepted by both parties in a significant proportion of cases.

Between 1997 and 1999, the provision of information under Part II of the Family Law Act 1996 was piloted in eleven geographical areas in England and Wales. Janet Walker, from the Newcastle Centre for Family Studies, was appointed to lead a multidisciplinary research team to evaluate those pilots. The team's final evaluation report was published by the Lord Chancellor's Department in January 2001.<sup>99</sup> At the same time, the former Lord Chancellor announced that the Government had decided, for a variety of reasons, not to implement Part II, which introduced the new conditions for divorce, and that he would be asking Parliament at an appropriate time in the future to repeal that part of the Family Law Act 1996. Part III, referring to mediation, was extended nationally and a four-year research study led by Professor Gwynn Davis of the University of Bristol recommended that the system of referral to family mediation should continue to receive public funding. Section 29 of the Family Law Act 1996 was subsequently re-enacted in the Access to Justice Act 1999.<sup>100</sup>

The research on the Family Mediation Pilot Project led by Professor Davis was based on a sample of 4,593 cases in which couples were offered mediation as an alternative to litigation. Seventy per cent were referred by lawyers, twelve per cent by the court and the remainder were self-referred. The experience of mediation was generally very positive:

- Eighty-two per cent of participants considered that the mediator had been impartial and seventy per cent had found mediation very helpful or fairly helpful.
- Seventy-one per cent said that they would recommend mediation to others in a similar situation.

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<sup>97</sup>Family Law Act 1996, Pt II, s. 8.

<sup>98</sup>See Stephen M. Cretney, Judith M. Masson and Rebecca Bailey-Harris, *Principles of Family Law*, London, Sweet and Maxwell, 2003, pp. 303 et seq. and 617 et seq.

<sup>99</sup>Janet Walker (Research Director), *Information Meetings and Associated Provisions within the Family Law Act 1996: Final Evaluation Report*, 3 Vols, research conducted by the Centre for Family Studies at the University of Newcastle upon Tyne, 2001, at <<http://www.dca.gov.uk/family/fla/fullrep.pdf>>.

<sup>100</sup>Gwynn Davis et al., *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission*, London, Legal Services Commission, 2000.

- There was evidence from the research that mediators are now more skilled in negotiating settlements.
- Of those couples who reached some level of agreement, fifty-nine per cent said they thought they would be able to negotiate modifications between themselves if necessary.

The researchers concluded that mediation as a process has its own distinctive and positive features and that mediation should be supported as a separate system running parallel to the court system.

In a green paper entitled *Parental Separation: Children's Needs and Parents' Responsibilities*, launched in July 2004,<sup>101</sup> the British Government, in conjunction with senior judiciary and rule committees, proposed to review relevant rules and Practice Directions in order to give the strongest possible encouragement to parties to agree to mediation or other forms of dispute resolution and to fund this mediation through legal aid. The respondents to the green paper agreed on the importance of mediation but, while some of them considered that mediation would not be effective if it is not made compulsory, others considered that mediation would not work if parents were forced to attend.

In a response from the Government published in January 2005 to the respondents to the green paper, the Government stated that it does not plan to make mediation compulsory, but will strongly promote its use; that it will work with the senior judiciary to find the best way to encourage parties to attend mediation and that it will look at other ways of involving children in mediation and developing new models of child-focused mediation.<sup>102</sup>

Finally, in the introduction to the Children (Contact) and Adoption Bill published on 2 February 2005,<sup>103</sup> the government recognises that the separation of parents - which affects three million out of the twelve million of children in Britain - can be a stressful and traumatic experience for parents and for children as well as for their wider families. It also recognises that, after a separation, parents are the people who know best what will work for their families and how to bring up their children. The Bill sets out a range of proposals to help the ten per cent of separating parents who need to have their contact arrangements ordered by the court.<sup>104</sup> The proposals include better access to information and advice through help-lines, the extension of in-court conciliation and contact centres and stronger encouragement towards mediation.<sup>105</sup>

#### 2.4.4 Other countries, in particular Belgium and Austria

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<sup>101</sup>Green paper, *Parental Separation: Children's Needs and Parents' Responsibilities*, Cm 6273, July 2004, available at <<http://www.dfes.gov.uk/childrensneeds/docs/DfesChildrensNeeds.pdf>>.

