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OUTLINE

TEXT

1. Introduction

1 European Union (hereafter: EU) law defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator;" this "process may be initiated by the parties or suggested or ordered by a court or prescribed by the law [...]."[1] EU law contains provisions not only on mediation in civil and commercial matters[2], but also on mediation in disputes between natural and legal persons and European institutions, bodies, offices and agencies. In the latter case, mediation thus concerns administrative law controversies, which obviously have their own peculiarities compared to civil and commercial disputes[3].

2 The mediation schemes laid down in EU administrative law are quite numerous: some of these are of a general scope, as they are applicable to a wide range of disputes, while others are sectoral in nature and thus concern specific kinds of cases. The mediator is at times the General Court (or one of its members), at times quasi-judicial bodies, and at others still administrative bodies or officials of an EU administration, that are, in any case, independent and

impartial (although the level of independence varies in different circumstances). At present, EU law does not provide for mandatory mediation in disputes with EU administrations.

3 The fact that EU law has established alternative dispute resolution (hereafter: ADR) mechanisms for acts and activities of EU administrations is consistent not only with the Council of Europe guidelines, [4] but also with long-standing trends in several Member States [5] as well as states outside the EU. [6] The interest of the doctrine, and on occasions also of national parliaments and governments, for mediation in administrative law is quite widespread, and is rooted in various factors: for instance, this ADR scheme is often considered more efficient, swifter and economical than the judicial process; [7] it is regarded as enhancing the autonomy of the disputing parties (as they are the only ones who can decide on the outcome of a dispute), thus reducing the asymmetry between the public authority and the other parties to the conflict. [8]

4 On the other hand, the use of mediation to settle administrative law disputes presents significant problems. For example, with reference to some Member States, it has been observed that the law often contains significant limits to the possibility for public authorities to reach an agreement to settle a dispute with a private party; the possible involvement of third parties can be a further complicating factor; mediation may also pose problems of equal treatment, as the administration is required to treat equivalent cases in exactly the same way, alongside problems of transparency that can arise. [9] Above all, there can be reluctance on the part of public administrations (and their managers) to take responsibility for negotiating and concluding an agreement when the possibility exists for the dispute to be resolved in a binding manner by a court of law.

5 The subject of this article is precisely mediation applied to various forms of disputes involving the acts and actions of EU institutions, bodies, offices and agencies, since there is currently a lack of systematic analyses or studies that take a theoretical approach to this issue. This paper does not aim to fill this gap, but to briefly illustrate some of the provisions of EU law governing mediation in administrative law disputes, and to examine whether, and to what extent, the problems mentioned above can also be found in the EU

legal system. This is also in order to make an initial assessment of the actual use of mediation and the role it plays in EU legal system.

6 In the following text the legal provisions on mediation as an ADR method of general scope are examined. After recalling some of the functions of the EU Ombudsman, attention is turned to the provisions of the Rules of Procedure of the General Court that envisage a conciliatory function of the General Court (Section 2). After this, a selection of sectorial regulations are analyzed: on the one hand, staff law, which provides for certain instruments to facilitate the amicable settlement of disputes between the EU institutions and other bodies and their agents, and which entrusts the General Court with the role of mediator (section 3); on the other hand, EU intellectual property law, that bestows mediation functions on administrative bodies, quasi-judicial bodies, as well as experts (Section 4). Reference is also made to the mediation conducted by the Board of Appeal set up within the EU Chemicals Agency and that which was carried out in two past cases by the Administrative Board of Review set up at the European Central Bank (Section 5). The conclusions show that the EU legal system has not invested in mediation as an ADR scheme and has instead preferred to focus on other non-judicial dispute resolution procedures (Section 6).

7 Before starting, however, two preliminary clarifications are necessary.

8 First, it is widely accepted in legal scholarship that there are at least two different styles of mediation. In the first, so-called "facilitative mediation," the mediator plays a discrete role, allowing the disputing parties to take full control of the negotiation and its outcome: he or she assists them in managing the procedure, ensuring proper communication, and asking questions to identify both their interests and the real subject of the disagreement. The second style, known as "evaluative mediation," sees the mediator instead play a more incisive role in that, through their own expertise, they can help the parties to assess the strengths and weaknesses of their respective positions and can in fact orient them towards a shared solution to the dispute by making proposals or recommendations;[10] in essence, the mediator "gives advice, makes assessments, states opinions,"[11] and thus in some way takes a position with respect to the controversy.[12]

9 Although this distinction has been the subject of much debate [13], it is nevertheless useful, since it clarifies that the mere invitation by a third party (e.g., a Court) to the parties in dispute to attempt to reach an agreement cannot be considered as a form of mediation, which still requires the active work of the mediator. In addition, this distinction allows for the framing and interpretation of a number of EU law provisions.

10 Second, as is well known, EU legal order is based on complex and intense forms of cooperation between national and EU administrations. This institutional pluralism causes considerable conflict within the administrative system and hence requires the establishment of specific administrative instruments to resolve such disputes. [14] In principle, some resolution mechanisms can resemble mediation schemes, as is the case, for instance, of the activities of the EU Supervisory Authority to settle disagreements between national banking authorities in cross-border situations. [15] However, this topic is out of the scope of this article. In fact, these procedures have peculiarities that exclude them from being discussed jointly with mediation referring to disputes between a private party and an EU institution, body or agency.

2. Mediation as an ADR Scheme of General Application

11 There are two cases in which EU law conceives mediation as an ADR scheme that can be applied to very broad types of disputes. The first, which is enshrined in Article 228 of the Treaty on the Functioning of the European Union (TFEU), [16] refers to certain functions of the EU Ombudsman, [17] and in particular to the inquires it conducts following complaints by natural and legal persons in respect to an instance of maladministration. In this context, the Ombudsman can propose solutions to eliminate the instance of maladministration; solutions that, if accepted by the complainant and the EU administration involved, lead to the closure of the file. [18] Since this topic has been widely studied, reference can conveniently be made here to the relevant literature and case law. [19] However, it should be noted that the Ombudsman deals with numerous complaints every year and in many instances succeeds in finding solutions shared by

the parties involved. In addition, while the functions of the Ombudsman in these cases have a number of features in common with "evaluative mediation," they probably go beyond the definition of mediation itself and could even be considered as particular forms of adjudication. This is confirmed by the full prominence of the Ombudsman (who follows the inquisitorial principle in their inquiries), the consequent minimization of the role of the complainant, and the additional activities that the Ombudsman themselves can carry out if no agreement is reached. [20]

12 The second case of mediation as a generally applicable ADR concerns the General Court (hereafter: GC). Pursuant to Article 89(2) of the Rules of Procedure of the General Court (RoPGC), [21] "the purpose of measures of organisation of procedure shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions." More specifically, Article 89(2) RoPGC establishes that "measures of organization of procedure shall, in particular, have as their purpose: [...] d) to facilitate the amicable settlement of proceedings." [22] To this end, under Article 89(3)(e), the Court may, *inter alia*, ask the parties for clarifications and details of the disagreement, in addition to summoning them to meetings.

13 These provisions are very concise and have not received much attention in doctrine. For its part, case law on this point is also rather limited. In any case, on the basis of these RoPGC provisions it was argued that "mediation is part and parcel of the Court's role." [23] While there is no doubt that these rules express a favour for conciliation, their concise character seems to have a precise meaning. On the one hand, they certainly allow the GC to invite the parties to come to an agreement, without the need to carry out further actions; but, as already mentioned, this cannot be considered a true mediation procedure. On the other hand, these provisions implicitly exclude that the Court may engage in "evaluative mediation," *i.e.*, that it may, outside the canonical procedure, make assessments of the facts of the case and the arguments put forward by the parties, give them advice on the settlement of the dispute or make conciliatory proposals. If this is correct, the GC could then only perform a "facilitative mediation" function, ensuring proper communication between the parties, e.g. by helping them identify their real interests

in the controversy. [24] It must still be added that the vagueness of these procedural provisions corresponds to a wide degree of discretion for the GC, which can then decide whether or not to mediate according to the specific features of the individual case. From this point of view, given that measures of organisation of procedure can be taken by the GC of its own motion or on application by one of the parties (Art. 88(1), RoPGC), it seems appropriate for the Court to act as mediator primarily when this is requested by at least one of the parties. [25]

14 Concerning the way in which the agreement between the parties must be finalised, the point of reference seems to be the provisions on amicable settlement. According to Article 124(1) RoPGC, "if, before the General Court has given its decision, the main parties reach an out-of-court settlement of their dispute and inform the General Court of the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs […], having regard to any proposals made by the parties on the matter." Article 124(2), however, states that "this provision shall not apply to proceedings under Articles 263 TFEU and 265 TFEU." [26] The fact that the rules on amicable settlement do not apply to actions for annulment and for failure to act is of particular importance here. This means that "no 'compromise' can be struck on the legality of an EU measure between the individual bringing the claim and the EU institution which enacted the challenged measure. Once a claim has been brought, it is the CJEU which ultimately decides on the legality of an EU measure […]." [27] Article 124(2), RoPGC thus has a clear consequence for our subject matter: if the parties cannot negotiate the legality of legal acts of EU institutions and bodies, the GC obviously cannot engage in activities aimed at facilitating agreements between the disputing parties that go in this direction.

15 As a consequence, only disputes concerning non-contractual damage allegedly caused by the institutions, bodies, offices or agencies of the EU or their servants (Art. 340 TFEU), as well as those concerning contracts concluded by the European Union, which expressly give jurisdiction to the GC (Art. 272 TFEU), can be the subject of a Court mediation. However, the practice and case law of the Court of Justice of the European Union (CJEU) shows that the GC's role as a mediator can also concern the request for interim measures (although this is

not always reflected in the text of the orders, which are generally rather concise). [28]

16 Since the annual reports of the CJEU make no mention of the mediation function performed by the GC, no recent data is available on these aspects. [29] All this suggests that the "termination of proceedings by amicable settlements play a negligible role in the reality of the CJEU […]." [30]

3. Mediation in Civil Service Disputes

17 Various tools are provided for in EU law to facilitate the amicable settlement of staff disputes. Some of these are administrative in nature (Subsection 3.1), while others are managed by the General Court (Subsection 3.2).