<sup>102</sup>Report of the responses to consultation and agenda for action, *Parental Separation: Children's Needs and Parent's Responsibilities - Next Steps*, Cm 6452, January 2005, <<http://www.dfes.gov.uk/childrensneeds/docs/ParentalSeparation.pdf>>.

<sup>103</sup>Available at <<http://www.dfes.gov.uk/childrensneeds/pdf/Adoption%20Bill.pdf>>.

<sup>104</sup>Green paper, *Parental Separation: Children's Needs and Parents' Responsibilities*, July 2004.

<sup>105</sup>See, in more detail, the working paper presented by Lisa Parkinson at the Trier Conference. I thank her for giving me the opportunity to exchange points of views with regard to family mediation in England and Wales and for having been able to consult her in the final stage of the elaboration of my own paper.

Mediation has had a similar development in other countries in Western and Central Europe,<sup>106</sup> i.e. spontaneous practice, the organisation of mediators in associations, the creation of a code of practice, the establishment of an ‘umbrella’ organisation in which the various associations participate; there is occasional reference to mediation in Acts dealing with family matters and, finally, most recently, debate and the drafting of general Acts concerning mediation which include family mediation.

Two of the countries that have reached this final stage are Austria (2004) and Belgium (2005).

#### 2.4.4.1 Austria

In Austria, mediation is carried out by two mediators (co-mediation) where one mediator has a psycho-social basic training (as a psychotherapist, a psychologist with a social work diploma or someone who has completed this basic training and has experience in the field of family conflicts) and the other mediator has a legal basic training (such as a lawyer, a notary or even a judge, or a person who has completed legal training and is acquainted with the field of family law). Apart from their prior basic training, all mediators must also have completed specific training in mediation. According to the 2004 *Richtlinien zur Förderung von Mediation* (Directives for the promotion of mediation), drafted by the Ministry of Social Security, Generations and Consumer Protection,<sup>107</sup> if possible there will be a male and a female mediator in each mediating team, and co-mediation is so strongly encouraged that any practice of mediation departing from the principle of co-mediation requires the authorisation of the ministry.<sup>108</sup>

In Austria, the first legal reference to family mediation appeared in Section 99 *Ehegesetz* (Matrimonial Act) as amended in 1999 and dealt with confidentiality.<sup>109</sup> This reference, however, has been repealed by the Federal Act on Mediation in Civil Matters, which came into force on 1 March 2004<sup>110</sup> and established the legal framework for mediation in all private law areas, including family law.

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<sup>106</sup>See, e.g., for the Netherlands, Katharina Boele-Woelki, Wendy Schrama and Machteld Vonk, in *Parental Responsibilities*, National Report: The Netherlands, Question 57 at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Netherlands.pdf>>. See also Annie de Roo and Rob Jagtenberg, ‘Mediation in the Netherlands: Past - Present - Future’, *Electronic Journal of Comparative Law*, 6 (2002) 4, at <<http://www.ejcl.org/64/art64-8.pdf>> and the website of *Nederlands Mediation Instituut* (NMI) at <<http://www.nmi-mediation.nl>>.

<sup>107</sup>Bundesministerium für soziale Sicherheit, Generationen u. Konsumentenschutz, *Richtlinien zur Förderung von Mediation*, Dezember 2004, at <[http://www.bmsg.gv.at/cms/site/attachments/1/1/6/CH0140/CMS1056977805966/richtlinien\\_.pdf](http://www.bmsg.gv.at/cms/site/attachments/1/1/6/CH0140/CMS1056977805966/richtlinien_.pdf)>.