3.1. Administrative Tools

18 With regard to administrative tools aimed at facilitating the amicable settlement of disputes with EU civil servants, Commission Decision C (2002)601 of 4 March 2002 on the Mediation Service [31] can be mentioned as an example. With this decision, a service was set up within the Commission that acts, in an independent and neutral manner, "as a facilitator in the settlement of disputes which can arise at work," [32] in the sense of "providing a non-bureaucratic way of resolving problems arising in the workplace in order to restrict, as much as possible, recourse to pre-litigation and litigation proceedings." [33] The Mediation Service deals with "disputes concerning statutory rights and obligations" and with "relational problems;" [34] upon request of the parties, it "endeavors to find lasting, consensus-based solutions." [35] Not much information is available on this issue; however, from the 2016 annual report of the Mediation Service (the latest available online) [36] it appears that in that year the Service handled 177 cases concerning statutory rights and obligations. Out of these, 100 were financial in nature and 77 non-financial, and the Mediation Service was able to provide a solution in 95 % of cases. Without dwelling further on the subject, it can be observed that, at least in certain circumstances, this form of

mediation is quite particular, having an essentially preventive function: it is in fact aimed at preventing a given disagreement or malaise on the part of the staff member from becoming radicalized and assuming the guise of a real dispute (which may subsequently need to be resolved through more formalized means). [37]

19 It is then worth considering Article 90(2) of the Staff Regulations, [38] which provides a specific administrative remedy to resolve disputes between EU administrations and their civil servants: every staff member, within three months, is entitled to lodge a complaint with the "appointing authority" against an act that affects them adversely, "either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations." In turn, the appointing authority must notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it. The admissibility of an action brought by an official against the institution or body to which they belong is conditional on the proper observance of this preliminary administrative procedure (Art. 91(2) Staff Regulations). A similar rule applies to complaints to the EU Ombudsman. This is an administrative remedy (a particular form of internal review) that is decided unilaterally by one of the parties in conflict (*i.e.*, the appointing authority) and that, for the CJEU, has the function of facilitating the amicable settlement of the disagreement. [39] However, precisely because it is decided by one of the disputing parties, it is very often of no real use. [40] Moreover, given that it is a mandatory remedy, it risks being a way to defer access to the CJEU for the complainant and possibly to allow the administration to strategically prepare for the case (e.g., by amending the grounds of the contested decision so as to make it free from censure). In view of these limitations, it has been suggested that this administrative remedy should be transformed into a mediation procedure; a mandatory pre-litigation phase, which should be entrusted to a third, impartial body. [41]

3.2. Judicial Mediation in Staff Litigation

20 The RoPGC entrusts the GC with the task of mediating in staff cases and contains specific rules to this end. These provisions were originally laid down in the Rules of Procedure of the Civil Service Tribunal (CST) and found their basis in Article 7(4) of Annex I to the Statute of the Court of Justice, [42] according to which, "at all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement." In 2016 these rules were transfused into the RoPGC following the abolition of the CST and the transfer of the relevant competences to the General Court. [43]

21 The analytical nature of this procedural regulation shows that the EU legislator is, in principle, in favour of amicable dispute resolution in this area: since the GC is allowed to perform a conciliatory function in an incisive way, it can certainly be regarded as "evaluative mediation." The legislator's favorable stance towards mediation is explained by the specific nature and sensitivity of controversies involving an EU institution or body and its employees. [44]

22 Articles from 125a to 125d of the RoPGC formalize mediation by making it somewhat autonomous from court proceedings. To begin with, it is established that the General Court shall instruct the Judge-Rapporteur (assisted by the Registrar) "to seek the amicable settlement of a dispute." (Art. 125a(2)) [45] To this end, pursuant to Article 125a(3), the Judge-Rapporteur may propose one or more solutions capable of putting an end to the dispute, adopt appropriate measures with a view to facilitating its amicable settlement, and implement the measures which he or she has adopted. The Judge-Rapporteur may require the parties to provide information or briefings and produce documents, invite the parties' representatives, the parties themselves or any official or servant of the institution empowered to negotiate an agreement to meetings, and may—with their consent—have contact with each of the parties separately. In this context, if the parties come to an agreement before the Judge-Rapporteur on a solution which brings the litigation to an end, they

may request that the terms of that agreement be recorded in a document signed by the Judge-Rapporteur and by the Registrar (a document which constitutes an official record). In this event, the case has to be removed from the register by reasoned order of the President and at the request of a party with the agreement of the other party, and the terms of the agreement reached by the parties must be recorded in the order removing the case from the register. [46] Finally, it is established that materials produced in the context of the amicable settlement procedure must be placed in a separate file from that of the case file (Art. 125c(1)) and that "No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of the amicable settlement may be relied upon as evidence by the General Court or the main parties in the judicial proceedings." (Art. 125d.)

23 Since the General Court took over the competence for staff cases in 2016, no quantitative information is available on mediation in the CJEU Annual Reports. It can therefore be inferred that this ADR scheme is either not used or is at most of marginal importance. Data is however available concerning the mediation activities of the CST. From 2006 to June 2009, slightly over 5 % of disputes were settled amicably (20 out of 379 cases settled), [47] while from 2010 to August 2016, the percentage rose to 6.2 % (67 out of 1073 cases completed). [48] As to the subject matter, in the CJEU Annual Report for 2007, the President of the CST noted that the CST had "identified a number of categories of dispute which would be suitable for amicable settlement" and these included those "whose real solution cannot be found in a legal ruling as such, which would not put an end to the dispute or the conflict giving rise to the proceedings, which is often of a personal nature," as well as "duplicate cases, following a 'pilot' judgment, which could be given the same solution as in that judgment […]." [49] However, CJEU Annual Reports concerning the CST show that over time, mediation has affected other types of litigation (e.g., appraisals and promotions) and in particular, although not exclusively, issues with financial implications (pensions and invalidity allowances, social security, remuneration and allowances). On the other hand, based on the data available in 2009, it was observed that "in a vast majority of cases, the Community institution or organ has not withdrawn—in whole or even in part—the contested decision but

has rather accepted a financial arrangement favourable to the applicant." [50]

4. Mediation in Trade Mark and Design Disputes

24 Mediation schemes are also provided for in the EU's trade mark [51] and design laws [52] which entrust a central role to the European Union Intellectual Property Office (hereafter: EUIPO). Considerable investment in ADR has been made in recent years.

25 Without going into too much detail, it should be recalled that EUIPO is tasked with registering and cancelling exclusive intellectual property rights that are valid throughout the EU (*i.e.*, EU trade marks and Community designs). Proceedings before the EUIPO are of two types: proceedings *ex parte*, where "the applicant addressing a request to EUIPO (in particular applications to register EUTMs and RCDs) is the only party to the procedure and the EUIPO carries out its examination of its own motion;" *inter parte* proceedings, where the applicant for registration or the owner of a trade mark or design "faces an opposition or a cancellation request filed by another party and the EUIPO is, in principle, limited to adjudicating the dispute between those parties on the basis of their claims and submissions" [53] (these are opposition, revocation and invalidity proceedings). In essence, in *inter partes* proceedings, the EUIPO is called upon to resolve disputes between private parties.

26 That said, the current legislation provides for two types of mediation against decisions taken by EUIPO in *inter partes* proceedings: [54] conciliation and mediation.

27 Conciliation may be proposed by the Office to the parties in opposition, revocation and invalidity proceedings; [55] likewise, the parties may request the Office (the examiner) to act as conciliator. On this point, according to the instructions of the Executive Director of EUIPO, the Office

> "may issue proposals for friendly settlement. As, in principle, the Office cannot… replace the parties, it will only take action in cases where a settlement between the parties appears desirable and if

> there are good reasons for considering that the proceedings can be ended through a settlement. If expressly requested by the parties, the Office can also offer assistance with their negotiations, for instance by acting as an intermediary or by providing them with any material resources that they need." [56]

28 Conciliation may also take place during the review proceedings conducted by the Boards of Appeal (BoAs) of the EUIPO. [57] In this regard, it should first be recalled that the BoAs are independent bodies established within EUIPO with the task of settling disputes concerning acts of the Office itself relating to intellectual property rights. [58] Although the BoAs are administrative in nature, they are considered quasi-judicial bodies by the CJEU, due to their independence and impartiality. [59] For our purposes, it should be noted that Article 33 of the Rules of Procedure of the BoAs of the EUIPO provides that, in *inter partes* appeal proceedings, one of the parties or the Rapporteur of the case may propose to attempt to resolve the dispute by conciliation. [60] If all parties agree, the Rapporteur may endeavor to reach an amicable settlement of the dispute, following the rules set out in Articles 33a and 33b of the BoA Rules of Procedure. [61] Alternatively, the parties may decide to use the services of the EUIPO Mediation Centre (with the suspension of the appeal proceedings).

29 This leads to mediation, the second ADR scheme envisaged for this area. On the basis of Articles 151(3) and 170 of Regulation 2017/1001, in November 2023 the EUIPO established a Mediation Centre to assist the parties in reaching an amicable settlement, by mutual agreement, of EU trade mark and design disputes. [62] The rules governing this procedure were adopted in November 2023: [63] mediation must be requested jointly by the parties and, in the case that the dispute is already the subject of proceedings (only *inter partes*) pending before the Office, such a joint request results in the suspension of these proceedings. Mediation is conducted by a mediator chosen jointly by the parties from a list drawn up by the EUIPO; the mediator, who must of course act impartially, cannot provide legal advice to the parties; however, "at the request of all the parties, the mediator may make proposals to resolve the dispute, but it will be for the parties to determine whether to accept these proposals." [64] In this context, the parties may also jointly appoint an expert to deliver an opinion "on a

specific legal, commercial and/or technical issue on which the parties cannot reach an agreement, impeding the progress of mediation and the amicable resolution of the dispute." [65]

30 Ultimately, in EU intellectual property law, while conciliation reflects an "evaluative mediation" style, mediation reflects a "facilitative mediation" style, with the parties remaining fully in control of the negotiation (although they can jointly then ask the mediator to make proposals to resolve the dispute).