<sup>108</sup>*Ibid.*, § 3(6).

<sup>109</sup>§ 99(1): ‘Ein zwischen Ehegatten zur Erzielung einer gütlichen Einigung über die Scheidung und deren Folgen berufsmäßig und auf der Grundlage einer fachlichen Ausbildung in Mediation vermittelnder Dritter (Mediator) ist zur Verschwiegenheit über die Tatsachen verpflichtet, die ihm bei den auf die gütliche Einigung abzielenden Gesprächen anvertraut oder sonst bekannt wurden. Durch solche Gespräche sind der Anfang und die Fortsetzung der Verjährung oder sonstige Fristen zur Geltendmachung von Ansprüchen im Zusammenhang mit der Scheidung der Ehe gehemmt.

(2) Eine Verletzung der Verschwiegenheitspflicht nach Abs. 1 ist ebenso zu bestrafen wie eine verbotene Veröffentlichung nach § 301 Abs. 1 StGB, sofern dadurch ein berechtigtes Interesse verletzt wird und der in seinem Interesse Verletzte dies verlangt.’ See also Marianne Roth, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 27, p. 297.

<sup>110</sup>29. Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediation-Gesetz-ZivMediatG) sowie über Änderungen des Ehegesetzes, der Zivilprozessordnung, der Strafprozessordnung, des

The First Part of the Act contains general provisions and includes a definition of mediation. The Second Part sets up a Council for mediation. Their members, appointed by the Ministry of Justice for five years, are representatives of the various associations of mediators, of the associations of legal professions and non-legal professions related to mediation, of several federal ministries related to mediation and includes academics with specific knowledge in the field of mediation.<sup>111</sup> The Council has authority on the preparation of regulations dealing with the training of mediators, the certification of training institutions and teaching programmes, the certification of mediators and their inclusion or exclusion in the list of certified mediators.<sup>112</sup>

The Third Part of the Act deals with the conditions that must be met to be included in the list of certified mediators. The main requirements to become a mediator are to be over 28 years old, to have the required qualifications, not to have been sentenced for a crime which could endanger the future activity of the mediator and to have contracted a liability or third-party insurance at the minimum amount of EUR 400,000.<sup>113</sup>

With regard to the qualifications of the mediators, the Act draws a distinction between basic qualifications, thereby including a long list of types of training related to law, psychology and social work, and specific training which can be offered only by certified training institutions.<sup>114</sup>

The Fourth Part of the Act deals with the rights and duties of mediators, and it includes an outline of the usual rights and duties of mediators established in codes of practice, such as the duty to explain to the parties what mediation is, the duty to refrain from mediating when there is a conflict of interests between the mediator and one of the parties, the duty to keep a detailed record of the mediation process, to respect voluntariness and confidentiality, to have insurance cover, to receive a minimum of fifty hours further training every five years, etc.<sup>115</sup>

The Fifth Part of the Act deals with the suspension of the running of the period of prescription of actions related to the rights and duties which are dealt with in the mediation procedure but only *vis-à-vis* its parties. Although the parties may, by an agreement in writing, extend the suspension to other matters, in the case of family mediation this written agreement is not necessary and the Act states that, unless otherwise stated by the parties, suspension extends to all family law actions between the mediating parties.<sup>116</sup>

Other parts of the Act deal more specifically with the requirements that must be met to obtain certification as a training institution and the sanction that may be imposed on mediators, training institutions or other persons who infringe on the provisions of the Act.<sup>117</sup>

In the case of family mediation, one hour of mediation is to cost EUR 182 per mediator team (2004 fees).<sup>118</sup> Depending on the income of each family - which the

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Gerichtsgebührengesetzes und des Kindschaftsrechtsänderungsgesetzes 2001 (BGBl Teil I, 6. Juni 2003, Nr. 29).

<sup>111</sup>See § 4 ZivMediatG.