31 In the latest annual reports of the Office, no data is available on conciliations and mediations conducted in *inter partes* proceedings, however data can be found on the use of ADRs in proceedings before the BoAs. The latter show that the number of requests for mediation and conciliation made before the BoAs has increased steadily over time, to reach 50 in 2023. Moreover, "when parties agree to solve their dispute using ADR mechanisms, they reach a settlement in around 60-75 % of cases. The acceptance rate of such proposals seems to be following the trend of 30 %." [66]

5. Other mediation scenarios

32 Finally, reference should be made to three other mediation scenarios provided for in EU law. The first concerns the BoA of the EU Chemicals Agency (ECHA). Despite the fact that this is also a largely complex piece of legislation, it seems sufficient to recall that ECHA performs a number of technical/scientific functions aimed at protecting the environment and public health through chemical safety and, to this end, delivers opinions and takes decisions that form the basis for the adoption of Union measures. [67] Even in this case, some of the acts adopted by ECHA can be challenged by the companies concerned before the BoA established at the same agency. [68]

33 Article 1a of the Regulation on the organisation and procedure of the ECHA BoA, introduced in 2016 [69], states that

> "(1) In the interest of the procedure the Chairman of the Board of Appeal may invite the parties to reach an amicable agreement. In that case the Chairman shall appoint a single member to facilitate the amicable agreement. The Chairman shall communicate the

> decision to appoint a single member to the parties. (2) If the parties reach an amicable agreement, the single member shall close the proceedings and a summary of the amicable agreement shall be published on the website of the Agency. In the absence of an amicable agreement within 2 months from the decision to allocate the case to a single member, the case shall be referred back to the Board of Appeal."[70]

34 This is a form of "facilitative mediation" and its provision has been justified in the following terms: "Drawing on current practice, it is also appropriate to provide the possibility for the parties to find an amicable agreement between them. In order to increase transparency, a member of the Board of Appeal should be appointed to facilitate the amicable agreement […]."[71] Indeed, the 2016 Annual Report of the Chairman of the ECHA BoA states that settlements "are reached in 31 % of all the cases closed by the BoA," and reports for previous years show that a total of 15 appeals were amicably settled before the BoA (6 in 2014, 4 in 2015, and 5 in 2016).[72] However, once the mediation procedure was regulated in 2016, it was no longer used.[73] In essence, disputes were settled amicably until a special procedure was established, which provides for the publication of a summary of the agreement.

35 The case of the ECHA BoA is also interesting because it underlines the fact that when there is an impartial adjudicator—as is the case of the BoAs—they can act as a mediator even in the absence of a specific regulatory provision which expressly permits this. In other words, it can be considered that "facilitative mediation" is implicit in the adjudicative function of the BoAs.[74] This is confirmed, for example, by the experience of the Administrative Board of Review (ABoR) set up at the ECB.[75] The ABoR, which is an independent and impartial body, has the task of conducting, at the request of an interested person, the internal administrative review of the ECB's supervisory measures and delivers an opinion to the Supervisory Board, which may then decide to abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. Interestingly, in 2015 in two cases "[…] the Board, including its Secretariat, contributed to the resolution of issues to the satisfaction of both the applicant(s) and the ECB, by playing a mediation role between the ECB and the applicant(s)."[76] However, as these proceedings are confidential it

is not possible to gain a more in-depth insight into these cases and the role played by the ABoR. [77]

36 Finally, the Complaint Mechanism of the European Investment Bank (EIB) Group should be mentioned. This body is tasked with investigating complaints of maladministration, independently from other EIB offices. When a complaint concerns the social and environmental impact or governance aspects of operations and projects financed by the EIB Group, the so-called extended procedure applies, which in certain circumstances can lead to a mediation process. [78] In these cases, however, disputes very often have not only legal, but also wider implications; these activities of the Complaint Mechanism thus seem to qualify rather as a form of social mediation, [79] *i.e.*, a different kind of mediation from those outlined here.

6. Conclusion

37 The above considerations and data show that EU legislation on mediation is somewhat fragmented and that the ADR scheme plays a rather marginal role in settling disputes between EU institutions, bodies and agencies and private parties. In fact, regardless of the activities of the Ombudsman, which have their own particular features, mediation is only used to a significant extent in intellectual property disputes regarding *inter partes* proceedings (that involve private rights).

38 This situation is the result of various factors. EU administrations generally act according to a strongly legalistic logic; [80] and in the disputes considered in this article, the legality of acts of EU institutions and body is very often at stake (even indirectly). This represents an obstacle to negotiation and leads institutions and bodies to prefer a judicial decision over an agreed solution. [81] Moreover, it cannot be ruled out that the limited application of mediation also depends on the reluctance of the officials within the EU institutions and bodies to renounce the asymmetry that usually characterizes their relations with private parties—an asymmetry that vanishes in the context of the mediation procedure.

39 As a consequence, for mediation to be used effectively, it is not sufficient for this tool to be established by a legal regulation, but other initiatives are also necessary. [82] For instance, if the EU legislator wished to encourage the employment of this ADR procedure in some areas it could provide for a mandatory attempt at conciliation before judicial proceedings could be brought. As mentioned, this solution has been proposed in the past for staff disputes, when a change to the current mandatory remedy (which is handled by one of the disputing parties and is generally considered of little use) into mandatory mediation was suggested. Similarly, mandatory mediation could be laid down for certain controversies concerning the compensation of non-contractual damage allegedly caused by EU institutions or bodies and their agents (e.g., when the unlawfulness of an act of an EU institution or body has been established beforehand by the CJEU).

40 However, legislative interventions alone are not enough. Indeed, it is unanimously agreed that these dispute resolution techniques, in order to be effective (and to gain the trust of the parties), must be entrusted to people with specific conflict management expertise. Consequently, if the EU institutional system really wanted to invest in mediation, it would also have to provide proper training for the mediators (including, of course, the members of the General Court). [83] As can be seen clearly in several passages of the Consolidated Annual Activity Reports for 2022 and 2023, the EUIPO is in fact channeling significant resources into the training of staff with a view to broadening the use of ADR in intellectual property matters. However, no similar efforts are apparent in the other cases examined in this article.

41 This shows that the EU legal system, while permitting the use of mediation, does not consider it to have strategic potential in the resolution of disputes involving the acts and activities of EU administrations. This is made amply clear considering that in recent years, despite numerous legislative interventions aimed at reducing the workload of the CJEU, [84] none of these has led to an effective strengthening of mediation, with the sole exception of those found in intellectual property law. On the contrary, certain signs of distrust towards this ADR scheme have come to light: as mentioned above,

the abolition of the CST resulting in the disappearance of mediation as an ADR in staff disputes.

42 That said, however, it cannot be assumed that all disputes are settled by the CJEU. [85] Indeed, the EU law has turned to other forms of out-of-courts proceedings and, in particular, to administrative remedies. [86] These are widely employed mechanisms, [87] through which disputes are decided in a binding manner, on the basis of legal criteria, with acts that can be submitted to the CJEU for review. In essence, through the establishment of administrative remedies, the EU legal system on the one hand facilitates the emergence of disputes with EU institutions and bodies (disputes that under certain circumstances would not be submitted to the CJEU), and this is a positive circumstance, [88] whilst on the other hand, it restricts the autonomy of the parties who are not allowed to negotiate the outcome of the controversy.

43 Despite numerous criticisms of administrative remedies, this solution appears to be consistent with the basic features of EU administrative law.

NOTES

1 Art. 2(a), Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, [2008] OJ L 136/3. For a review of the different definitions of this term, see M. Giacalone, S. Salehi, "An Empirical Study on Mediation in Civil and Commercial Disputes in Europe: The Mediation Service Providers Perspective." *Revista ítalo-española de Derecho Procesal*, vol. 2, 2022, p. 11-54, p. 14-16.

2 Directive 2008/52 ; Directive 2013/11/EU on alternative dispute resolution for consumer disputes, [2013] OJ L 165/63 ; Regulation (EU) 524/2013 on online dispute resolution for consumer disputes, [2013] OJ L 165/1. On this issue, See e.g., C. Esplugues, J. L. Iglesias, G. Palao (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, Anterwap, Portland, Intersentia, 2013 and, more, recently, Giacalone, Salehi *op. cit.*

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11 L. P. Love, "The Top Ten Reasons Why Mediators Should Not Evaluate," *Florida State University Law Review*, vol. 24, 1997, p. 937-948, p. 938.

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15 Art. 19, Regulation 1093/2010 establishing a European Supervisory Authority (EU Banking Authority), [2010] OJ L 331/12.

16 See also Art. 43, Charter of Fundamental Rights of the EU.

17 See Regulation 2021/1163 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the EU Ombudsman), [2021] OJ L 253/1.

18 Art. 2(10)(2), Regulation 2021/1163.

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21 Rules of Procedure of the General Court.

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23 S. J. Schønberg, "Coping with judicial overload: The Role of Mediation and Settlement in Community Court Litigation", *CMLR*, vol. 38, 2001, p. 337.

24 See Schønberg *op. cit.*, p. 342 *sqq.*, who lists a number of examples, some of which seem however to be related to "evaluative mediation" activities.

25 G. Vandersanden, "Les réflexions disparates d'un praticien du droit communautaire sur le fonctionnement du Tribunal de première instance des Communautés européennes," in *Le Tribunal de Première Instance des Communautés Européennes* 1989-1999, Luxembourg, Office des publications officielles des Communautés européennes, 2000, p. 66-76, p. 69.

26 See also Art. 147(2), Rules of Procedure of the Court of Justice.

27 EU Parliament, *Study in Pursuit of an International Investment Court*, European Union, 2017, p. 34; in similar terms see Schønberg *op. cit.*, p. 336.