<sup>112</sup>§ 5 ZivMediatG.

<sup>113</sup>See §§ 9, 11(2) and 19 ZivMediatG.

<sup>114</sup>See §§ 10, 23 et seq. and 29 ZivMediatG.

<sup>115</sup>See §§ 15 to 21 ZivMediatG.

<sup>116</sup>§ 22 ZivMediatG.

<sup>117</sup>See §§ 223 to 232 ZivMediatG. For a short commentary to the Act, see Christian Fuchshuber, *Mediation im Zivilrecht. Neue Wege der Konfliktlösung*, Wien, LexisNexis/ARD/Orac, 2004.

<sup>118</sup>See the website of the *Bundesministerium für soziale Sicherheit, Generationen und Konsumentenschutz* at <<http://www.bmsg.gv.at/cms/site/detail.htm?channel=CH0140&doc=CMS1056977805966>>.

participants in mediation have to show by presenting salary sheets, declaration of income, etc. - and on the number of children under maintenance of the mediating parties, the Federal Ministry of Social Security, Generations and the Protection of Consumers provides a subsidy for the mediation, i.e. the mediating parties must pay part of it. The mediators assess the amount of the contribution by the parties which is then directly paid by them and they arrange for the remaining payment with the subsidised associations and the Ministry. The Ministry subsidises five associations, to which all licensed mediators belong<sup>119</sup>.

#### 2.4.4.2 Belgium

The Belgian *Code judiciaire* (Judicial Code - CJ) was amended by the Statute of 19 February 2001 concerning family mediation in order to introduce family mediation (cf. Article 734 *bis* - 734 *sexies* CJ). According to these provisions, the judge may appoint a mediator on his or her own initiative in disputes concerning the consequences of marriage, divorce, parental responsibility and cohabitation if the parties concerned agree to mediation and also decide on the person who will act as mediator. Mediation may also take place at the request of the parties concerned. During mediation, the judicial procedure is suspended.<sup>120</sup>

In February 2005, the Belgian Parliament passed an Act which modifies the Judicial Code with regard to mediation.<sup>121</sup> The Act repeals the 2001 Act dealing with family mediation and introduces mediation into the Judicial Code as an all-purpose tool for the resolution of conflicts, extending mediation to all disputes on civil and commercial matters that can be solved by means of settlement.

The Act sets up a Federal Commission of Mediation consisting of one general commission and three specific commissions devoted, respectively, to family matters, civil and commercial matters and social matters. The general commission has six members (two civil law notaries, two lawyers and two representatives from the mediators who are neither civil law notaries nor lawyers). All of them, however, have to be experts in mediation. The specific commissions are composed along the same lines (cf. Article 1727 CJ). This composition, which gives two thirds of the places to lawyers in preference to other professions, has already been sharply criticised in parliamentary proceedings.<sup>122</sup>

The general commission is entrusted with the approval of organisations providing training for mediators and their training programmes and has the power to establish the

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<sup>119</sup>Österreichischer Verein für CO-Mediation (VCM) <<http://www.verein.co-mediation.or.at/>>; Verein zur Förderung der Mediation (VFM) (contact: [ief@ief.org.at](mailto:ief@ief.org.at)); Österreichischer Bundesverband für Psychotherapie (ÖBVP) <[www.psychotherapie.at/oebvp](http://www.psychotherapie.at/oebvp)>; AVM - Anwaltliche Vereinigung für Mediation und kooperatives Verhandeln, <[www.avm.co.at](http://www.avm.co.at)>; Win.Win. Gesellschaft für Angewandte Mediation und Konfliktregelung, <<http://www.winwinmediation.at>>.

<sup>120</sup>See Walter Pintens, in Boele-Woelki, Braat and Sumner, *European Family Law in Action*, vol. I, Question 27, p. 298, and Walter Pintens and Dominique Pignolet in *Parental Responsibilities*, National Report: Belgium, Question 57, at <<http://www2.law.uu.nl/priv/cefl/Reports/pdf2/Belgium.pdf>>. The text of the *Loi du 19 février 2001 - Loi relative à la médiation en matière familiale dans le cadre d'une procédure judiciaire* can be found in *Moniteur Belge/Belgisch Staatsblad*, 03.04.2001, pp. 11218-12221, available through <[http://www.ejustice.just.fgov.be/doc/rech\\_f.htm](http://www.ejustice.just.fgov.be/doc/rech_f.htm)>.

<sup>121</sup>21 février 2005, *Loi modifiant le Code judiciaire en ce qui concerne la médiation*, *Moniteur Belge/Belgisch Staatsblad*, 22.03.2005, Ed. 2, pp. 12772- 12778, available through <[http://www.ejustice.just.fgov.be/doc/rech\\_f.htm](http://www.ejustice.just.fgov.be/doc/rech_f.htm)>.

<sup>122</sup>See, e.g., the declaration of the deputies Mme Nathalie de T. Serclaes (MR) et Mme Jacinta De Roeck (SP.A-SPIRIT), *Sénat de Belgique. Session ordinaire 2004-2005. Séances plénières. Mardi 21 décembre 2004. Séance de l'après-midi. Annales*, pp. 18 and 16.

standards for the certification of mediators according to the type of mediation. Additionally, the commission certifies mediators, imposes disciplinary sanctions including removal, makes and circulates the lists of mediators and develops the code of practice.

The main principles that underpin the new Act are:

- a) The mediator is technically competent, independent and impartial.
- b) There is a guarantee that the information gathered during mediation remains confidential and that it will not be used in any subsequent proceedings.
- c) Mediation is on a voluntary basis.
- d) The mediation agreement can easily and readily be transformed into an enforceable agreement; for this purpose, the agreement is ratified by the judge (in French, *homologation*) and his power to refuse ratification is reduced. Accordingly, the judge may only refuse ratification if the agreement is contrary to public policy or, in the case of family mediation, if the agreement is detrimental to the interests of underage children (cf. Article 1733(II) CJ). However, this has been subject to criticism, since some experts have considered that the control of the judge should have been extended to analyse whether the rights of defence of the parties and of third parties had been honoured and whether the consent given to a waiver of rights has been informed and free.<sup>123</sup>
- e) The parties do not suffer a legal disadvantage if they do not reach an agreement. For this reason, the Act pays special attention to the suspension of the period of prescription of the rights and actions. Accordingly:
  - in the case of the so-called *médiation volontaire*, i.e. mediation unrelated to judicial proceedings, the suspension of prescription commences with the signature of the protocol by which the parties initiate mediation (cf. Article 1731(3) CJ) and ends one month after one of the parties or the mediator has duly notified the other party of its intention to end mediation (cf. Article 1731(4) CJ);
  - in the case of the so-called *médiation judiciaire*, i.e. when the parties request mediation after having started judicial proceedings, the suspension of the procedural periods starts at the moment when the parties jointly request the judge to order mediation (cf. Article 1734(5) CJ).

A much criticised aspect of the Act is that, in the case of *médiation volontaire*, i.e. mediation unrelated to judicial proceedings, the mediator need not be certified. Therefore, non-professional mediators will be able to conduct mediation in this area, although they will not be able to request the courts to certify the agreements they reach with their clients, since for certification by the courts it is necessary for the mediator to be professionally qualified, i.e. in the sense of certified mediator (*médiateur agréé*).<sup>124</sup>

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<sup>123</sup>See in this sense the intervention of Mme Clotilde Nyssens (CDH), *Sénat de Belgique. Session ordinaire 2004-2005. Séances plénières. Mardi 21 décembre 2004. Séance de l'après-midi. Annales*, p. 15.

<sup>124</sup>See the explanation of Mme Nyssens, *ibid.*, p. 13.