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29 For data in the range of from 1 January 1989 to 6 September 2000 : see Schønberg *op. cit.*, p. 338 *sqq.*

30 EU Parliament *op. cit.*, p. 34.

31 Decision C (2002)601 has not been published and is only known through reference in other documents. This Decision was reportedly replaced by Commission Decision C (2024)1420 on the Mediation Service and repealing Decision C (2002)601 (also unpublished).

32 Commission document, "2016 General Activity Report of the Mediation Service of the Commission," Brussels, 26/06/2017, SEC (2017) 323, p. 3 (Online < https://u4unity.eu/document3/Mediateur-rapport2016en.pdf >, consulted on 06/19/2025).

33 Case T-688/16, *Janssen-Cases v Commission*, EU :T :2018 :822, para 1.

34 Commission document *op. cit.*, p. 3.

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36 The 2009 annual report of the Mediation Service of the Commission, SEC (2010)734 final, is also available online.

37 On this See e.g., W. L. F. Felstiner, R. L. Abel, A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…," *Law & Society Review*, vol. 15, 1980-1981, p. 631-654.

38 Consolidated Version of Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations, [1962] OJ P 45/1385.

39 See e.g., Case C-173/84, *Rasmussen v Commission*, EU :C :1985 :490, para 12 and Case T-766/22, *Canel Ferreiro v Council*, EU :T :2024 :336, para 31.

40 See e.g., EU Parliament, *Administrative procedure in EU civil service law*, Brusselles, 2011, p. 20. Online < https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453171/IPOL-JURI_NT(2011)453171_EN.pdf >, consulted on 06/19/2025.

41 On this, see G. Vandersanden, "La procédure et les voies de recours dans le domaine de la fonction publique communautaire," in I. Govaere, G. Vandersanden (eds.), *La fonction publique communautaire*, Bruxelles, Bruylant, 2008, spec. p. 111.

42 Annex I to the Statute was introduced by the Council Decision establishing the EU Civil Service Tribunal (2004/752/EC, Euratom), [2004] OJ L 333/7.

43 Regulation 2016/1192 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, [2016] OJ L 200/137.

44 See e.g., P. Mahoney, "The European Union Civil Service Tribunal: a specialised tribunal or a special tribunal," *Mélanges en homage à Georges Vandersanden*, Bruxelles, Bruylant, 2008, p. 955-970, p. 965-969.

45 On this, See e.g., H. Kraemer, "The European Union Civil Service Tribunal: a New Community Court Examined After Four Years of Operation," *CMLR*, vol. 46, 2009, p. 1873-1913, spec. p. 1896-1900.

46 See e.g., CST, F-78/08, *Locchi v Commission*, EU :F :2009 :56 ; F-142/07, *Kaminska v Comittee of the Regions*, EU :F :2009 :52.

47 Kraemer *op. cit.*, p. 1898 and footnote 155.

48 Elaborations by the author.

49 CJEU, *Annual report* 2007, p. 206.

50 Kraemer *op. cit.*, p. 1899.

51 Regulation 2017/1001 on the EU trade mark, [2017] OJ L 154/1. On this, see e.g., G. Humphreys, "Mediation at OHIM: an alternative to litigation?," in *ERA Forum. Journal of the Academy of European Law*, vol. 16, 2015, p. 61-71 ; S. Magiera, W. Weiss, "Alternative Dispute Resolution Mechanisms in the European Union Law," in Dragos, Neamtu *op. cit.*, p. 489-536, p. 522 *sq.* ; N. La Femina, "Alternative Administrative Dispute Resolution Methods in the European Union Intellectual Property Office," in B. Marchetti (ed.), *Administrative Remedies in the European Union*, Turin, Giappichelli, 2017, p. 80.55.

52 Council Regulation 6/2002 on Community designs, [2002] OJ L 3/24.

53 D. Hanf, "The Trailblazers: The Boards of Appeal of EUIPO and CPVO," in M. Chamon, A. Volpato, M. Eliantonio (eds.), *Boards of Appeal of EU Agencies*, Oxford, OUP, 2022, p. 60-84, p. 62.

54 The fact that mediation in these cases concerns disputes between private parties explains why reference is sometimes made to Directive 2008/52 : see e.g., the premise of the Decision 2013-3 of the Presidium of the Boards of Appeal on amicable settlement of disputes (Mediation).

55 For oppositions, see art. 47(4), and for revocation and invalidity proceedings, see art. 64(4), Regulation 1017/1001.

56 Decision of the Executive Director EX-23-2 on the adoption of the Guidelines for Examination of EU Trade Marks and Registered Community Designs at the EUIPO, Part C, Section I, Para 1.1.

57 On the previous regulation, see Decision 2013-3 of the Presidium of the Boards of Appeal, and Decision 2014-2 of the Presidium of the Boards of Appeal on the friendly settlement of disputes by the competent Board (Conciliation) ; see also Humphreys *op. cit.* and La Femina *op. cit.*, p. 75-77.

58 See e.g., Chirulli, De Lucia *op. cit.*, Ch. IV.

59 See e.g., Case T-133/08, *Schräder v* OCVV – *Hansson*, EU :T :2012 :430, paras 137 and 190. The quasi-judicial nature of the BoAs of the EUIPO was accentuated by Art. 58a of the Statute of the CJEU, that was introduced by Regulation 2019/629, and that established a filtering mechanism for appeals brought before the ECJ against GC decisions concerning the decisions of the BoAs of a number of EU offices and agencies (see more recently Regulation 2024/2019).

60 Decision 2020-1 of the Presidium of the Boards of Appeal on the Rules of procedure before the BoAs.

61 These rules are similar to (but more analytical than) those contained in Arts 125a ff. RoPGC.

62 Decision of the Executive Director of the EUIPO ADM-23-45 REV on the Establishment and Operation of the Mediation Centre.

63 Decision of the Executive Director of the EUIPO EX-23-9 on the administration of mediation processes ("Rules on Mediation.")

64 Art. 7(4), Decision EX-23-9.

65 Arts 1(4) and 20-24, Decision EX-23-9.

66 Appendix G to the 2023 Consolidated Annual Activity Report of the EUIPO.

67 Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, [2006] OJ L 396/1.

68 Art. 91, Regulation 1907/2006.

69 Commission Implementing Regulation 2016/823 amending Regulation (EC) 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, [2016] OJ L 137/4.

70 Commission Regulation 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, [2008] OJ L 206/5.

71 Recital 5 of Commission Implementing Regulation 2016/823.

72 The annual reports of the Chairman of the ECHA BoA can be found at < https://echa.europa.eu/it/regulations/appeals >, consulted on 02/05/2025.

73 It appears from the report for 2018 by the Chairman of the ECHA BoA that the appellant once asked to initiate the amicable settlement procedure, but ECHA refused to follow this route.

74 For the CJEU, see Schønberg *op. cit.*, p. 337.

75 Art. 24, Council Regulation 1024/2013 conferring specific tasks on the EU Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287/63.

76 ECB Annual Report on supervisory activities 2015, p. 14.

77 Art. 22(2), ECB Decision concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16), [2014] OJ L 175/47.

78 On this issue, see the following documents the EIB Group: Complaints Mechanism Principles, Terms of Reference and Rules of Procedure 2012, Complaints Mechanism Policy 2018, Complaints Mechanism Procedures.

79 For some examples, see EIB Group, Complaints Mechanism Report 2023.

80 See however, Harlow, Rawlings *op. cit.*, dealing with the broader phenomenon of so-called Eurolagalism ascribing to it partly different consequences from those described in the text.

81 For example, with regard to staff disputes, in 2009, the President of the CST observed a certain reluctance of the parties (and in particular the institutions) to negotiate and noted that the CST "received the impression, in some cases, that the institutions would only have been prepared to conclude an amicable settlement if they had been convinced that they had committed a wrongful act. However, other, not strictly legal, factors, such as equity, may be taken into consideration to justify the conclusion of an amicable settlement:", CJEU, *Annual Report 2009*, p. 187.

82 See in general, M. Asimow, "Five Models of Adjudication," *The American Journal of Comparative Law*, vol. 63, 2015, p. 3-31, p. 7.

83 See e.g., European Commission for the Efficiency of Justice, Mediation awareness programme for judges, CEPEJ (2019)18.

84 See e.g., A. Alemanno, L. Pech, "Thinking justice outside the docket: A critical assessment of the reform of the EU's court system," *CMLR*, vol. 54, 2017, p. 129-175 ; M. Bobek, "Preliminary rulings before the General Court: What judicial architecture for the European Union?," *CMLR*, vol. 60, 2023, p. 1515-1550.

85 On this, see R. Rawlings, "Complaints system and Eu governance – a new look," in C. Harlow, P. Leino, G. della Cananea (eds.), *Research Handbook on EU Administrative Law*, Cheltenham -Northampton, Edward Elgar, 2016, p. 490-517, p. 492 *sqq*.

86 On this point, it should be recalled that according to the CJEU, "the object of an administrative remedy, whether optional or not, is to enable and encourage the amicable settlement of differences arising between the person concerned and the administration in order to avoid litigation:", Case C-326/16 P, *LL v Parliament*, EU :C :2018 :83, para 25.

87 See data reported by Chirulli, De Lucia *op. cit.*

88 *Ibid.*, p. 271 *sqq*.

ABSTRACTS

English

This paper briefly illustrates a number of the provisions of EU law on mediation relating to disputes between private parties and the institutions, bodies, offices and agencies of the European Union. Based on the data available, an attempt is then made to undertake an initial assessment of the actual use of the mediation procedures analyzed and the role of mediation in the EU legal system.

Français

Cet article illustre brièvement un certain nombre de dispositions du droit de l'Union européenne relatives à la médiation dans les litiges entre personnes privées et institutions, organes et organismes de l'Union européenne. Sur la base des données disponibles, l'auteur suggère une évaluation de l'utilisation réelle de ces procédures, et du rôle de la médiation dans le système juridique de l'Union.

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